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# ESSAY

## People's Court

Nicholas S. Zeppos\*

### I. INTRODUCTION

The Supreme Court's opinion in *Bowers v. Hardwick*<sup>1</sup> contains the usual cant about the legitimacy of the judicial function. In holding that the due process clause of the fourteenth amendment does not recognize a fundamental right to practice homosexual sodomy, the Court cautioned that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."<sup>2</sup> What exactly did the Court mean? That the public would refuse to obey judicial judgments if the Court were to recognize rights not "found in" the Constitution? That the public would disregard Court rulings that at least partially reflected the Justices' policy judgments rather than being based on so-called "neutral principles?" That constitutional law scholars would decry the Court's use of policy analysis in interpretation?

All of these consequences are unlikely for a variety of reasons. Throughout history the Court has recognized rights not "found in" the Constitution without jeopardizing the Court's legitimacy.<sup>3</sup> The public at

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1. 478 U.S. 186 (1986).

2. *Id.* at 194.

3. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (invalidating state law limiting access to contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state law limiting access of married couples to contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating state law denying access to private school education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating state law prohibiting teaching of foreign law in school). Typically, these cases fall under the label of substantive due process. For an effort to link the concept of substantive due process to the origins of the Constitution, see Riggs, *Substantive Due Process in*

large is unlikely to know what is or is not "in" the Constitution. Most people are ignorant about its contents<sup>4</sup> or overtly disagree with some of its contents.<sup>5</sup> Academics may critique the Court's forays into policy analysis.<sup>6</sup> But even this form of scholarly attack is increasingly rare,<sup>7</sup> and no link between scholarly critique and public acceptance of the Court's judgments has been established.<sup>8</sup> If anything did matter to the public it probably would be the result. Judge Robert Bork's failed effort<sup>9</sup> to educate the public on the alleged indefensibility of the reasoning in *Griswold v. Connecticut*<sup>10</sup> and *Bolling v. Sharpe*<sup>11</sup> demonstrates that judicial methodology may be of little interest to a citizenry whose everyday lives can be governed by what it considers objectionable results.

Unpacking the Court's "legitimacy" discussion in *Bowers v. Hardwick* reveals some preoccupation with the public's vision of law and legal interpretation. Yet it is improbable that the public learns about law only from the opinions of the judiciary. Other sources of information include newspapers, books, television, personal experience, or word of mouth. The public's image of law unquestionably is shaped by what lawyers would describe as "extra-legal" sources.<sup>12</sup>

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1791, 1990 WIS. L. REV. 941.

4. Periodic surveys of public knowledge about the Constitution produce some startling results. A 1987 survey showed that about 64% of those polled believed that the Framers made English the national language. Nearly half believed that during time of war or national emergency the President could suspend constitutional protections. This number no doubt was reduced by the fact that only 41% even knew that the first ten amendments are called the Bill of Rights. A majority also believed that the Constitution includes the Marxist slogan "From each according to his ability to each according to his need." Allen, *Secrets of the Constitution*, Wash. Post, Apr. 20, 1987, at B1.

5. The 1987 survey shows that the public seemingly has numerous ideas for improving the document. About 61% favored a constitutional convention to consider amendments on school prayer, abortion, and freedom of the press. About 75% favored a constitutional amendment guaranteeing each citizen adequate health care, and 70% favored an amendment requiring a reappointment process for Supreme Court Justices. See Marcus, *Constitution Confuses Americans; Public Ill-Informed on U.S. Blueprint*, Wash. Post, Feb. 17, 1987, at A13.

6. See, e.g., Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988).

7. See Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 427 (1990).

8. See Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 528-29.

9. See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Judiciary Comm.*, 100th Cong., 1st Sess. 115-17, 285-87 (1987).

10. 381 U.S. 479 (1965).

11. 347 U.S. 497 (1954).

12. See Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987); *Symposium: Popular Legal Culture*, 98 YALE L.J. 1545 (1989). The link is demonstrated further by surveys on public knowledge about the Constitution because the public always scores highly on criminal justice issues. See Marcus, *supra* note 5. The dominance of criminal law on television likely accounts for this knowledge. Television

One such obvious source of knowledge is literature. Law has a way of working itself into literature, both popular<sup>13</sup> and classic.<sup>14</sup> This raises many interesting questions. Can literature profitably shed light on legal issues or jurisprudential questions? Do readers draw a view of law from works of literature? If so, do they believe what they read? Do authors even care about their portrayals of law in their works of fiction? These provocative questions have generated substantial debate and discussion.<sup>15</sup> For my purposes, however, I view them as largely irrelevant, or as a given. It is difficult to deny that popular culture plays some role in contributing to the public's perception of law and legal institutions.<sup>16</sup> That being so, what messages do people get about law from works of literature? Do the messages differ from those transmitted through more formal legal channels, like *Bowers v. Hardwick*?

I offer a tentative examination of this topic by examining Scott Turow's recent work *The Burden of Proof*.<sup>17</sup> The book is a worthwhile subject for a number of reasons. It has widespread popularity among both lawyers and nonlawyers. Turow is a lawyer who writes about the law and legal characters. His work draws extensively on his personal experiences, particularly his tenure as an Assistant United States Attorney (AUSA) in the Northern District of Illinois. Whether intended or not, the book develops a view of law throughout that is of interest not only to lawyers, but any reader with a sense of curiosity about law and legal institutions.

## II. AN INSIDER'S VIEW

The protagonist of Turow's work is Alejandro ("Sandy") Stern, one of the elite of the criminal defense bar in a Midwestern city with obvious similarities to Chicago, Turow's own legal milieu. Turow's fictional Kindle County and its complex politico-legal structure no doubt is based on the equally alliterative Cook County, Illinois. Readers of Turow's first book, *Presumed Innocent*,<sup>18</sup> will recall Stern as Rusty

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hardly is accurate in its portrayal of criminal law. On basic issues, such as the right to a lawyer or trial by jury, however, television probably gives viewers some idea of what the Constitution requires.

13. See, e.g., P. FRIEDMAN, *REASONABLE DOUBT* (1990); T. WOLFE, *BONFIRE OF THE VANITIES* (1987); H. WOUK, *THE CAINE MUTINY* (1951).

14. See, e.g., C. DICKENS, *BLEAK HOUSE* (1977); F. KAFKA, *THE TRIAL* (1956); H. MELVILLE, *BILLY BUDD* (1948).

15. For a skeptical view, see R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988). It seems to me that Judge Richard Posner's more recent attention to the rhetorical form of judicial opinions represents a retreat from his earlier skepticism. See R. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

16. See sources cited *supra* note 12.

17. S. TUROW, *THE BURDEN OF PROOF* (1990).

18. S. TUROW, *PRESUMED INNOCENT* (1987).

Sabitch's defense lawyer. Here, however, Stern and his practice are center stage. The book is a character study of Stern the lawyer, father, husband, brother, and person.

The book's plot is a bit convoluted and at times unbelievable.<sup>19</sup> Being mostly a character study of Stern, the plot at first moves slowly, then gathers pace, and is tied up all too neatly at the end. The book opens with Stern discovering his wife Clara dead from an apparent suicide.<sup>20</sup> As he comes to terms with the suicide and the reason for it Stern is revealed to the reader and to himself. Readers come to know Stern through his interactions and encounters with his children, his lovers, his sister, his opposing counsel, and his client and brother-in-law. Through all of this, sex, and a sexually transmitted disease, help move the plot along. What really carries the plot, though, and ultimately serves as the test for Stern's character (as well as the explanation for Clara's suicide), is a grand jury investigation into the activities of Dixon Hartnell, Stern's brother-in-law and high-flying, high-living commodities trader.

A federal grand jury begins investigating certain trades at Dixon's brokerage house. Stern naturally defends his regular client. Here, Turow applies his considerable talents to develop a complex family and lawyer-client relationship and to reveal the workings of the legal system. As Stern and Dixon proceed through the investigation—often as adversaries—Turow unmistakably reveals his vision of the law. It is a world of us and them, of insiders and outsiders. Lawyers are part of an elite, mandarin class who must shepherd people through a system they do not and could not hope to understand, much less master. Turow's legal world is not one of rules accessible to all, but a secret culture of insider knowledge in which results turn not on the words of the Constitution, a statute, or a rule of criminal procedure, but on knowledge of personalities and custom. Only those from within can understand and manipulate this system.<sup>21</sup>

From the start Stern is the ultimate insider. In his struggle to understand Clara's tragedy, Stern enlists the assistance of his usual nemesis, the police. Stern, however, benefits from the lifelong gratitude of Lieutenant Radczyk, whose brother Stern had represented successfully in an earlier investigation into police corruption.<sup>22</sup> Stern accomplished this feat not by knowing the "law," or even crafting a brilliant appellate

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19. Perhaps this is the common lawyer's complaint about the book. See Russell, *Assessing the Summer's Sizzler: Exaggerated, Unrealistic, Unwieldy "Burden,"* Legal Times, July 16, 1990, at 66, col. 1.

20. S. Turow, *supra* note 17, at 4.

21. The point has been noted by others. See Maas, *Scott Turow's New Mystery*, N.Y. Times, June 3, 1990, § 7, at 1, col. 1.

22. S. Turow, *supra* note 17, at 147-48.

brief. His task, instead, was to "touch[] the pressure points, like someone who knew jujitsu."<sup>23</sup>

Throughout the grand jury investigation of Dixon, Stern's defense depends extensively on his special relationship with federal prosecutors. Familiarity with the judge, not just legal precedents, drives his legal advice.<sup>24</sup> When aspiring young trial lawyers pay Stern a compliment they applaud his "sleight of hand."<sup>25</sup> He is at once magician and jujitsu master.

Stern uses these skills in the course of the investigation. But the game is not one-sided. Opposing counsel also is steeped in this lore and culture, and is quite capable of pushing the pressure points. In this game lawyers measure their opposing counsel's tactics like chess grand masters. Actions obscure to the uninitiated are translated easily by Stern. The government's broad subpoena request is, to Stern, a standard tactic warranting a canny countermeasure.<sup>26</sup> The customary, but "extra-legal," pregrand jury meeting between Stern, his witness, and the AUSA in charge of the case is Stern's chance to better read the prosecutor's game plan.<sup>27</sup>

If, for Turow, only lawyers participate in this informal game, it is, nonetheless, a game with its own set of rules. A special code of honor—"custom"—governs Stern and Klonsky, his part-time antagonist, and unrequited lover, in the Office of the United States Attorney.<sup>28</sup> Conduct that each perceive to be unacceptable quickly draws a rebuke when measured against what all lawyers know to be the rules.<sup>29</sup> While sparring over Dixon's future, however, they still remain friends. They even take the time to share a hot tub after Stern has tried to extract critical information from her on the course of the investigation.<sup>30</sup> Toward the end of the book, when the tension mounts as Stern faces the prospect of being called to testify before the grand jury, the judge (a friend of Stern's) admonishes all present (only lawyers) to resolve things amicably: "I don't like to see lawyers in the grand jury [room]."<sup>31</sup>

Against this background it is not surprising that nonlawyers survive in the system only when protected by competent counsel. Targets of grand jury investigations are lost in a "storm"<sup>32</sup> and left only in their

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23. *Id.* at 148.

24. *Id.* at 178.

25. *Id.* at 269.

26. *Id.* at 212.

27. *Id.* at 274.

28. *Id.* at 291.

29. *Id.* at 361.

30. *Id.* at 326-27.

31. *Id.* at 378.

32. *Id.* at 194.

"lawyer's hands."<sup>33</sup> The client's plight is predictable since, for the layperson, the language of the law is "foreign."<sup>34</sup> Through all of this the lawyer must save the client, often from the client's own impulses. Stern attends a meeting with one of Dixon's closest employees, Margy (whom Stern sleeps with), and AUSA Klonsky, to discuss Margy's forthcoming grand jury appearance. When Margy, without prodding from Stern, seeks to volunteer information to the prosecutor, her counsel must physically restrain her.<sup>35</sup> Yet even here Turow tells the reader there are limits. The best lawyer could "never save clients from themselves."<sup>36</sup> If they had only listened to their lawyer.

Turow is not preoccupied entirely with the internal culture of the legal system. The more formal aspects of law do appear, but usually only to demonstrate the ignorance of the layperson. Stern's son-in-law, John, who works for Dixon, is about to become a grand jury witness. When Stern mentions that John will need a different lawyer Dixon blandly responds "if you think so."<sup>37</sup> The comment evokes a "stern" lecture to Dixon on conflict of interest rules.<sup>38</sup> Stern's lover, Helen, raises the age-old question of the defense lawyer representing people known to be guilty. Stern's "More-esque" response counters the layperson's impatience with the orderly functioning of the legal system.<sup>39</sup>

On other occasions when Turow discusses more formal legal rules they appear to be absurd or unrealistic to the layperson, but easily understandable to the lawyer. For example, after his wife's death Stern is told about the distribution of her estate. Stern learns that shortly before her death Clara had a certified check issued for \$850,000, leaving Stern nothing from the estate.<sup>40</sup> Stern and the reader suspect foul play or unscrupulous maneuverings. Was Clara blackmailed? Stern learns that the check has not yet been paid. The solution seems easy: stop payment on the check. For the layperson this is quite reasonable. But the reader is told quickly that this is illegal. Stopping payment would constitute wrongful dishonor subjecting the bank to considerable liability.<sup>41</sup> This restraint may seem too much for the layperson. A man's wife

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33. *Id.* at 196.

34. *Id.* at 228.

35. *Id.* at 283.

36. *Id.* at 280.

37. *Id.* at 183.

38. *Id.*

39. *Id.* at 202.

40. *Id.* at 186.

41. *Id.* at 188. Actually, the result suggested by Turow (Sandy's inability to stop payment) may be right, but the explanation (the bank's fear of a suit for wrongful dishonor) may be wrong. A purchaser cannot stop payment on a certified check. See U.C.C. § 4-403 (1989) (stating that a stop order is untimely after the payor has certified the check). The certified check is a contract between the bank and the payee. The bank may decide voluntarily not to pay on the check, as a

is found dead from suicide. He then discovers that shortly before her death she used her considerable wealth (and his legacy) and had drawn a certified check for some mysterious payee and for unknown purposes. Can't Stern hold up payment to find out what is going on? Only the true insider would see otherwise. The negotiability rule for a certified check is not some silly doctrine. It allows for the free flow of large and complex commercial transactions.<sup>42</sup> Sellers of goods should not have to worry about the creditworthiness of an unknown buyer. A certified check guarantees payment.

Formal law is portrayed as impervious to human needs. As the investigation continues Stern is tempted to enlist the aid of his sister Sylvia, Dixon's wife, to control Dixon's increasingly suspicious and destructive activities.<sup>43</sup> Again, this may seem reasonable. Unable to get through to Dixon, Stern turns to his sister. Here again the law erects another artificial, but perhaps necessary, barrier. Stern's discussions with his sister would not be privileged. Stern laments that law is marked by its "obliviousness to family affection."<sup>44</sup>

Turow uses law in another interesting respect. Invariably the health of Stern's personal relationships are related directly to the character's proximity to the law. His adolescent crush on AUSA Klonsky is almost sappy. His relationship with his daughter Marta is close and genuinely affectionate. She is a lawyer who demonstrates her love for her father by defending him (brilliantly and on short notice) in his grand jury fiasco.<sup>45</sup> Stern's estrangement from his son Peter is palpable and painful, but predictable: Peter is a doctor and the two professions hold each other in contempt.<sup>46</sup> Ties to the law serve as a security blanket and litmus test for Stern's personal and professional life. As lawyer

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courtesy to a customer on whose behalf the check was issued. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 18-5, at 792-93 (3d ed. 1988). The holder of the certified check then can sue the bank for breach of contract. See *id.* In that suit the bank may not be able to assert any defenses that the customer might have. See *Thompson v. Wright*, 53 Ga. App. 875, 187 S.E. 311 (1936); *Louis Falcigno Enters. v. Massachusetts Bank & Trust Co.*, 14 Mass. App. Ct. 92, 436 N.E.2d 993 (1982); *Abilities Inc. v. Citibank, N.A.*, 87 A.D.2d 831, 449 N.Y.S.2d 242 (1982). Wrongful dishonor has no application to Clara's check because the U.C.C. gives a cause of action for wrongful dishonor to the payor bank's customer, not to the payee of the check. See U.C.C. § 4-402 (1989). Thus, Clara's bank could refuse to pay the check and be liable in a subsequent suit by the payee on the check.

42. See *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14 (Mo. 1976); *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (Law Div. 1970); Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective: A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code*, 64 MINN. L. REV. 275, 279-81 (1980).

43. S. TUROW, *supra* note 17, at 395.

44. *Id.* at 396.

45. *Id.* at 376-79.

46. See *Brinkley, Doctors v. Lawyers: A Real Nasty Fight*, N.Y. Times, Feb. 14, 1986, § A, at 18, col. 3.



and parent, he is most comfortable and in control when in his legal domain. It is a game at which he excels, and through it barriers between children (Marta) and even opponents (AUSA Klonsky) are overcome. At the end of the book, when Stern is losing control quickly—both personally and professionally—the reason seems obvious. He is now the target of the grand jury investigation. He is now the outsider, outflanked by the legal system and his family members, who as informant (son Peter), defense counsel (daughter Marta), and coconspirators (daughter Kate, son-in-law John, brother-in-law Dixon, and apparently even wife Clara) nudge him from insider to outsider. The book ends with a somewhat imperfect resolution for Stern. The future remains uncertain. Some relationships are destroyed, others are only in need of mending. The reader hopes for Stern's happiness, suspecting that he again must assume the role of magician or jujitsu master, or guide the client lost in the storm.

### III. "REAL" LAW

Turow's vision of law as elitist or clubby should come as no surprise given his background and plot choice. As a criminal AUSA in the Northern District of Illinois, he undoubtedly practiced in a world similar to Stern's. With the significant power and resources of the United States, an AUSA conducting a grand jury investigation operates in a nonadversarial posture with a relatively open-ended mandate.<sup>47</sup> The AUSA, who alone has access to the secret grand jury proceedings, is the ultimate insider.<sup>48</sup> As much as any area, this practice is dominated by the informal (for example, granting immunity to specific witnesses).<sup>49</sup> Had Turow chosen a different legal context his view of law might have been different. Yet, regardless of the context, Turow's vision of law raises intriguing questions. People's perception of law often mirrors Turow's story. Law is perceived as elitist, clubby—an insider's game.<sup>50</sup> If this is the way that popular fiction portrays the law, is it a view embodied in law itself? What do judges tell people about the law? Is law the stuff of Sandy Stern's world—insular, esoteric, mystical? Or is it more real and human, responsive to and shaped by the public's needs? Courts often give mixed messages. These mixed messages may represent a jurisprudential gulf as wide as the literary gulf between the works of Turow and the works of Shakespeare.

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47. See *United States v. Calandra*, 414 U.S. 338, 343-44 (1974).

48. See *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424, 428-29 (1983).

49. See *Pillsbury Co. v. Conboy*, 459 U.S. 248, 254 (1983); 18 U.S.C. § 6002 (1988).

50. See Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989).

Consider the plurality opinion written by Justice Scalia in *Burnham v. Superior Court*.<sup>51</sup> The issue in *Burnham* was whether a state may exercise jurisdiction over a person who was served while present in the state—the problem of transient jurisdiction. The Court in *Burnham* unanimously held that on the facts presented—a father on a business trip to California who, while there, visited his children and was served by his former spouse—the state properly exercised personal jurisdiction. The Court agreed, however, on little else. Justice Brennan's concurring opinion, joined by Justices Marshall, Blackmun, and O'Connor, concluded<sup>52</sup> that the exercise of jurisdiction was proper under the "fair play and substantial justice" standard established previously in *International Shoe Co. v. Washington*.<sup>53</sup> Writing for himself, Chief Justice Rehnquist, and Justice Kennedy, Justice Scalia concluded that a state can obtain personal jurisdiction over a person who is served while present in the state.<sup>54</sup> In adopting this clear physical presence rule Justice Scalia rejected the more nebulous fair play and substantial justice test set forth in *International Shoe* and *Shaffer v. Heitner*<sup>55</sup> and employed in Justice Brennan's concurring opinion. For Justice Scalia the constitutionality of governmental action turns on a test of tradition.<sup>56</sup> If a practice was widely accepted at the time the Constitution was adopted, the Court cannot strike it down. A contrary approach, according to Justice Scalia, would allow the Court to sit as a group of platonic guardians imposing their values on the public.<sup>57</sup>

One is tempted to say that Justice Scalia's vision of the law pronounced in *Burnham* is the antithesis of Turow's elitism. His call for clear, bright-line rules in place of multifactor balancing tests<sup>58</sup> provides people with fair notice and predictability of what the law is. His opinions indicate that he takes this point very seriously. In *Burnham*, for example, he defends the physical presence test by noting that it was a "continuing tradition, which anyone entering California should have known about."<sup>59</sup> By contrast, the uncertain multifactor balancing test allows only for ex post determinations reflecting the judge's personal view of justice. Justice Scalia's tendency to emphasize the plain mean-

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51. 110 S. Ct. 2105 (1990) (plurality decision).

52. *Id.* at 2120 (Brennan, J., concurring).

53. 326 U.S. 310 (1945).

54. *Burnham*, 110 S. Ct. at 2117-19 (plurality opinion).

55. 433 U.S. 186 (1977).

56. *Burnham*, 110 S. Ct. at 2117-19 (plurality opinion).

57. *Id.* at 2119 (plurality opinion).

58. See Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

59. *Burnham*, 110 S. Ct. at 2118 (plurality opinion).

ing of the text of statutes<sup>60</sup> and the Constitution<sup>61</sup> and to read words as the general population would understand them<sup>62</sup> allows people to better conform their conduct to the law. This curbing of judicial power prevents the Court—an elite, life-tenured, unelected institution—from setting aside those judgments of the people as represented by the elected branches of government.

Looked at more closely, however, the *Burnham* approach is that of the mandarin judge. It is a legal world as cloistered, elite, and insular as the defense bar of Kindle County. What counts is the legal tradition at the time of the adoption of the Constitution. For the most part, this information will be accessible only to lawyers. Even more striking, however, the governing tradition is one made by lawyers and judges long dead and is hardly representative of our present-day society.

This legal world is closed in yet another way: It fears that judges will make policy decisions. The apparent solution is to turn even further inward. In this interpretive world answers to all legal questions are found “in the law”—text, tradition, or the internal structure or logic of constitutional, statutory, and common law. Only a person versed in mining these purely legal sources can declare what the law is and what it is not.<sup>63</sup> And most assuredly what it is not is what society may need or demand.<sup>64</sup> For example, the facts giving rise to *Burnham* or the consequences of the physical presence rule are not relevant to the purely legal inquiry.

A curious policy-minded judge faced with *Burnham* may ask a host of questions. How often is physical presence used to obtain jurisdiction? Is it used overwhelmingly to get jurisdiction over absent former spouses in child support and custody disputes?<sup>65</sup> If the rule becomes a recognized part of domestic relations law will it deter a parent from visiting children, particularly in a case like *Burnham* in which the parent's trip to California was primarily for business purposes? Will parents seek to avoid *Burnham* by flying children to visit them rather than traveling to the state of residence of the former spouse? Will this added cost decrease the frequency of visits or adversely affect the children? Will a parent enter into a previsit contract with the other parent agree-

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60. See Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); Zeppos, *supra* note 58, at 1299-1300.

61. See *Coy v. Iowa*, 487 U.S. 1012 (1988); *Arizona v. Hicks*, 480 U.S. 321 (1987). Here, however, he has been inconsistent. See Zeppos, *Justice Scalia's Textualism—The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

62. See *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring).

63. See Zeppos, *supra* note 61, at 1623.

64. See *Burnham*, 110 S. Ct. at 2118-19 (plurality opinion).

65. See *Kulko v. Superior Court*, 436 U.S. 84 (1978).

ing not to serve process during the visit? Will such terms be included as a matter of course in initial divorce-custody decrees? Will strategic bargaining occur in a broader context? Will states voluntarily curb the use of presence as a jurisdictional predicate out of fear of retaliatory measures taken by other states?<sup>66</sup>

These questions may be interesting, but they may not be a basis for judicial results. The court's denying the autonomy of law would be to allow the judge's individual views to shape interpretation.<sup>67</sup> This view of the law carves out decisional domains for courts and legislatures and arrogates to courts a special interpretive function that denies policy choice. The judicial role is preserved as unique and untainted by the temptations of power or judgment that may affect other decisionmakers.

Why do these formalist justifications dominate the judicial craft long after the basic insights of the legal realists have revealed choice in judging? Perhaps a less sinister explanation is that judges act out of habit or acculturation. The judge's resort to formalist reasoning is as habitual and unreflective as the well-mannered diner's resort to the proper salad fork.<sup>68</sup> If judicial rhetoric is designed consciously to influence the popular conception of law, however, the motivations are more troubling. The methodology is largely accepted because academic criticisms of formalist reasoning have little impact. The public at large cares little about law in general or judicial methodology. The public may be completely ignorant of the judicial decision-making process. To the extent the public has some rudimentary understanding, they have been so inculcated with the notion of determinacy in judicial decision making that they have no reason to believe otherwise. The point of formalist reasoning is to legitimate judicial power by not disturbing the complacency held by most people.

This vision of the law is far more elitist than Turow could portray. Nothing changes in judicial rhetoric because the public pays no attention or simply knows no better. If the public is curious the courts' opinions provide false information. Judges contribute to the latter by overtly denying choice in judging, as in *Burnham*, or by controlling the

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66. For a provocative and novel analysis of choice of law problems from the perspective of strategic decision making, see Kramer, *Return of the Renovi* (unpublished manuscript on file with the Author).

67. For devastating critiques of the reasoning in *Burnham*, see Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court*, 1990 U. ILL. L. REV. 593 and Maier & McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, \_\_\_\_ AM. J. COMP. L. \_\_\_\_ (1991) (forthcoming).

68. See R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 189-90 (1990); Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

flow of information.<sup>69</sup> The business of the judiciary is not suited for traditional media coverage.<sup>70</sup> The result is troubling: a cloistered judiciary renders judgments allegedly unaffected by policy demands, and these judgments then are interpreted for the public by a specialized media trained to explain legal opinions to the masses. Thus, law that started out looking open and democratic now is revealed as akin to the ancient Greek practice in which laws were known to and applied by an elite group of thesmothetai.<sup>71</sup>

This portrayal of the relationship between the judicial product and the public's knowledge and perception of law is distressing. About the best that can be said is that judicial methodology is irrelevant, and therefore, a little bit of lying never really hurts. It is not clear, however, that the judicial product and people's lives or the consequences of legal rules have to be so disconnected. A different judicial tradition coexists with the *Burnham* approach. It is the approach of legal pragmatism that bases law not on abstract theory but on the practice and experience of those whose conduct the law seeks to reach.<sup>72</sup> Under this vision, law is not mandarin, separate from the people. Law is involved intimately with society's needs and demands. Legal interpretation does not require resort to a closed set of legal authorities accessible only to lawyers and judges. Instead, an informed judgment of the consequences that the potential outcome will have on society shapes the results.<sup>73</sup> Legal pragmatism concedes choice in judging, with new information and experience leading to an evolving set of rules that better meets societal demands.

This difference in approach suggests differences in methodology that portray law in a far different manner. Consider the problems that arise when the law of divorce intersects with bankruptcy law. Suppose a married couple divorces, owning a home with \$15,000 in equity and \$5000 worth of other marital property. The divorce decree divides the assets equally, \$10,000 to each spouse. The decree gives the husband the house and custody of the two children. The wife receives the \$5000 in marital assets. Additionally, the decree orders the husband to pay

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69. See Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. 586, 589 (1990).

70. See Mauro, *Justice Scalia to the Media: Go Away*, Legal Times, Dec. 3, 1990, at 14; Legal Times, Dec. 31, 1990, at 6, col. 4 (Justice Scalia noting that "the law is a specialized field, fully comprehensible only to the experts").

71. For a discussion of the controversy over the accessibility of ancient Greek laws, see M. GAGARIN, *EARLY GREEK LAW* 122-23 (1986).

72. See, e.g., R. POSNER, *supra* note 68; Eskridge & Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

73. See, e.g., R. POSNER, *supra* note 68, at 121-30.

the wife \$5000, secured by the home. The husband misses the first two payments on the \$5000 and then files for bankruptcy.

The wife returns to her lawyer and asks what happens next. The advice given is tentative and uncertain. The divorce lawyer—cut from the Sandy Stern mold—says it is hard to predict what will happen. It depends on what the judge wants to do.<sup>74</sup> The bankruptcy case proceeds to judgment and the message received is different but also the same. The court tells the wife that it is all a matter of rules. The bankruptcy code allows the husband to set aside his debt to her.<sup>75</sup> Her lawyer was wrong. The judges do not act on whim or caprice; the internal logic of the law mandates this seemingly unjust result. But her lawyer was right in a different respect. The result is both inaccessible to and unaffected by the layperson. The court determines the answer by immersing itself in the legal sources and announcing a decision based on this closed set of materials.<sup>76</sup> For the court the legal materials tell a clear story. The bankruptcy code<sup>77</sup> provides that a debtor may avoid judicial liens on exempt property in which the debtor has an interest. The wife has a judicial lien. The husband has an interest in the house because the divorce decree awarded it to him. The house is exempt as the husband's homestead.<sup>78</sup> The result may be harsh, but this is what the law provides; the alleged injustice cannot invade the judge's interpretive domain.<sup>79</sup>

The lesson learned by the layperson is that the law remains perplexing and removed. The internal workings are so complex and Byzantine that only a lawyer like Sandy Stern can seek to steer the client through the process. Judicial determination confirms the inside-outside view of law. The clear answer is found, immune to the claims of fairness or adverse consequences.

Law need not be so disengaged from the actors in the system. Law just as easily, and more effectively, can ask questions that seek to make the statute more responsive to the situation. Certainly for the participants in the divorce-bankruptcy case the questions to be asked and an-

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74. The empirical data on lawyer-client discourse in divorce suggest that this sort of advice is not rare. See Sarat & Felstiner, *supra* note 50, at 1671-76.

75. See *In re Sanderfoot*, 899 F.2d 598, 605 (7th Cir.) (stating that "we are not free to disregard the clear legislative judgment that debtors may avoid judicial liens of the type at issue"), *rev'd*, 59 U.S.L.W. 4483 (U.S. May 23, 1991). The matter was not so clear, however, that the Eighth and Tenth Circuits had not already ruled to the contrary. See *Donahue v. Parker*, 862 F.2d 259 (10th Cir. 1988); *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984).

76. See *Sanderfoot*, 899 F.2d at 604-05.

77. 11 U.S.C. § 522(f)(1) (1988).

78. See *id.* § 522(d)(1) (exempting personal residence from property of the estate up to \$7500).

79. See *Sanderfoot*, 899 F.2d at 605.

swered are ones more clearly tied to the real world. If the wife's debt can be set aside in bankruptcy how will divorce practice change? Will there be a forced sale of homes prior to the entry of a divorce decree to ensure immediate payment to the spouse? What effect will this have on the price obtained for the house? Will a forced sale adversely affect any children or disrupt a home? Could a spouse retain some kind of property interest in the home until full payment, perhaps with rent paid by the spouse inhabiting the home? Would state law recognize such a curious interest as a property interest? How would bankruptcy law treat such a reserved interest? Could the spouse taking the house under a divorce decree take out a second mortgage to pay off the other spouse immediately? Will there be enough equity in the home to take out such a loan? Will these transaction costs adversely or disproportionately affect the value of the marital estate? Does the use of bankruptcy in this context typically occur with smaller estates or people who would be financially incapable of refinancing? How will lenders respond to demands for this kind of credit?

Even if adopted, the pragmatic approach leaves many questions unanswered. How does a judge with pragmatic leanings obtain the necessary data or begin to analyze the data? Tentative suggestions have been made to resolve this problem.<sup>80</sup> If most people are ignorant of judicial methodology and care only about results—the point overlooked by the Court in *Bowers*—why even care about the rhetoric of judicial opinions? To the extent results do matter, the pragmatic approach sometimes may lead to better results, or at least better informed results. Moreover, perhaps when judicial opinions begin to discuss what counts, they—apart from the results—will have an educative function. The goal may be to suggest that law is not so autonomous and that outsiders may shape the development of legal rules. This line of analysis, however, may continue to be elitist. Public opinion surveys reveal a woefully uninformed populace.<sup>81</sup> No matter what is written in judicial opinions a large number of people will remain totally ignorant and apathetic. That this is true does not mean that the baseline for defining the audience and interpreters of judicial opinion cannot be altered constructively.<sup>82</sup>

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80. Davis, "There Is a Book Out. . ." *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987); Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Monahan & Walker, *Empirical Questions Without Empirical Answers* (unpublished paper on file with the Author).

81. See *United Auto Workers v. Johnson Controls, Inc.*, 886 F.2d 871, 914 (7th Cir. 1989) (Easterbrook, J., dissenting) (stating, "A recent poll show[s] that more than 20% of American adults do not know that the Earth orbits the sun"), *rev'd*, 111 S. Ct. 1196 (1991).

82. See R. POSNER, *supra* note 15, at xi; R. POSNER, *supra* note 68, at xiii.

## IV. FACT AND FICTION

Turow's work cannot be faulted or applauded for the image of the law he presents. It no doubt is a real image, at least in part, and is shaped by years in the Office of the United States Attorney. He has a concern over verisimilitude. His acknowledgments include thanks to numerous physicians who assisted him on the pathology of genital herpes that figures so prominently in the book's plot. The plot's description of the legal system had its own special consultant, who happened also to serve as author. Turow's goal, however, was to tell a story, not to educate the public on the law. On this account he is successful; the story is a good one. Given the public's general ignorance about the law, however, perhaps more attention should be paid to the influence of popular culture and the way in which it shapes the public's perception of the law.<sup>83</sup> The elitist vision pronounced in Turow's work is not new, either in literature or in the law itself.<sup>84</sup> As portrayed in *The Burden of Proof* it may lead to differing consequences. The vision may breed a cynicism about the law, or may enforce a sense of security that one ensnared by the law will survive as long as the likes of Sandy Stern can be afforded as counsel.

Producers of and commenters on popular works about the law nonetheless may continue to believe that their toil remains far from performing a true educative function about the law. Lawyers and legal scholars may agree, focusing instead on that which is truly the "law." Meanwhile, however, judges will continue to decide cases and write judicial opinions directly affecting real people. The Supreme Court this Term will decide whether one spouse can use bankruptcy law to set aside the other spouse's share of the marital estate awarded under a divorce decree.<sup>85</sup> The Court can claim that the answer is clear, discovered by it in legal sources. Or the Court perhaps can get the wrong answer (if there is such a thing) but at least ask the right questions: What are the consequences for people under either result? Turow al-

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83. For initial efforts to examine the link, see Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 2 AM. B. FOUND. RES. J. 281 (1986); Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police As Television Heroes*, 42 U. MIAMI L. REV. 229 (1987); *Symposium*, *supra* note 12.

84. See Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1581 (1989).

85. See *Sanderfoot*, 899 F.2d at 598. After this Essay went to print the Supreme Court reversed the Seventh Circuit and, agreeing with Judge Posner's dissent, held that a spouse's lien is not dischargeable in bankruptcy. *Farrey v. Sanderfoot*, 59 U.S.L.W. 4483 (U.S. May, 23 1991). The Court's analysis, however, is along more formalist lines, relying upon dictionary definitions, the legislative history, and the purpose of the statute. The opinion shows little concern for the potential consequences discussed above or in Judge Posner's dissent.



ways can claim that the educative impact on people's vision of law was intended only as a by-product of his work. To the extent judges send the wrong message about the law, they have no similar excuse.