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Abortion and Divorce in Western Law

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ABORTION AND DIVORCE IN WESTERN LAW. By *Mary A. Glendon*. Cambridge, Mass.: Harvard University Press. 1987. Pp. 197. \$25.

Both abortion and divorce have been extensively analyzed in legal literature, in other scholarly literature, and in popular writings as well. A new perspective on these subjects may seem elusive. Yet Mary Ann Glendon,¹ in *Abortion and Divorce in Western Law*, offers a thoughtful, and thought-provoking comparative legal analysis that provides fresh insight on these two topics.

Chapters 1 and 2 of this book provide comparative surveys of abortion and divorce law in the United States, Canada, and eighteen other Western countries.² In the third and final chapter, Glendon attempts to explain why American law differs from that of other Western countries, and focuses on the evolution of political and legal ideas as one part of the explanation of America's distinctiveness.

The author approaches her comparative analysis of abortion and divorce from the perspective of what she terms the rhetorical method of law-making. In European thinking, she says, law is viewed as an educational tool. This contrasts with English and American legal theory which "den[ies] or downplay[s] any pedagogical aim of law."³ Glendon is concerned with both the interpretive and the constitutive aspects of the rhetorical activity of the law. "Law is interpretive when it is engaged in converting social facts into legal data and systematically summarizing them in legal language. . . . Law is constitutive when legal language and legal concepts begin to affect ordinary language and to influence the manner in which we perceive reality" (p. 9).

In the first chapter of her book, Glendon analyzes the interpretive and constitutive aspects of abortion regulation in twenty Western countries.⁴ Her inquiry is aimed at examining "the messages about

1. Mary Ann Glendon is Professor of Law at Harvard Law School. Professor Glendon has written extensively in the areas of comparative and family law. Her books include M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL LAW, COMMON LAW AND SOCIALIST LAW TRADITIONS* (1985), M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981), and M. GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* (1977).

2. The Western countries surveyed are Austria, Belgium, Denmark, England, Finland, France, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and West Germany.

3. P. 8. Glendon credits two American scholars, James Boyd White and Clifford Geertz, with recognizing the importance of the rhetorical activity of law. See White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985); C. GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983). See also J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

4. The author provides a detailed description of current abortion laws in these countries (except Belgium and Ireland) in the Appendices. Pp. 145-57. For another, more detailed discus-

such important matters as life and liberty, individual autonomy and dependency, that are being communicated both expressly and implicitly by abortion regulation" (p. 15). Although seventeen of these twenty countries abandoned strict abortion laws in the last two decades, abortion is subject to less regulation in the United States than in any other country in the world. The French abortion statute, which specifies the underlying issue as one involving human life, is contrasted with the American view of the issue as a conflict between a woman's individual liberty or privacy and a nonperson (p. 19). European countries have tried to prevent abortion from becoming routine by discouraging the establishment of specialized abortion clinics. The United States Supreme Court has struck down hospitalization requirements as a burden on the pregnant woman's freedom of choice,⁵ and a vast profit-making industry has grown up around abortion.

Glendon acknowledges that the philosophical differences she identifies may be partially due to the fact that the development of European abortion policy takes place in the give-and-take of the legislative process rather than through court-imposed limitations on regulation (p. 25). Yet she notes that important differences emerge even between *Roe v. Wade*⁶ and European court decisions on abortion. The West German abortion statute was challenged and struck down by the West German Constitutional Court in 1975.⁷ However, the West German court left room for the West German legislature to revise abortion policy, recognized that human life was at stake, and emphasized communitarian values. In contrast, *Roe* and its progeny have virtually eliminated legislative action on abortion, failed to recognize the fetus as either human or alive, and emphasized individualistic values.⁸

Relying on her comparison of American and European abortion law, Glendon addresses two misconceptions commonly held in the United States. The first misconception is that the present legal situation in the United States with respect to abortion is not unusual, and the second is that compromise on this issue is not possible (p. 40).

sion of the formation of abortion law, and its current application in the United Kingdom, Canada, West Germany, France, and Italy, as well as the United States, see ABORTION LAW AND PUBLIC POLICY (D. Campbell ed. 1984).

5. *Doe v. Bolton*, 410 U.S. 179, 201 (1973); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 431-38 (1983); *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476, 481-82 (1983).

6. 410 U.S. 113 (1973).

7. Judgment of Feb. 25, 1975, 39 BVerfGE 1. For an English translation of the decision, see Jonas & Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. OF PRAC. & PROC. 605 (1976).

8. For further elaboration on the differences between the American and German abortion decisions, see Jonas & Gorby, *supra* note 7; Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 B.Y.U. L. REV. 371 (focusing on American and German abortion jurisprudence, and the tension between liberty and community in the abortion issue).

Glendon argues that the abortion issue should be left to the state legislatures. She notes that nineteen states liberalized their abortion laws between 1967 and 1973, and concludes that if the issue were returned to the states, the great majority would move to the moderate position exhibited by most of the European countries. For Glendon, this is the ideal solution.

The idea of returning the abortion debate to the state legislatures makes Glendon appear a pro-life advocate. But Glendon's message is a different one. Europeans have resolved the abortion debate without the polarity and violence still prevalent in the United States. Glendon is searching for a method to build a similar consensus in America, and to temper continued extremism.

The author does recognize that there are flaws in her solution, such as the inadequacy of the representation of women in state legislatures, and she does not satisfactorily address these problems. She also does not discuss the possibility that it is the very philosophical differences which she identifies as distinctly American, the traditional emphasis on freedom and individual rights, that may make compromise on abortion in this country impossible. Although the book is primarily characterized by thoughtful, even-handed analysis,⁹ Glendon presents hypothetical criticisms from her pro-choice and pro-life friends to her solution to the abortion problem and sanctimoniously dismisses them (pp. 59-62). Yet Glendon's comparative analysis demonstrates that a divided society can compromise on the abortion issue.

In chapter 2, Glendon compares divorce laws in Western countries noting that divorce, like abortion, has become more readily available in the last twenty years. Between 1969 and 1985, divorce law in nearly every Western country was profoundly altered. These changes were characterized by the recognition or expansion of no-fault grounds for divorce, and by the acceptance or simplification of divorce by mutual consent.

Glendon's emphasis is on how and why divorce law in the United States differs from divorce law in other countries. In most of the United States, in Sweden, and since 1986, in Canada, the legal definition of marriage is that of a relationship terminable at will. Other European countries have officially maintained the idea of marriage as an enduring relationship invoking reciprocal rights and obligations. Glendon sees American divorce as "no-responsibility" divorce (p.

9. This even-handedness contrasts with the majority of existing abortion literature, which is decidedly either pro-choice or pro-life. See, e.g., *ABORTION: UNDERSTANDING DIFFERENCES* xvii (S. Callahan & D. Callahan eds. 1984) (in choosing essays for this book, the editors "sought a group equally divided between prolife and prochoice"); Luker, *Abortion and the Meaning of Life*, in *ABORTION: UNDERSTANDING DIFFERENCES* 25, 26 (S. Callahan & D. Callahan eds. 1984) ("Abortion polarizes."); KRASON, *ABORTION: POLITICS, MORALITY AND THE CONSTITUTION* 1 (1984) (claiming that there is no neutral position on abortion).

105). She is concerned with the effect of "the ideological aspects of divorce law on the way people think and feel about marriage" (p. 109).

The greatest practical difference between American and European divorce, Glendon notes, is an economic one. In continental Europe, child support is calculated in a predictable fashion, and community property, in principle, is divided equally. Judges determine the amount of child support through formulas or standardized support tables that are designed to calculate a realistic amount, given the needs of the child and the resources of the parents. European countries also have a better record of enforcing collection of child support payments. Additionally, some European countries partially absorb collection failures by advancing funds to the custodial parent and collecting directly from the noncustodial debtor parent.

In contrast, American and English statutes give great discretion to judges for allocating marital property and assessing child support. Glendon asserts that the uncertainty of the Anglo-American system deprives spouses of any clear principles to set the parameters for negotiation. This is especially important because settlement is the prevailing method of finalizing marital dissolution in the United States. When a case actually reaches a judge, the judge typically greatly underestimates the costs of raising a child (p. 87). Thus, the expense of raising a child falls disproportionately on the custodial parent, usually the mother.¹⁰

Glendon argues that the economic consequences of divorce, under American law, should take a different form when children are involved.¹¹ The author advocates that a "children first" principle govern such divorces (p. 94). Under such an approach, all of the marital property would be subject to the duty to provide for the children. Under Glendon's theory, "the judge's main task would be to piece together, from property and income and in-kind personal care, the best possible package to meet the needs of the children and their physical custodian" (p. 95). Glendon's solution seems ideal, but she does not address the political viability of putting such a standard in place.¹²

The third and final chapter of *Abortion and Divorce in Western Law* tries to explain why America's abortion and divorce law is subtly, yet profoundly, different from that of other Western countries. Glendon reaches back to the philosophical theories and theorists that

10. For a detailed description of the extent of this problem, see generally L. WEITZMAN, *THE DIVORCE REVOLUTION — THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 264-356 (1985).

11. Other scholars have also argued that greater weight should be given to the interests of children when property is distributed in divorce proceedings. See J. EEKELAAR & M. MACLEAN, *MAINTENANCE AFTER DIVORCE* 104-34 (1986).

12. Cf. R. NEELY, *THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE* 188 (1984) ("It is possible to create a competent and entirely self-financing system for collecting child support *if* there is the political will." (emphasis in original)).

shaped American and European law. She asserts that the development of the law has been affected by the fact that the natural rights "theories were elaborated for [America] by Hobbes and Locke, and for [Europe] by Rousseau and Kant" (p. 125). American law places a "greater emphasis on individual rights," while the civil law system gives "more attention to social context and individual responsibility" (p. 131). Glendon acknowledges that philosophical ideas are only one part of the explanation for the distinctiveness of American law. She concentrates her analysis on this explanation because she thinks it has not been adequately explored before.

Glendon also identifies the United States' lack of an explicit national family policy as one reason for the American difference. Because American family policy is implicit, in part due to its diverse development among the fifty states, it is unexamined. Explicit national policy is important, Glendon says, because of the symbolic value of the recognition of the importance of child raising (p. 135).

Glendon successfully stimulates thought in three areas in *Abortion and Divorce in Western Law*. First, she forces us to examine our law's failure to encourage consensus on abortion. Second, she encourages us to question our society's widespread acceptance of no-fault divorce in its current form, given its economic consequences for women and children. Third, and most importantly, Glendon compels us to reevaluate the purpose and role of law in our society. She condemns the view that "moral questions are out of bounds, and that the task of law is to adapt itself to behavior." Such attitudes, Glendon states, "render insight and self-correction less likely to occur, and lend themselves to perpetuation of long cycles of decline. At worst they are counselors of nihilism and despair" (p. 140).

— Sara J. Vance