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# Honour Bound

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Echoing the language of commandment found in the Decalogue, article 597 of the *Civil Code of Québec* provides that every child owes respect to his or her mother and father. Notwithstanding its expression in legislative form, most experts think that this duty to honour one's parents is not legally binding. After sketching what attitudes to article 597 say about the constraints on legislative rules of conduct, the author considers whether article 597 might alternatively be imagined as a source of learning. By seeking to teach through the law of interpretation and the formal deployment of a symbol for parental authority, the legislature has enacted article 597 not as precept but as preceptor. Article 597 is thus an invitation to use legislative enactment, on occasion, to shape behaviour through counsel rather than by force.

Faisant écho au langage de commandement du décalogue, l'article 597 du *Code civil du Québec* stipule que chaque enfant doit respect à sa mère et son père. Nonobstant son expression dans la forme législative, le devoir d'honorer ses parents, selon la plupart des experts, n'a force de loi. L'auteur esquisse d'abord la pertinence des approches à l'égard de l'article 597 qui décrivent les contraintes des règles législatives de comportements, puis se penche sur l'alternative selon laquelle cet article pourrait être une source d'apprentissage. En voulant enseigner par la loi d'interprétation et l'emploi officiel d'un symbole d'autorité parentale, le législateur adopta l'article 597 en tant que précepteur et non pas en tant que précepte. Ainsi, l'article 597 convie à une utilisation de la législation afin de modeler les comportements par des recommandations plutôt que la force.

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- I. **Legislation As Precept (and the constraints on this view)**
    - A. *Duty and Sanction*
    - B. *Duty and Intimate Family Life*
  - II. **Legislation As Preceptor (and the learning in this view)**
    - A. *Teaching and Interpretation*
    - B. *Teaching and Symbol*
-

PARENT : Clean your room.

CHILD : [No response]

PARENT : [Voice raised ever so slightly in a cunning effort to suggest at once injunction and request] Clean your room.

CHILD : [Innocently, of course] You didn't say please.

PARENT : Please, [the tone suggests that the word has been cut free from its etymological connections (*placidus*: gentle; *placare*: to soothe) and the pronunciation (pleeeeeez) puts the listener in mind of antonym rather than primary meaning] please, clean your room.

CHILD : [Wielding the big and proven stick of indifference] Huh?

PARENT : [No longer in a dialogue with Child but engaged in unpleasant encounter with Self (the Child within)] Clean your room ... or else.

CHILD : [Testing the obligatory character of the proposed rule of conduct, as a matter of legal theory and domestic governance, by suggesting a necessary relationship between the existence of the rule and a formal sanction] Or else what?

PARENT : [Now actually cleaning the room as he speaks (in a sovereign mumble)] Or else nothing.

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I am a parent of three small children. I like to think of our home as a happy one—a place which my partner and I have sought to organize around an ideal of the hidden order in chaos rather than the chaos that often hides (we console ourselves) in more ordered households. In our lighter moments, we smile at the gentle disarray of our daily lives, with the thought in mind that it reflects not a domestic rulelessness but a sensible approach to our children's obvious creative flair, their right-sided braininess and the ascendancy of the spiritual over the material in their little catalogues of values. In a moment less light some weeks ago, Jane said to me, "You know, I'm not sure if the kids listen to us when we tell them what to do. At times, they don't seem to behave very respectfully."

In our despair, we reach for those miserable books that outsell Piaget for me-generation parenting—the titles tend to be their only differentiating feature—*Helping Your Child Learn Right from Wrong: A Guide to Values Clarification* or *The Answer Is No: Saying It and Sticking to It* or *Discipline without Shouting or Spanking*. The advice uniformly offered is tidy, tiresome, and no doubt true: respect cannot be im

posed by force; respect can be taught, but only by example. “What we need is a law,” says my non-lawyer partner, with a hint of friendly sarcasm that dismisses both jurists and their discipline as a means for dealing with this kind of problem.

Can a legislative enactment impose a duty upon a child to honour and respect his or her parents? The question, which would rightly be treated as ludicrous by any parent or child spared the awful dignity of a legal education, finds an answer sillier still in law. For in those legal traditions, be they overtly religious<sup>1</sup> or self-consciously secular,<sup>2</sup> in which a child’s duty to honour his or her mother and father has been the object of formal enactment, the conventional lawyers’ response is: *yes*, the duty has been legislatively imposed, but *no*, it is not law. Children are (to turn an old expression against itself for present purposes) only honour bound. Beyond the plain interest this matter holds for parents, children, and family lawyers, an examination of article 597 of the *Civil Code of Québec*<sup>3</sup> provides a useful if unusual opportunity for scholars to test the proper aspect and temper of legislative enactment.

For if respect cannot be imposed by force, as the parental guidebooks remind us, article 597 nevertheless takes shape legislatively, like the Old Testament commandment, as a *precept*, even if it is rarely treated as a legal one (Part I). Moreover if respect is better taught than imposed, article 597 signals that legislation has a role as *preceptor* whereby teaching, rather than force, is used to shape behaviour (Part II). Article 597—failed precept, hopeful preceptor—stands as a reminder that legislation might usefully be thought of without reference to its conventional uses, and not just as a means to an end but also as an end in itself.

## I. Legislation As Precept (and the constraints on this view)

Whether as a matter of convenience or in service of ideas of fairness, law often allows matters of form to dictate issues of substance. In this tradition, the legislative form is often the end point in an inquiry into the obligatory character of a given rule

<sup>1</sup> The injunction forms part of the Decalogue in the Old Testament: “Honour thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee.” Exod. 20:12 King James Version.

<sup>2</sup> Art. 371 C. civ. provides: “L’enfant, à tout âge, doit honneur et respect à ses père et mère.” The text figured in the French code in 1804; Jean Carbonnier has noted its tenacity and its ancient connections: “Paraphrase du Décalogue, [art. 371] a échappé en 1970 à la vague de fausse laïcisation.” J. Carbonnier, *Droit civil — 2/La famille*, 20th ed. (Paris: Presses universitaires de France, 1999) at 167.

<sup>3</sup> Art. 597 was enacted by S.Q. 1991, c. 64:

L’enfant, à tout âge, doit respect à ses père et mère.

Every child, regardless of age, owes respect to his father and mother.

of conduct.<sup>4</sup> Article 597's shape should indeed be expected to stave off questions as to its binding effect. Enacted by a constitutionally competent legislature, the provision conforms to ordinary legislative style for a rule that seeks to impose a given course of action. It unquestionably bears what French jurilinguist Gérard Cornu has aptly called the marks of sovereignty<sup>5</sup> that are the usual signs of law as a normative discourse: the verb (to owe/*devoir*) suggests a legally binding constraint, and the fact that it is conjugated in the present indicative tense is characteristic of legislation where the verb seeks to express, in effective and "diplomatic" terms, a commandment.<sup>6</sup> The choice of subject, while not identical in the French and English texts of article 597,<sup>7</sup> indicates a norm of general application that seeks out the status of universally binding principle. Indeed the stylistic<sup>8</sup> and substantive<sup>9</sup> differences between the idea as expressed in the Old Testament and that expressed in the *Civil Code of Québec* would suggest a conscious effort on the part of earthly lawmakers to cast the duty in more conventional

<sup>4</sup> Needless to say, grammatical and syntactical considerations are not dispositive of a statute's normative status, although certain patterns of speech do tend to be associated with legislation as law. See G. Kalinowski, *La logique des normes* (Paris: Presses universitaires de France, 1972) at 18-19; J.-L. Souriaux & P. Lerat, *Le langage du droit* (Paris: Presses universitaires de France, 1975) at 48-49.

<sup>5</sup> G. Cornu, *Linguistique juridique*, 2d ed. (Paris: Montchrestien, 2000) at 268-77 [hereinafter Cornu, *Linguistique*]. A sign of the normative character of legal discourse in the legislative form, the "marque de souveraineté" is a reminder of the presumptive omnipotence of the institution from which legislation emanates.

<sup>6</sup> Cornu has associated legislative use of the verb *devoir* with the creation of an obligation, *ibid.* at 269; he notes that the usual practice of conjugated verbs in the present indicative, as in art. 597, is "une façon plus discrète, plus douce et plus diplomatique de commander" (*ibid.* at 272).

<sup>7</sup> In French, art. 597 speaks to "L'enfant" whereas in English the text refers (like a morality play?) to "Every child". The emphasis in the English text seems more consonant with the expression of fundamental rights, even in this field (see e.g. *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, art. 39 ("Tout enfant"/"Every child")), or as a means of expressing the imperative character of the rule (see e.g. art. 32 C.C.Q., which calls for the "respect" of children's rights ("Tout enfant"/"Every child")). But compare art. 598 C.C.Q.—no less imperative—on the duration of parental authority ("L'enfant"/"A child"). One might also note the slight difference in emphasis in the temporal scope of art. 597 (compare "à tout âge" and "regardless of age").

<sup>8</sup> By way of comparison, note the choice, for the norm as expressed in Exodus, of the imperative ("Honour" in the King James Version, "Honore" in the *Traduction Œcuménique*) or future imperative ("honoreras" in some French translations or adaptations), as well as the use of second person singular ("thy"), both uncharacteristic of modern legislative drafting practice. See generally M. Villey, "De l'indicatif dans le droit" Part I of M. Villey, G. Kalinowski & J.-L. Gardies, "Indicatif et impératif juridiques. Dialogue à trois voix" (1974) 19 Arch. ph. dr. 33; Cornu, *Linguistique*, *supra* note 5 at 272, 279.

<sup>9</sup> Substantively, both the Quebec and French codes specify, unlike the formulation in the Decalogue, that respect is due "regardless of the age" of the debtor. In a rich historical examination of the French rule, Xavier Martin noted this change as a sign of the "lourde précision" consonant with the legislative as opposed to the biblical form. See X. Martin, "À tout âge? Sur la durée du pouvoir des pères dans le Code Napoléon" (1992) 13 Rev. d'hist. fac. dr. sci. jur. 227 at 230.

legislative form. Article 597 looks and sounds like enactment in its classical mode which, at least for lawyers, should ordinarily stop the inquiry as to whether it is law.<sup>10</sup>

Notwithstanding these unequivocal formal indicia, most legal scholars are of the view that the "duty" spoken to in article 597 is non-binding as a matter of positive law. It is described variously as a "principe purement moral",<sup>11</sup> a "devoir moral",<sup>12</sup> or as the expression of a "relation plus sociale que juridique"<sup>13</sup> such that it is banished to the realm of non-law notwithstanding its source and mode of expression. Seemingly out of place in the *Civil Code of Québec*, article 597 is taken to separate family law from family morality, and family law from family life; accordingly, it is seen to fall outside lawyers' ordinary field of study. One measure of the extent to which the duty to respect is considered to be non-law is the slender attention it receives from judges and legal commentators despite its prominence in the *Civil Code*.<sup>14</sup>

Behind this semblance of unanimity among family law scholars are two distinct reasons for placing the precept beyond the law. Some experts fix on the apparent absence of formal sanction for violation of the duty to respect one's parents as a sign that this duty is not a legal one (Section A). Others argue that article 597 is only a moral precept on the theory that law cannot reach into the intimate or sentimental lives of parents and children in the way the text purports to do. In other words, the legislative enactment is seen as incapable of entering into a family's private world of personal relations (Section B). Whether from the perspective of its absence of sanction or its failure to regulate an inherently private matter, article 597 is said not to bind children, as a matter of law, to respect their parents. Both perspectives are important generally in the theory of legislative enactment. By imagining legislative rules of conduct as necessarily and exclusively connected to the formulation of binding duties, lawyers not only limit the ambitions of family law, but also frustrate the ambitions of the legislative form.

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<sup>10</sup> A compelling argument for breaking lawyers' tablets, which seeks to disentangle legislative form from normative substance, can be made by challenging the prevailing view that legislation is necessarily confined to a "Classical frame". See R.A. Macdonald, "The Fridge-Door Statute" (2001) 47 *McGill L.J.* 11 at 18.

<sup>11</sup> M. D.-Castelli & É.-O. Dallard, *Le nouveau droit de la famille au Québec* (Sainte-Foy, Qc.: Presses de l'Université Laval, 1993) at 239.

<sup>12</sup> J. Pineau, *La famille* (Montreal: Presses de l'Université de Montréal, 1972) at para. 210. Professor Pineau's remark addresses art. 242 C.C.L.C.

<sup>13</sup> A panel of French notaries used this phrase to refer to art. 371 C. civ. See C. Proost *et al.*, "La condition de l'enfant" in 91<sup>ème</sup> congrès des notaires de France, *Le droit & l'enfant* (Paris: Jouve, 1995) 231 at para. 87.

<sup>14</sup> See *e.g.* J. Turgeon, "L'autorité parentale et l'intérêt de l'enfant" in J. Boucher & A. Morel, eds., *Le droit dans la vie familiale. Livre du centenaire du code civil (I)*, t. 1 (Montreal: Presses de l'Université de Montréal, 1970) 75 at 76 who, after announcing his intention to cite arts. 242-45 C.C.L.C. for his readers, actually omits the duty of respect at art. 242.

### A. Duty and Sanction

Would an action in damages brought by a parent against a child for lack of respect be treated seriously by a court? Would a parent fare better seeking injunctive relief against insolent behaviour, or perhaps a mandamus forcing a child to bring honour to his or her parents and the family name through a course of action he or she would not otherwise be inclined to pursue? Generally lawyers see these remedies as implausible; they say that if the Civil Code imposes a duty of respect on the child, then it does so without a state-sponsored sanction.<sup>15</sup> Unlike the commandment to honour one's parents in the Decalogue, article 597 sets forth no specific consequence designed to make good the wrong.<sup>16</sup> The "duty" to respect one's parents in the Civil Code seems cut adrift; the text tells children what to do but fails to say what happens if they do not.<sup>17</sup> This defect—for lawyers see it as such—is a principal reason why article 597 is considered not to be "legally" binding.<sup>18</sup>

This sense reflects a more generally held view that the defining feature of a legal duty is the availability of a remedy that can be fashioned by a judge in the event of non-performance.<sup>19</sup> Occasionally scholars identify sanctions meted out by actors other than judges as part of law's reality, but only rarely as part of a project of redefining "nonlegal commitments" as law.<sup>20</sup> Indeed lawyers tend to argue that article 597 is

<sup>15</sup> While it is uncommon, if not to say unheard of, that doctrinal scholarship connects the remedies of the law of obligations with a breach of art. 597, it has been suggested that this "moral" duty does not bar, as a legally sanctioned "manque de respect", an action in civil liability brought by a child against his or her parents. M. Ouellette & J. Pineau, "Rapport canadien" in *Travaux de l'Association Henri-Capitant, La protection de l'enfant (Journées Égyptiennes)*, t. 30 (Paris: Economica, 1981) 39 at 49.

<sup>16</sup> The commandment in Exodus directly associates a positive consequence with its performance rather than its non-performance, *i.e.* "that thy days may be long upon the land which the Lord thy God giveth thee." For a view that this and other texts in the Decalogue are nevertheless best not viewed as a "récompense venant sanctionner des pratiques," see P. Beauchamp, *L'un et l'autre testament* (Paris: Seuil, 1976) at 55.

<sup>17</sup> See *e.g.* M. D.-Castelli & D. Goubau, *Précis de droit de la famille* (Quebec City: Presses de l'Université Laval, 2000) at 238, who see this as a confirmation of art. 597 as a purely moral principle: "En effet, aucune sanction n'est prévue s'il y a contravention à cette obligation." See also P. Verge, "La puissance paternelle" (1958) 3 C. de D. 143 at 145 who notes that the "moral" duty at art. 242 C.C.L.C. "n'est pas sanctionné civilement comme tel."

<sup>18</sup> See *e.g.* Jean Pineau's characterization of art. 645 C.C.Q. (1980): "[C]e n'est là que l'expression d'un principe moral dépourvu de sanctions juridiques." J. Pineau, *La famille. Droit applicable au lendemain de la «Loi 89»* (Montreal: Presses de l'Université de Montréal, 1982) at para. 329.

<sup>19</sup> For a thoughtful presentation of the sanction—reconfigured as a *tarif*—as fundamental to the legal conception of duty, see P. Jestaz, "La sanction ou l'inconnue du droit" D. 1986.Chron.197.

<sup>20</sup> See *e.g.* D. Charny, "Nonlegal Sanctions in Commercial Relationships" (1990) 104 Harv. L. Rev. 373 at 466.

binding “in conscience only”<sup>21</sup>—only in the “*for interieur*”<sup>22</sup>—such that it is best thought of as non-legal despite its appearance. “Il dicte une loi du cœur,” said Cornu of this understanding of the French codal text, “qui tient tout droit par elle-même, comme un précepte moral, sans le secours d’aucune sanction.”<sup>23</sup> Article 597 is all dressed up as law with nowhere legal to go.

Here we have a classical instance of the positivist’s separation between law and morality. “On n’est plus au temps des lettres de cachet,” wrote one jurist in the 1950s, suggesting that a child’s disobedience does not justify a state order for imprisonment or any other like sanction.<sup>24</sup> While a generation ago the parents’ right to punish a child was occasionally linked to a notional “breach” of the duty of respect, it was not done as proof that the duty was a legal one.<sup>25</sup> Moreover the ultimate sanction for a child—moral and material disinheritance—has not generally been cited to support the legality of article 597 or its antecedents. On the contrary, parental punishment and filial disinheritance are generally treated by lawyers as private sanctions rather than those in the formal arsenal of the law. Historically, the father acting under his authority to command honour and respect was doing so as a “magistrat domestique”.<sup>26</sup> While it has sometimes been said that a portion of the state’s authority is delegated to parents through the law of parental authority, the “judicial order” of the household magistrate is typically seen as beyond the law rather than as redefining the notion of sanction to include non-state actors. The requirement that the duty be allied with a sanction to be legal might have moved lawyers to look further afield than the courtroom for the enforcement of the duty of respect. While some scholars have considered social sanctions inside and outside the family setting as relevant to law, the mainstream view is

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<sup>21</sup> See D. Laszlo-Fenouillet, *La conscience* (Paris: Librairie générale de droit et de jurisprudence, 1993) who, at paras. 22 and 82, distinguishes between the “norme juridique de contrainte” and rules that are addressed only to conscience, classifying art. 371 C. civ. in this latter category.

<sup>22</sup> See generally D. Lochak, “For intérieur et liberté de conscience” in C. Haroche *et al.*, eds., *Le for intérieur* (Paris: Presses universitaires de France, 1995) 180.

<sup>23</sup> G. Cornu, *Droit civil. La famille*, 7th ed. (Paris: Montchrestien, 2001) at para. 61 [hereinafter Cornu, *La famille*].

<sup>24</sup> J. Mercier, “Puissance paternelle. Déchéance en certains cas” (1954) 14 R. du B. 234 at 234, citing judicial opinion.

<sup>25</sup> In Quebec, formal recognition of the right to correct a child was suppressed—consigned to the “black box” of the privacy of the family—when art. 645 C.C.Q. (1980) was not replaced in the C.C.Q. Under the disconcerting title of “Protection of Persons in Authority”, s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-45 retains, as a defence, the justification for a parent to use force by way of correction in limited circumstances.

<sup>26</sup> For a discussion of this term in connection with the history of paternal authority in France, see P. Murat, “La puissance paternelle et la Révolution française: essai de régénération de l’autorité des pères” in I. Théry & C. Biet, eds., *La famille, la loi, l’état: de la Révolution au Code civil* (Paris: Centre Georges Pompidou/Imprimerie nationale, 1989) 390 at 399.



that redress from a judge is the ultimate test for the juridical character of a legislative rule of conduct.<sup>27</sup>

The tendency to measure the normative pull of a legislative rule by reference to its formal sanction is generalized, even in the family where connecting sanctions and duties—is divorce, for example, a sanction for breach of obligations in marriage?—often proves difficult.<sup>28</sup> The hold of the sanction theory on lawyers' imagination is so strong that the few scholars inclined to recognize the legal character of the duty seem to feel bound to identify a possible judicial recourse. Lawyers grasp at sanctions like straws—successoral unworthiness<sup>29</sup> or forced detention in the home<sup>30</sup> are sometimes cited—the whole standing as a plain demonstration of how widely held is the view that a duty (even a duty found in explicit legislative text) must have a formal legal sanction to be law. Others still, sensing that the duty to honour parents cannot have legal force on its own, seek to construct duties around it (a duty to rescue, or a duty to provide care to a parent in need, for example) on the theory, one supposes, that such an idea could only have legal relevance if it entails judicial constraint on children's behaviour.<sup>31</sup>

For our purposes, the view that article 597 is not law because it is without a specific judicial remedy is important in two respects. First, it confirms lawyers' predispo-

<sup>27</sup> For an alternative explanation of how informal law relies on the "viguer de la réaction du groupe provoquée par sa violation" rather than judicial sanction, see H. Lévy-Bruhl, *Sociologie du droit*, 4th ed. (Paris: Presses universitaires de France, 1971) at 46. See also, for reference to the family context, N. Kasirer, "Testing the Origins of the Family Patrimony in Everyday Law" (1995) 36 C. de D. 795.

<sup>28</sup> Moreover, as Alain Roy observed in respect of the legislative obligations between spouses in Quebec (which include a "duty of respect" at art. 392 C.C.Q.), "il est loin d'être certain que le manquement aux normes de conduite imposées par l'État durant le mariage soit de nature à inciter les conjoints à s'y conformer." A. Roy, *La régulation contractuelle du mariage: approche socio-juridique pour une réforme* (LL.D. Thesis, Université Laval, 2000) at 267 [unpublished].

<sup>29</sup> Art. 621(1) C.C.Q. provides that a person having behaved towards the deceased in a seriously reprehensible manner may be declared unworthy of inheriting. That person is also, one might suppose, guilty of disrespect—although art. 620(2), in speaking to the parent-child relationship, is limited to bad parents rather than bad children.

<sup>30</sup> Art. 592 C.C.Q., which allows a parent to offer to take a child who is creditor of support into his or her home, affords a basis for exemption from the obligation of support. Is the disrespectful child who refuses such an offer "punished" for his or her disobedience? See generally S.-H. Pringle, "L'enfant majeur: nne P.M.E. subventionnée?" in Barreau du Québec, Service de la formation permanente, *Développement récents en droit familial* (1991) (Cowansville, Qc.: Yvon Blais, 1991) 17 at 30-33.

<sup>31</sup> See A. Bainham, "'Honour Thy Father and Thy Mother': Children's Rights and Children's Duties" in G. Douglas & L. Sebba, eds., *Children's Rights and Traditional Values* (Aldershot, U.K.: Ashgate/Dartmouth, 1998) 93. After cataloguing possible legal duties for children, Bainham notes that "there is no general duty in English law to honour parents corresponding with that in the Decalogue" (*ibid.* at 97).

sition to see legislative rules of conduct exclusively as duties that shape human behaviour by force orchestrated by the state. For lawyers who hold this view, the connection between duty and sanction precludes rules of conduct that do not direct behaviour in so violent a fashion from constituting law at all. Second, by limiting sanction to that which is sponsored by the judge, the scope of legal duty is circumscribed further still, in service of a distinction between legal duties and moral duties. Both these attitudes—whether or not they are right-minded—have tended to limit the ambitions of legislatures shy to enact rules of conduct that are perceived to be neither duty nor sanction bound.

### ***B. Duty and Intimate Family Life***

Connected to the argument that an absence of sanction disqualifies article 597 as law is the view that the very object of the prestation—honour and respect—is inherently beyond the reach of legislation. This is no doubt a feature of a more general attitude among lawyers, whereby honour is seen as partaking of a form of moral dignity best left to systems of social ordering more sensitive to its contours than legal normativity in all but exceptional cases.<sup>32</sup> Lawyers' language gives vent to this; rules, laws, codes, and pacts of honour are often seen as those that bind in conscience rather than "in law". Honour is of course protected by law in some settings—the extrapatrimonial right to respect of reputation and privacy is but one example—but this should be distinguished from instances in which law purports to impose a duty to honour others.<sup>33</sup> It is particularly uncommon in non-arm's-length relationships; imposing rules of honourable behaviour on accountants or advocates is thought of as within law's scope, but honour between intimates is seen as an affair of the heart. Indeed it is not that honour cannot itself be a charge, but that the charge and its prestation partake of a moral rather than a legal duty where they are wrapped up in affective relationships.<sup>34</sup> This position is regularly presented by those who contend that the duty of respect is not binding on children and their parents. "Inutile de définir le respect et l'honneur,"

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<sup>32</sup> But see L. Rodríguez, *L'honneur dans le droit suisse* (Geneva: Librairie de l'Université Georg, 1983) on how honour can find remedy in the law of obligations when civil liability results from the violation of extrapatrimonial rights causing harm.

<sup>33</sup> For the contrast between honour protected by law and honour imposed by law, see B. Beignier, *L'honneur et le droit* (Paris: Librairie générale de droit et de jurisprudence, 1995). Beignier uses the distinction to organize his thesis in two parts. Regarding honour imposed by law, he notes the difficulty lawyers have in characterizing art. 371 C. civ. as a legal duty (*ibid.* at 487).

<sup>34</sup> See G. Cornu, ed., *Vocabulaire juridique*, 7th ed. (Paris: Presses universitaires de France, 1998) at 426-27, who defines "honneur" in law ("[m]arque exceptionnelle de considération; égard dû à son rang") with reference to art. 371 C. civ.

wrote one leading commentator of article 242 C.C.L.C., “sujet d’étiquette plus que de droit.”<sup>35</sup>

Notwithstanding its conventional form, article 597 does ring incongruous for legislation—it has a solemnity verging on the pompous<sup>36</sup>—and its tone sets it apart from its surrounding rules on personal and patrimonial relations in family life. By speaking to honour and respect in this direct fashion, the rule sounds non-legal;<sup>37</sup> indeed even theologians have signalled this oddity.<sup>38</sup> This is especially true in a culture that sees law as an inherently rational form of expression rather than one, as Cornu has so convincingly argued, that purports to deal with sentimental matters in a manner more consonant with religion’s regulation of conscience.<sup>39</sup> Given the immensity of its resources and the breadth of its ambitions in other connections, family law is often oddly timid in its ordering of positive human feelings such as love, sensuality, and loyalty. Certainly the law does not shy away from dealing with the collapse of a sentimental bond; much of family law deals with the crisis that flows from the “break-down of a marriage” or situations in which a couple’s “will to live together is gravely

<sup>35</sup> G. Trudel, *Traité de droit civil du Québec*, t. 2 (Montreal: Wilson & Lafleur, 1942) at 179. Art. 242 C.C.L.C., untouched by amendment until it was replaced by art. 14 C.C.Q. (1980)—often noted as a tribute to the timelessness of the rule—provided as follows:

L’enfant, à tout âge, doit honneur  
et respect à ses père et mère.

A child, whatever may be his age,  
owes honor and respect to his  
father and mother.

<sup>36</sup> Alain Sériaux comments that art. 371 C. civ. is the perfect illustration of a “règle d’apparat”. A. Sériaux, “‘Tes père et mère honoreras’: réflexions sur l’autorité parentale en droit français contemporain” [1986] *Rev. trim. dr. civ.* 265 at 265.

<sup>37</sup> It bears noting that art. 242 C.C.L.C. was changed, on recommendation of the Civil Code Revision Office (“C.C.R.O.”), by removing the word “honour/honneur” such that in its current formulation, art. 597 C.C.Q. refers only to “respect/respect”. The commentary of the C.C.R.O. is not telling as to why this was done; one might suppose—given the C.C.R.O.’s express concern to secularize and modernize the law—that this reflects a conscious decision to distance the text from its religious analogue. See C.C.R.O., *The Québec Civil Code, Commentaries*, vol. 2, t. 1 (Quebec City: Éditeur officiel du Québec, 1978) at 211.

<sup>38</sup> One author has noted the rarity of the object of the commandment as follows: “[I]t is interesting that prescriptive texts rarely require the Israelite to honor Yhwh, the suzerin par excellence. ... Yet the command to honor parents has a place in the Decalogue (Exod 20:12, Deut 5:16), whatever its precise meaning.” S.M. Olyan, “Honor, Shame, and Covenant Relations in Ancient Israel and Its Environment” (1996) 115 *J. Biblical Lit.* 201 at 218.

<sup>39</sup> G. Cornu, “Du sentiment en droit civil” in G. Cornu, *L’art du droit en quête de sagesse* (Paris: Presses universitaires de France, 1998) 71. Professor Cornu has noted that art. 371 C. civ. is unable to strike at respect as a matter of the heart: “Le décalogue commande sans nul doute une disposition intérieure de l’âme. Le droit s’épuiserait à vouloir l’imiter. Il le ferait au risque de rester lettre morte, impuissant à saisir l’irrespect contenu qui est le plus radical” (*ibid.* at 80).

undermined” or the “grave reasons” giving rise to a deprivation of parental authority. Yet when it comes to describing and regulating family sentiment amongst those not in crisis, legislation is bashful or silent. The general sense, largely unexplained, is that love is beyond the law, and honour and respect in article 597 and its analogues seem to be similarly non-legal as objects of obligation.

Marriage provides a plain example. Rights and obligations between spouses are the subject of enactment, but those rules tend to deal with financial and practical matters associated with the relationship and its breakdown rather than the sentiment that unites and may tear asunder. The obligation of fidelity is recognized, of course, but is understood to be a rule of conduct in officialdom only in the breach; and even then only where the marriage to which it is attached is already dead. Until that time, the duty evolves—performed or not—beyond the view of formal law as part of a private, notionally non-legal side of family life. Privacy is erected as an apparent barrier to entry for law, creating what has been described as a “black box” into which law (read the state) is unable or unwilling to enter, at the inevitable expense of the economically or physically vulnerable in that dark space. For some, this is a feature of a general incompatibility between affection, as a fundamentally voluntary reflex, and social ordering through law, which ultimately rests upon force. On this view, filial love, unlike law, has no sanction. Some scholars have pursued this apparent stand-off between love and law from the perspective of rationality and its importance in the articulation of legal rules of conduct susceptible of enforcement: “Love is arbitrary in the sense that it cannot be constrained or predicted by law; it knows no reason—the demands of law and rationality fall before it.”<sup>40</sup> Lawyers would be the first to say that one person cannot be obliged to love another and, on this same reasoned reasoning, the stand-off between duty and filial piety seems well anchored in positivist legal culture.<sup>41</sup>

The prevalent view that happy families are left to their own devices in service of (legal) values of privacy means, for many lawyers, that happy or “normal” families do not need law.<sup>42</sup> This sense that intimacy should keep law out of sentimental matters

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<sup>40</sup> Z. Bankowski & C. Davis, “Living In and Out of the Law” in P. Oliver, S.D. Scott & V. Tadros, eds., *Faith in Law: Essays in Legal Theory* (Oxford: Hart, 2000) 33 at 33. This essay, critical of the standoff, proposes that love and law may occupy an interdependent “middle ground” upon which religious ideas throw light (*ibid.* at 38).

<sup>41</sup> On occasion, legal scholars make the counterpoint by relying—importantly for our purposes—on a conception of law touched by religious thought. See e.g. R. Dekkers, “Moïse” in *Mélanges en l’honneur de Jean Dabin*, t. 1 (Brussels: Bruylant, 1963) 79 at 79-80: “Où réside, en premier lieu, la matière juridique? Dans nos cœurs. Le droit est avant tout affaire de sentiment. C’est pourquoi ... un enfant ... possède un certain sens du droit.”

<sup>42</sup> The view is such that for the happy family—sometimes described optimistically as the “normal” one—the parameters of legal duties need not be defined. See e.g. Y. Martin & J.A. Ulysse, *L’autorité parentale: un droit ou un devoir... pour qui? Prix Charles-Coderre 1984* (Cowansville, Qc.: Yvon Blais, 1985) at 33: “Dans une situation normale, c’est-à-dire lorsque les parents exercent effective-

can fairly be criticized as conceiving of law in a narrow, formalistic, or even overly rational way, but it remains an influential perspective. Certainly the idea that custom actively shapes behaviour within the family, through good times and bad, in the presence or absence of state-made law, is not a widely shared one. Whatever one's views on the appropriateness of this formal conception of law as an account of legal normativity in family life, as the dominant paradigm it explains why lawyers tend to consider rules of conduct that treat human feelings—even those that are legislatively enacted—as non-legal or moral precepts.<sup>43</sup> Love, conceived as a free-will offering, and law, imagined as constraint and sanction-driven, are again seen to be on separate paths, so that when a legislature imposes an obligation on family members to provide one another with “respect”, the sentimental dimension of the duty is read down or ignored. In the obligation to establish a *vie commune* in marriage, to take a comparable example, lawyers generally fail to see the legislative metaphor for marriage as a shared life, or when they do, they take it as an allusion to a moral duty not susceptible of legal regulation beyond the obligation to share the same dwelling.<sup>44</sup>

In this spirit, lawyers who speak to the legislative duty to respect or honour parents tend to characterize it as an intimate matter removed from the purview of social ordering by law. In other disciplines honour is thought to be a more public manifestation of sentiment; it is an outward recognition of status, authority, and the value of a person in the eyes of others. One anthropologist speaks of this public dimension in the lawyers' language of rights by describing honour as a person's “*claim to pride*, but it is also the acknowledgement of that claim, his excellence recognized by society, his *right to pride*.”<sup>45</sup> While this understanding of honour as part of a sphere of public life might be thought of as inviting formal law's intervention, there is little echo of this in the family law literature. Lawyers might admit of its relevance in arm's-length relationships, but in the family, honour is seen as an intensely private matter. Only a parent will sense the import of a lack of respect, only a parent can attend to its adherence,

ment l'autorité parentale de façon collégiale, il importe peu de définir les frontières des différents droits et devoirs des parents.”

<sup>43</sup> For a comprehensive and critical appraisal of the unhappy relationship between affection and (formal) law, see J. Pousson-Petit & A. Pousson, *L'affection et le droit* (Toulouse: Centre national de la recherche scientifique, 1990). The authors note that private law traditionally prefers regulating human relationships on the basis of “rapports d'autorité plutôt que sur les liens du cœur” (*ibid.* at 21).

<sup>44</sup> On the tension between the sentimental and rational content of the legal idea of *vie commune*, see N. Kasirer, “What is *vie commune*? Qu'est-ce que *living together*?” in *Mélanges offerts par ses collègues de McGill à Paul-André Crépeau* (Cowansville, Qc.: Yvon Blais, 1997) 487.

<sup>45</sup> J. Pitt-Rivers, “Honour and Social Status” in J.G. Peristiany, ed., *Honor and Shame: The Values of Mediterranean Society* (Chicago: University of Chicago Press, 1966) 19 at 21 [emphasis in original]. See also D.D. Gilmore, “Introduction: The Shame of Dishonor” in D.D. Gilmore, ed., *Honor and Shame and the Unity of the Mediterranean* (Washington, D.C.: American Anthropological Association, 1987) 2 at 3. But compare A. Lever, “Honour As a Red Herring” (1986) 6:3 *Critique of Anthropology* 83.

and this parental action is, except at family breakdown, beyond the law. Even in the breach, sentimental obligations are rarely described in respect of their content. The “failure” of this duty of the heart is inevitably seized upon by a judge through its externalized sign—the redress is not for a “lack of respect” or “non-performance of a duty to love” but rather for a less sentimental wrong that is within the rightful province of the law.<sup>46</sup> Even those inclined to see the obligation as juridical thus feel bound to acknowledge that, in a good many circumstances, it is “invisible”.<sup>47</sup> At most, scholars see the legal character of the duty as originating not in state-made law but in some notionally higher authority—“droits que la nature a gravés au cœur des enfants en leur prescrivant des devoirs de respect et de reconnaissance envers ceux de qui ils tiennent l’existence”<sup>48</sup>—but they place it, ultimately, beyond the effective reach of any legislature. Others just do not see it as law at all.

Here we see an example of an ancient phenomenon for family law—the abandonment by formal law of the private sphere of intimate relations in favour of a sort of impervious family fiefdom. Article 597 has been connected to antecedents in Roman law and old French law in which powers were conferred on the father as a sort of sovereign.<sup>49</sup> Part lawmaker, part judge, the father invested with the *patria potestas* in Romanist jurisprudence was not just an omnipotent figure, but was, to invoke Gibbon’s colourful phrase, not “responsible to any earthly tribunal.”<sup>50</sup> The “unbounded confidence in the sentiments of paternal love” shown by Roman lawmakers and of those who draw direct or indirect inspiration from them is more than the delegation of powers to make and apply rules of domestic governance. In this device is an unspoken recognition that matters of sentiment cannot be effectively governed by rules made from the outside. Certainly the so-called advent of children’s rights has opened up the domestic sphere to intervention by the state in situations of crisis, but values of privacy continue to encourage the view that, short of collapse, the family and its affective

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<sup>46</sup> Said so well by Jean Carbonnier: “Le droit, cependant, a une propension invétérée à ne saisir les (bons) sentiments qu’à travers des faits objectifs (inverses)” (citing adultery in marriage as an example). J. Carbonnier, *Droit civil. Introduction*, 26th ed. (Paris: Presses universitaires de France, 1999) at para. 34.

<sup>47</sup> For Cornu, the duty of honour and respect is a legal one in French law whereby children perform the obligation—invisibly during minority—by obeying their parents. Cornu, *La famille*, *supra* note 23 at para. 61.

<sup>48</sup> E.-A. Côté, *La puissance paternelle* (Rimouski: Imprimerie générale S. Vachon, 1926) at 95-96. The author explicitly sources art. 242 C.C.L.C. to a “droit divin” and to “droit naturel” (*ibid.* at 20, 96).

<sup>49</sup> See the full historical account in E. Deleury, M. Rivet & J.-M. Neault, “De la puissance paternelle à l’autorité parentale: une institution en voie de trouver sa vraie finalité” (1974) 15 C. de D. 779, where the Quebec codal provision is said to originate in old French law, as is the view that it is a “devoir moral sans sanction” (*ibid.* at 830).

<sup>50</sup> E. Gibbon, *The History of the Decline and Fall of the Roman Empire*, ed. by D. Womersley (London: Penguin, 1994) at vol. 4, c. 44, “Fathers and children”.

life are less susceptible to regulation than the ordering of arm's length relationships. Even the recent triumphs of the best interests doctrine have left the essentials of this instinct intact—while no longer irrefutable, there remains a vigorous presumption that Father—and now Mother—know best.

This phenomenon signals that, in respect of legislation, law's empire extends only tentatively to matters of the heart, and even then only in circumstances of crisis. The rightful domain of legislation is understood to be a notionally rational sphere of human endeavour in the minds and hearts of most, such that matters of sentiment or of the good life are not appropriately conceived as legislative duty except retrospectively and even constructively in the breach. It is not so much that legal scholars are insensitive to honour and respect of parents, but their understanding of rules of conduct in the intimacy of the family precludes them from seeing children as duty bound.<sup>51</sup>

## II. Legislation As Preceptor (and the learning in this view)

Whether the failure of the duty of respect as a legal precept reflects some inherent limitation of the legislative form or a narrowness in lawyers' attitude to obligations in the family law setting is, in the final analysis, unimportant. As a supposed binding duty, article 597 is understood as legislative non-law. Its biblical connections, however, invite a second and complementary hypothesis for the vocation of the legislative "duty". As one theologian noted, the commandment announces as much an "ethical paradigm" as it does a mere rule, which encourages the view that the injunction to honour parents should transcend its strictly judicial function.<sup>52</sup> For parent-child relations, article 597 may seek not to command as precept but to provide knowledge or insight on the appropriateness of a course of action. The view of law as preceptor—the term is not used in its narrow Romanist sense but seeks to evoke a broader mandate to show legislation's other "path" as a pedagogical instrument—is certainly understood to be part of the theological conception of the Decalogue, even if teaching is most often associated with New Testament rather than Old Testament discourse.<sup>53</sup>

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<sup>51</sup> This sensibility manifests itself most publicly in some legal authors' decision to dedicate their work to their parents. Côté, *supra* note 48 did so for his study of *la puissance paternelle*; Beignier did the same in his book on honour and law, citing art. 371 C. civ. on his dedication page, *supra* note 33 at 1. Is the choice of dedication the object of absolute authorial discretion or, conversely, were Côté and Beignier honour bound to acknowledge their parents in this most personal, most public way?

<sup>52</sup> In a wide literature which varies, in part, on the basis of confessional perspectives of the authors, see W. Janzen, *Old Testament Ethics: A Paradigmatic Approach* (Louisville, Ky.: Westminster/John Knox Press, 1994) at 60.

<sup>53</sup> See e.g. M. Davies, "Is There a Future for New Testament Ethics?" in D.J.A. Clines & S.D. Moore, eds., *Auguries: The Jubilee Volume of the Sheffield Department of Biblical Studies* (Sheffield, U.K.: Sheffield Academic Press, 1998) 184 at 188, 192 where the use of metaphors and parables as devices of New Testament teaching is contrasted with commandments.

“[S]ur la lancée des allusions bibliques,” wrote Jean Carbonnier, “on ne manquera pas d’invoquer la fonction pédagogique de la loi.”<sup>54</sup> But while the texts of the Decalogue and article 597 suggest they may be thought of on the same plane, lawyers generally do not tend to associate legislation—in particular the expression of rules of conduct in enactment—with the gentle art of teaching.<sup>55</sup>

Like anyone else, the legislature can teach in different ways, to different audiences, and with differing objectives. Article 597 can be seen, for example, as a form of counsel designed to promote a general understanding of the more specific rights and duties of parental authority found in the *Civil Code of Québec*. From this perspective it remains a purposive text, but instead of directing behaviour by force, the “duty” indirectly shapes an understanding of parent-child relations through the law of interpretation (section A). Teaching is not, however, always so programmatic—a teacher’s means and ends may be more obliquely connected. A legal duty may seek to shape behaviour not through force, nor even through direct suggestion of how to interpret law. If understood to be speaking in a non-instrumentalist voice (or at least a less instrumentalist one), the legislature may have enacted the duty of respect as a statement that constitutes an end in itself. The text is thus a symbol more than a duty or even a model, pointing to the “aspirational” side of law. In this respect, article 597 represents an encouragement for legislatures to adopt rules of conduct as signs (section B).

### A. Teaching and Interpretation

By positioning article 597 first in the *Civil Code of Québec*’s title on parental authority, the legislature intends the duty to cast its shadow over that whole area of the law. There is nothing accidental here: the first provision of an enactment often plays a formal role in announcing a principle relevant to understanding all of a given body of law.<sup>56</sup> Sometimes characterized as “declarative” provisions of law, such texts have been described as having value as points of reference in the “démarche intellectuelle

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<sup>54</sup> J. Carbonnier, “Préface” (1975) 20 Arch. phil. dr. 1 at 3.

<sup>55</sup> It is an understatement to say that the opinion that legislative rules of conduct have a pedagogical function is not universally held. Many authors see this educational vocation more appropriately associated with moral duties. See e.g. P. Jestaz, “Pouvoir juridique et pouvoir moral” [1990] Rev. trim. dr. civ. 625 at 637 for a discussion of how “l’éducation n’a pas son équivalent en droit.”

<sup>56</sup> G. Rouhette, “L’article premier des lois” in N. Molfessis, ed., *Les mots de la loi* (Paris: Economica, 1999) 37. Art. 371 C. civ., like its Quebec analogue, is the first provision in the title “De l’autorité parentale”, although the French text figures in chapter 1 which regulates parental authority over the “person” of the child separately from the “property” of the child in chapter 2. This might be taken to suggest that, formally, the duty of respect does not “apply” to patrimonial matters in French law.



du lecteur de la loi.<sup>57</sup> Article 597 certainly takes up that role in respect of its audience of legal professionals. The legislature teaches judges, lawyers, and other legal officials that the duty of respect should animate the interpretation of other legal rules and duties. Short of teaching children themselves—formal law seems to be only a small factor in legal socialization of young people<sup>58</sup>—the *Civil Code of Québec* teaches lawyers how to understand family life.

Certainly one might fairly ascribe an explanatory function to the duty of respect; in fact this is cheerfully acknowledged even by those otherwise disinclined to see the duty as “legal”.<sup>59</sup> By speaking to the whole of the duties owed by a child to a parent, the text has both “synthetic” and “annunciatory” qualities which Cornu connects with the “didactic” function of legislation.<sup>60</sup> In scholarly descriptions of the powers that parents have over their children, for example, the duty of respect is regularly noted as a justification<sup>61</sup> or explanation<sup>62</sup> of other rules. One expert, for example, noted a generation ago that the rule served to “reinforce” rules of family governance designating the father as head of the household.<sup>63</sup> Article 597 has been invoked, for example, to buttress the already free-standing obligation of support owed by adult children to their indigent parents.<sup>64</sup> Elsewhere the provision has been cited by courts to justify the creation of a distinct obligation, such as in respect of funeral expenses,<sup>65</sup> as a *quid pro*

<sup>57</sup> M. Sparer & W. Schwab, *Rédaction des lois: rendez-vous du droit et de la culture* (Quebec City: Éditeur officiel du Québec, 1980) at 160.

<sup>58</sup> As a matter of child psychology and legal sociology, the manner in which children learn and appropriate law in their daily lives is studied by C. Kourilsky, “La perception du Droit dans la vie quotidienne: les représentations des concepts de droit privé chez les 11-17 ans” (1991) 22:4 *Revue d'études comparatives est-ouest* 77. I am grateful to Pierre Noreau for our discussion of this point.

<sup>59</sup> One commentator writes, for example, that art. 371 C. civ. embodies a “[p]rincipe certes purement moral mais révélateur d'un esprit plus général.” J. Cazals, *Age et droit privé* (Doctoral Thesis, Université de Paris II, 1976) at 32.

<sup>60</sup> Cornu, *Linguistique*, *supra* note 5 at 298-99, who cites examples other than art. 371.

<sup>61</sup> Classically deployed to justify the right to discipline children, the duty is sometimes noted as a foundation for the power to stop the unemancipated minor from leaving home without parental consent. See art. 602 C.C.Q.

<sup>62</sup> As in the case of the right of parents to oppose the marriage of their minor children. See art. 373(1) C.C.Q.

<sup>63</sup> “Ce précepte [art. 242 C.C.L.C.] est venu renforcer une règle d'économie domestique.” A. Mayrand, “L'évolution de la notion de puissance paternelle en droit civil québécois” in *Mélanges offerts à René Savatier* (Paris: Librairie Dalloz, 1965) 621 at 622.

<sup>64</sup> In *Droit de la famille—2626*, [1997] R.J.Q. 1117 at 1122 (Sup. Ct.), Denis J., who imposed an alimentary pension on an adult child, noted “[c]’est également une question de respect pour un enfant que d’aider et supporter ses parents dans la misère” before citing art. 597 C.C.Q.

<sup>65</sup> Consider the Cour de cassation’s decision to hold an adult child responsible for funeral expenses—even if that child has no rights under the deceased parent’s will—on the theory that the duty to pay funeral expenses is sustained by a transcendent duty to honour (even dead) parents. See Cass.

quo for parental obligations,<sup>66</sup> or as an interpretative tool to help understand how a judge should exercise discretion in another context.<sup>67</sup> The example most frequently cited is the obligation of support<sup>68</sup> which has in some instances been read down to nothing where a child, however needy, has acted so disrespectfully towards his or her parents as to lose everything except status as a child and standing as a creditor.<sup>69</sup>

On this view, the duty of filial piety is certainly no less “legal” than it would be if it had some autonomous, executory character as a duty in positive law. The legal character of the rule is felt indirectly as it “shapes”<sup>70</sup> judicial and scholarly reading of other rights and obligations in the law. Here the duty might again be compared to the duty to establish consortium between spouses which, whatever its independent juridical content, is one that “commande, conditionne ou au moins favorise l’accomplissement harmonieux, l’exécution naturelle des autres devoirs du mariage.”<sup>71</sup> As a legal rule that, when properly understood, shapes the understanding of more specific filial duties, article 597 might be seen as serving a comparable pedagogical purpose.

### B. Teaching and Symbol

It may be that the influence that the legislature seeks to have over children’s behaviour is even more indirect than that achieved by enacting an “interpretative”

civ. 1re, 14 May 1992, J.C.P. 1993.II.22097 (Annot. F.-X. Testu) at para. 5, in which the court’s decision is seen as a first historical instance that art. 371 “entre véritablement dans le droit positif.”

<sup>66</sup> See e.g. *Droit de la famille—2477*, [1996] R.D.F. 569 at 571 (Qc. Sup. Ct.). This perspective seems to be in decline in light of heightened sensitivity to the doctrine of best interests of the child. See generally A. Mayrand, “Égalité en droit familial québécois” (1985) 19 R.J.T. 249 at 276.

<sup>67</sup> Some have suggested that the right of grandparents to have “personal relations” with their grandchildren is sustained by a super-obligation of respect, felt exponentially (once by child towards his or her parent, then again by grandchild). See art. 611 C.C.Q.

<sup>68</sup> See arts. 585 and 587 C.C.Q. and, among many examples of cases in which disrespectful older children are held not deserving of support, *Droit de la famille—3476* (18 October 1999), Abitibi (Amos) 605-04-000878-999 (Qc. Sup. Ct.). I am grateful to Dominique Goubau for our discussion of this point.

<sup>69</sup> But see *Droit de la famille—3431*, [1999] R.D.F. 726 at 731 (Qc. Sup. Ct.), where Hilton J. decided that “such conduct on the part of the children, however sad, is not a determining factor in the granting of alimentary support that is otherwise due.”

<sup>70</sup> The term is taken from Gerald Bildstein who wrote in respect of the Fifth Commandment that “Judaism does not stress the instrumental role of filial responsibility,” but sees it instead as “a shaping, directing value that contributes to the meaning of life in society.” G. Bildstein, *Honor Thy Father and Mother: Filial Responsibility in Jewish Law and Ethics* (New York: Ktav, 1975) at 1.

<sup>71</sup> Cornu, *La famille*, *supra* note 23 at para. 26 [emphasis omitted]. Professor Cornu’s characterization of the obligation of *vie commune* as “l’adjuvant des autres devoirs” is also useful for the duty of honour and respect.

guideline. Article 597—“struck” in the form of a maxim<sup>72</sup>—may have a symbolic function as its principal design. Announced by the Quebec legislature without any identified purpose beyond its value as a sign, article 597 points to the legitimate semi-otic role that legislative enactment has as a form of human expression.

Article 597 is, without question, a sort of marker; by evoking so plainly the Decalogue, it is both a cultural referent for the *Civil Code of Québec* and a validating technique for the whole of Quebec family law.<sup>73</sup> The biblical injunction is of course unlikely, on its own, to give rise to adherence in a secularized culture. Yet the connection made to an established religious source may provide an anchor for a secular idea;<sup>74</sup> here article 597 is connected to a recognizable Judeo-Christian intellectual tradition which inevitably situates and validates the codal text for its reader.

But quite apart from its biblical roots, article 597 may stand on its own as a symbol of the legislature’s aspiration for the law of parental authority. Here is a statement—bold and legal in its form—that Quebec wants children to relate to their parents in an honourable way. Its appropriateness as a symbol may be the object of disagreement, as is the case with any legislative enactment. The legislature’s aspiration may indeed be more or less honourable; one French historian has argued that article 371 was enacted as a sign that “trahit discrètement certaines aspirations législatives à un autoritarisme paternel viager.”<sup>75</sup> And of course the meaning attributed to the symbol, like everything else in law, is bound to change in time and space. Once understood to be a sign of the submissiveness that was characteristic of the relationship of a child to his or her father,<sup>76</sup> the presence of the duty in the *Civil Code of Québec* would no doubt be understood otherwise from the perspective of the child’s-eye view that prevails in contemporary family law.<sup>77</sup>

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<sup>72</sup> Cornu, *ibid.* at para. 61, writes that art. 371 is “frappé en forme de maxime, solennellement inscrit en tête du Titre,” thereby reminding his readers that some laws feel—symbolically—like they are etched onto tablets, a particularly apt image in this context.

<sup>73</sup> It may be observed that the duty of filial piety is not always pointed to as an example of religious influence on family law. See e.g. A.-M. Bilodeau, “Quelques aspects de l’influence religieuse sur le droit de la personne et de la famille au Québec” (1984) 15 R.G.D. 573.

<sup>74</sup> On the designs by the state to link secular institutions to cultural constructs offered by religious texts, see M. Beauregard, “Confrontation Freitag/Ellul sur le rapport droit/religion” (Undergraduate Essay, McGill University, 2000) [unpublished, on file with author].

<sup>75</sup> See Martin, *supra* note 9 at 301. Professor Martin argues that the addition “à tout âge” to the French code as compared to the text of the Decalogue signals that in the minds of codifiers fathers had a permanent legislative and policing power over their children.

<sup>76</sup> See e.g. W. Rodys, *Cours élémentaire de droit civil français et canadien* (Montreal: Wilson & Laflour, 1956) at 53.

<sup>77</sup> See e.g. F.S. Freedman, “The Status, Rights and Protection of the Child in Quebec” (1978) 38 R. du B. 715 at 730. Freedman contends that the transition for the child from object to full-fledged sub-

Wrapped up in an understanding of law tinged by too categorical a distinction between law and morality, lawyers have dismissed this duty as unenforceable rather than seeing it, to invoke Fuller's well-known idea, as part of law's morality of aspiration.<sup>78</sup> Article 597 is nevertheless an example, albeit a rare one, of a legislative "beatitude",<sup>79</sup> the strength and purpose of which is symbolized in its very articulation. Certainly the theological view of the commandment as a "positive"<sup>80</sup> one, as against the prohibitory character of others in the Decalogue, allies itself naturally with Fuller's aspirational view of law. Article 597 might be thought of as expressing an "ideal" or a "message", as some other comparable family law duties have been understood to do,<sup>81</sup> the expression of which might properly be thought of as part of the legislative function.<sup>82</sup> The "portée pédagogique" of the legislative text resides in its aspiration to create "les conditions du civisme familial",<sup>83</sup> or more prosaically, as a reminder that parenting involves the exercise of power and the cultivation of loyalties. Ironically, its expression as a rule of conduct obscures its relevance to law, suggesting that it is to be understood within the framework of a rights-based conception of parent-child relations. Like the best interests principle spoken to at article 33 C.C.Q. (also cast as a matter of "respect"!), article 597 is a "guide",<sup>84</sup> a signpost for the general law, rather than a duty that constrains behaviour in a more narrow sense. There would seem to be no reason not to recognize legislation as having a symbolic function.<sup>85</sup>

ject of rights tempers the view, suggested by the duty of respect, that children have only duties to obey while parents have all the rights in parental authority.

<sup>78</sup> L.L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) at 5.

<sup>79</sup> Cornu, *La famille*, *supra* note 23 at para. 61.

<sup>80</sup> For an exposition of the duty of honour and respect as a "positive" one, see R.H. Charles, *The Decalogue* (Edinburgh: T. & T. Clark, 1923) at 173ff. I am grateful to Vitali Rosenfeld for his contribution here.

<sup>81</sup> See P.-A. Crépeau *et al.*, eds., *Private Law Dictionary of the Family and Bilingual Lexicons* (Cowansville, Qc.: Yvon Blais, 1999) at 30. The editors link the duty of consortium in marriage to an aspirational ideal: "The provision of the Civil Code which sets forth this duty [art. 392 C.C.Q.], as well as the duties of assistance, respect, fidelity and succour, is as much a statement of principle for marriage, and thus an ideal, as an account of juridical obligations imposed on the spouses."

<sup>82</sup> J. Carbonnier, in *Droit et passion du droit sous la V<sup>e</sup> République* (Paris: Flammarion, 1996) at 271, notes this ambition for legislative style: "[L]'idéal serait le style gnomique, des maximes, un message."

<sup>83</sup> A. Teissier-Ensminger, *La beauté du droit* (Paris: Descartes, 1999) at 243. The meaning of art. 371 C. civ. is explored by this scholar against the backdrop of parent-child relations in French literature.

<sup>84</sup> The term was used to describe the relevance of art. 30 C.C.L.C. (now art. 33 C.C.Q.) to the attribution of custody by L'Heureux-Dubé J. in *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 at 169, 108 D.L.R. (4th) 287.

<sup>85</sup> Cornu recognized that on occasion legislation has a symbolic value that does not preclude it from being thought of as a rule of law. Cornu, *Linguistique*, *supra* note 5 at 300, n. 50.

The recognition of article 597's symbolic character should not be trivialized by seeking an arithmetic measure of the influence of the symbol on those subject to the law. Symbols teach, to be sure, but that ambition alone would suggest an overly instrumentalist explanation of article 597. The duty of honour and respect may have been erected as a symbol without regard to any particular ends—as a legislative end in itself. In this sense, it signals that law may not just seek to command, but may also content itself with the statement of an ideal as its principal if not sole object.<sup>86</sup> No doubt one might contend that article 597 reflects as much a desired attitude to growing up as a rule of conduct. (One might well argue further that different scholarly attitudes to the normative character of article 597 reflect as much different perspectives on parenting as they do different attitudes to legislative enactment.)

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If a legislative rule fails to bring about the course of conduct it explicitly purports to impose, is it still law? Scholars who have studied legal discourse have noted that many voices and tones of voice of legislative technique do not seek to impose conduct directly. Legislative texts that do not direct behaviour—definitions,<sup>87</sup> preambles,<sup>88</sup> and organizing principles<sup>89</sup> are obvious examples—are of course no less law than formal injunction. Yet what is remarkable about article 597 is that, unlike a definition or a simply “narrative” legislative text,<sup>90</sup> it is presented in a form that suggests that its purpose is to oblige children to adopt a course of conduct. Here then is the basis of a first conclusion—legislative form alone is an unreliable guide for legislative substance or, as Georges Rouhette observes, “[l]e problème est que le caractère de la norme ne se reconnaît pas à son simple énoncé.”<sup>91</sup> In a medium of communicative action in which

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<sup>86</sup> See the (second!) definition of “loi” given in A.-J. Arnaud *et al.*, eds., *Dictionnaire encyclopédique de théorie et de sociologie du droit*, 2d ed. (Paris: Librairie générale de droit et de jurisprudence, 1993) at 353: “[R]ègle impérative exprimant un idéal, une norme, une éthique.”

<sup>87</sup> It seems implausible to argue that “definitions” in legislation are less normative than rules of conduct. By fixing on one meaning and excluding others in a definition, the legislature has the ultimate objective of shaping behaviour. On the great variety of types and objectives of legislative definitions, see G. Cornu, “Les définitions dans la loi” in *Mélanges dédiés à Jean Vincent* (Paris: Dalloz, 1981) at 87. Cornu observes that by virtue of origin, all legal definitions have a “valeur positive” and constitute a “règle de droit”.

<sup>88</sup> See K. Roach, “The Uses and Audiences of Preambles in Legislation” (2001) 47 McGill L.J. 129.

<sup>89</sup> See generally J.-P. Richard, “Les formulations d’objectifs dans les textes législatifs” [1989] R.R.J. 785.

<sup>90</sup> On this latter category, see G. Rouhette, “Le style de la loi: normes narratives et normes contraignantes” in K.D. Kerameus, ed., *General Reports XIVth International Congress of Comparative Law, Athens 1994* (Athens: Kluwer, 1996) 37.

<sup>91</sup> *Ibid.* at 42.

so often “the form is the message,”<sup>92</sup> article 597 is a bold reminder of the fragility of the I-am-that-I-am method of identifying what is law.

That article 597 looks like a legal precept but is understood as something else certainly points to some of the limitations that prevailing conceptions of legal rules of conduct place on the legislative form. But thinking of the text as a legal preceptor may, on the other hand, encourage legislatures to experiment with this teaching mode. It may indeed be countercultural and counter-intuitive for lawyers to see legislative duties as shaping behaviour by counsel rather than by force, but this view may provide both an explanation and a justification for the tenacity of article 597 and for its pre-eminent place as the first provision in the *Civil Code of Québec*'s title on parental authority.

A small body of experts has recognized that legislative style is variable and that the tenor of a legislative norm may change depending on its context or ambitions. Fewer still are inclined to make the point for formally enacted duties. Professor Rouhette has advanced that sometimes duties may be understood as “advice”<sup>93</sup> rather than precepts imposing a course of action by force; Antoine Jeammaud has sought to generalize the idea by imagining rules of conduct not as commandments but as “models”<sup>94</sup> for behaviour which do not depend, for their success, on judicial sanction. While the precise contours of this pedagogical function of legislation require further study, it would be wrong to see this as a phenomenon wholly distinct from law as authority. Certainly teachers are power figures, even if some theories of pedagogy prefer to emphasize a more dialogic relationship between student and teacher as equals. Where law teaches it does more than “rely on appeal to pride.” David Daube’s insight that “[i]t would be out of keeping with the very essence of legislation to stress the voluntary, matter-of-course nature of the conduct desired”<sup>95</sup> still fits this understanding of enactment where teaching is thought to include that push to learn. The authority of what Carbonnier calls the “loi institutrice” comes not from fiat but from that powerful, sometimes overpowering sense that what is being taught is right.<sup>96</sup> This form rec-

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<sup>92</sup> See D. Daube, *Ancient Jewish Law* (Leiden: E.J. Brill, 1981) at 71ff. This examination of the form of Jewish law includes a study of the Fifth Commandment of the Decalogue as a “Wisdom tenet” (*ibid.* at 97).

<sup>93</sup> *Supra* note 90 at 41, where Rouhette notes, citing 371 C. civ., that some legislative rules in French law use the verb *devoir* notwithstanding that they only represent “des ‘conseils’ adressés au juge.”

<sup>94</sup> Professor Jeammaud argues that the normative character of a rule of conduct turns more on its status as a “modèle” than its prescriptive ambitions: “[C]’est de sa vocation à servir de référence afin de déterminer *comment les choses doivent être*, qu’un énoncé tire sa signification normative, et non d’un prétendu contenu prescriptif, prohibitif ou permissif d’une conduite.” A. Jeammaud, “La règle de droit comme modèle” D. 1990.Chron.199, No. 4 [emphasis in original]. Interestingly, he cites the Decalogue as counterpoint in argument (*ibid.* at No. 8).

<sup>95</sup> D. Daube, *Forms of Roman Legislation* (Oxford: Clarendon Press, 1956) at 70.

<sup>96</sup> Carbonnier, “Préface”, *supra* note 54 at 4.

ognizes that legislation can occupy a space between objectified commandment and subjectified social fact, to invoke Pierre Noreau's scheme of analysis, whereby legislation is understood "comme processus instituant et institué"—and why not *comme processus instituteur?*—"plutôt que comme simple expression posée du droit de l'État."<sup>97</sup>

This tendency to use legislation as counsel as opposed to constraint is not always applauded. One French scholar, in reference to the legislative obligation of spouses to share a *vie commune*, notes that in the absence of sanction, "l'obligation dégénère et change de nature" such that the rule which purported to impose an obligation cannot be considered as "normative".<sup>98</sup> Yet one might well subscribe to another understanding of normativity, and perhaps even of obligation, that leaves room for law as preceptor. The alternative view is that pedagogy is no less normative than a judicially-sanctioned rule of conduct; it is just normativity of a different stripe. Where legislative duties step out of generally recognized parameters of binding rules of conduct they may be less non-law than different law. Thus, just as a legal duty to rescue may express a new conception of legal obligation rather than a mere moral imperative,<sup>99</sup> so too might article 597 express an aspirational value in law rather than moral injunction irrelevant to legal regulation of family life. Study remains to be done on how legislation can be deployed as an instrument of teaching<sup>100</sup> or as a (non-instrumental) symbol.<sup>101</sup> Indeed like a parent, legislation might properly concern itself "moins encore de donner des ordres que de faire régner l'ordre."<sup>102</sup> It may seem odd to conclude with a plea for paternalistic enactment, but insofar as this entails teaching rather than fiat, learning rather than obedience, article 597 and the legislative regulation of parental authority may provide an unexpected model for law-making.

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<sup>97</sup> P. Noreau, "Comment la législation est-elle possible? Objectivation et subjectivation du lien social" (2001) 47 McGill L.J. 195 at 234.

<sup>98</sup> C. Atias, "Normatif et non-normatif dans la législation récente du droit privé" [1982] R.R.J. 219 at 222.

<sup>99</sup> See N. Kasirer, "Agapè" [2001] Rev. int. dr. comp. 575 at para. 19.

<sup>100</sup> One terrain for studying the phenomenon are those laws which are suppletive rather than imperative in effect—a form of "pédagogie douce" for legislation, "propre à vaporiser dans les esprits une morale sans obligation ni sanction." See J. Carbonnier, "Variations sur la loi pédagogique" in J. Carbonnier, *Flexible droit*, 7th ed. (Paris: Librairie générale de droit et de jurisprudence, 1992) at 155. See also, by the same author (and law reformer), his account of the law of parental authority which gave him occasion to observe that "[e]ntre la législation et la pédagogie, l'affinité est naturelle." J. Carbonnier, *Essais sur les lois*, 2d ed. (Paris: Répertoire du notariat Defrénois, 1995) at 79.

<sup>101</sup> In a manner most useful to a consideration of the symbolic charge of art. 597, this point is canvassed from a biblical perspective by legal semiotician B.S. Jackson in "The Ceremonial and the Judicial: Biblical Law as Sign and Symbol" in J.W. Rogerson, ed., *The Pentateuch* (Sheffield, U.K.: Sheffield Academic Press, 1996) 120.

<sup>102</sup> J. Ray, *Essai sur la structure logique du Code civil français* (Paris: Félix Alcan, 1926) at 46.