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BLEST BE THE TIE THAT BINDS

Joan Heifetz Hollinger*

THE NEW FAMILY AND THE NEW PROPERTY. By *Mary Ann Glendon*. Toronto: Butterworths. 1981. Pp. xvii, 269. \$19.95.

Mary Ann Glendon's *The New Family and the New Property* is an ambitious, informative and socially conservative account of the legal aspects of the relations between family structure and economic structure in the advanced industrial societies of America and Western Europe.¹ Glendon's central claim is that economic and legal ties within families have become attenuated, while each individual's ties to work and government have tightened. The role of the family as a source of economic support and as a determinant of social standing for its members has diminished, especially during the past hundred years; in the process, legal and emotional bonds between husbands and wives, and between parents and children have loosened.² In the late twentieth century a "new family" has displaced the traditional one that was formerly reinforced by the law.³ Glendon's concept of the "new family" represents, she tells us, "a variety of co-existing family types" (pp. 3-4). It is, more accurately, a "no family" expressing the fluidity, detachability and interchangeability of modern personal relationships.⁴ It consists of married and remarried couples with or without children; divorced, separated or never-married single parents, mostly women, and their

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1. Although recent developments in American law and society are the focal point of this study, Glendon also discusses developments in English, French, Swedish and West German law. For a more detailed analysis of what she says about western European family law and social structure, she refers us to her earlier work. See generally M. GLENDON, *STATE, LAW AND FAMILY* (1977).

2. See, e.g., pp. 1-2, 11, 47, 143. Glendon is generally reluctant to make claims about the emotional or affective quality of the relationship between spouses while a marriage lasts. See, e.g., pp. 17-18, 13 n.9. Her neglect of the affective aspects of either traditional or modern marriages weakens her discussion of the causes of marital instability, where she pays too little attention to the role of personal values and ideology. See notes 21-31 *infra* and accompanying text.

3. Glendon describes the traditional family as patriarchal, marriage-centered, indissoluble before the death of a spouse except for serious cause, committed to the subordination of individual preferences to the needs of the family unit, and based on a clear division of responsibility between the husband-father as wage-earner and the wife-mother as homemaker and child-nurturer. See, e.g., pp. 101-02.

4. See also pp. 3-4, 12-13. Glendon describes this proliferation of "family types" as the perhaps inevitable concomitant of the profound shifts in the meaning and distribution of property that have occurred in modern capitalist societies, but she would clearly prefer to live in a world where men and women marry once and for keeps. A more sanguine attitude toward the "higher degree of pluralism" in contemporary living arrangements can be found in S. LEVITAN & R. BELOUS, *WHAT'S HAPPENING TO THE AMERICAN FAMILY?* (1981).

children; unmarried heterosexual and homosexual couples with or without children; and widowed or unmarried individuals living by themselves.⁵

Coincident with this proliferation of family types, Glendon explains, has been the increased dependence of individuals on "new property" for their economic sustenance and social standing. If the "old" property was land and pewter bowls, the "new property" refers to jobs, job-related fringe benefits, and various forms of public assistance, all of which have come to be recognized as entitlements in keeping with the economic reliance upon them by more and more individuals.⁶ The new family and the new property are reciprocally related; neither could exist without the other. It is no accident, for example, that "in the United States, as elsewhere, divorce for cause, disappearing from family law, is finding its way into labor law."⁷

5. Of the estimated 82.4 million households in the United States in March 1981, only 73% met the Census Bureau's definition of a family household: two or more persons living together and related to each other by blood or marriage. Nearly 27% were defined as nonfamily households, consisting of individuals living alone or of two or more unrelated persons sharing a residence. Since 1970, more than half the increase in the total number of households is attributable to the growth of nonfamily units. Only 60% of all households now include a married couple living together. About half of these married couples live with one or more of their own children under the age of 18. In other words, about 30% of all households and slightly more than two-fifths of family households consist of a mother and a father and their own children under the age of 18. In considerably less than half of these families is the husband the sole wage-earner and the mother a full time homemaker. About 11% of all households are maintained by women living with one or more relatives other than a spouse (an increase of over 65% since 1970). In more than three-fifths of these households, women who are divorced, separated, or never-married live with one of more of their minor children. Another 2.3% of all households are maintained by men living with relatives other than a spouse. In about 35% of these households, men live with their own minor children. Adults living by themselves comprise approximately 23% of all households. The number of unmarried, divorced, separated or widowed persons living by themselves increased 75% since 1970; the largest increase has occurred in the 25-34 age group. Of the remaining 3-4% of all households, about half consist of unmarried heterosexual couples. The others represent a variety of living arrangements, including homosexual couples, elderly adults with live-in housekeepers, college or university student roommates, and other unrelated persons sharing a residence. Of the family households with children, more than one out of five are one-parent families. Although less than 17% of all white families are headed by one parent, more than 50% of all black families are headed by one parent. Over 90% of all one-parent families are maintained by mothers; the number of children under 18 living with one parent has increased by nearly 54% since 1970. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 371, HOUSEHOLD & FAMILY CHARACTERISTICS: MARCH 1981, Tables A, B, and accompanying text; SERIES P-20, NO. 372, MARITAL STATUS & LIVING ARRANGEMENTS: MARCH 1981, Tables D, E, F, 4, 5 (June 1982); SERIES P-20, NO. 374, POPULATION PROFILE OF THE UNITED STATES: 1981 Table D (Sept. 1982). See also *A Portrait of America*, NEWSWEEK, Jan. 17, 1983, at 20-33 for a report of the most up-to-date population statistics from the Census Bureau.

6. Glendon borrows the term "new property" from Charles Reich. See Reich, *The New Property*, 73 YALE L.J. 733 (1964). She uses it, as he and others have, to declare that in the twentieth century the principal forms of wealth and the main determinants of social and economic status are legally protected entitlements to work-related and government-derived benefits such as seniority, pensions, health care, profit-sharing and stock-ownership plans, unemployment and disability insurance, social security, and public income assistance. See pp. 185-92; Reich, *supra* at 733. Glendon is sensitive to the ways in which race and sex discrimination hinder access to certain jobs and thus to employment-related new property. She is also aware of the precariousness of all new property entitlements during times of prolonged recession, inflation or high unemployment. See, e.g., pp. 192-98.

7. P. 153. She is referring to the contrast between the recent easing of the legal restrictions on divorce and the increase of statutory, contractual, regulatory, and judicially-imposed constraints on an employer's ability to discharge employees.

Glendon claims further that the new family and the new property reflect changes in contemporary private and public law that are, in turn, part of a more general transformation of law in the twentieth century. Contract is being replaced as the major ordering or legitimating principle by a system of law that is regulatory, administrative, increasingly public and bureaucratic.⁸ This system operates directly upon the individual; it weakens and threatens to annihilate the family as well as all institutions that might serve to mediate between individuals and the large-scale occupational and other organizational hierarchies to which they are bound. Glendon here joins the chorus of literary and social scientific voices that sing the mournful tune of Max Weber. Further "bureaucratization of the legal order" (p. 224), she warns, can push us all into the "iron cage."⁹ Our only hope to escape this imprisonment may be a renewal of ancient faiths that foster community and stewardship instead of autonomy and ownership (pp. 238-45). Glendon implies that the modern "liberated" individual is too selfish in his or her purported striving for self-realization.¹⁰ We must transcend individualism, she says, and renew our "sense of connectedness" (p. 239) with each other and to unborn, future generations. To avoid being locked into the iron cage, she offers us Homer's "golden chain linking the heavens and all the creatures of the earth together" (p. 243).

Glendon's argument is presented on two levels, one grandly abstract, the other strictly nuts and bolts. She offers a veritable warehouse of data about contemporary legal developments,¹¹ but there are few stairways to the upper level where her history and sociology reside. Glendon's history is derived from the work of Lawrence Stone and other historians of western Europe; she uses it to explain the emergence of what she has dubbed the new family and the new property.¹² Glendon's sociology is derived from Max Weber, Jürgen Habermas and some recent scholars of American contract law;¹³ she uses it to explain the apparent absorption of private law in the twentieth century into the bureaucratic grip of the modern administra-

8. *See generally* ch. 5.

9. P. 236. For the original score, see M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181 (T. Parson, trans. 1958).

10. Glendon usually places the words "liberated" or "freed" within quotation marks, as if to suggest that the terms are merely slogans and cannot be used to denote serious or genuine striving for individual emotional or intellectual fulfillment. She is also unclear as to precisely what kinds of "liberation" she has the most doubts about: is it economic, emotional, sexual, or political? *See, e.g.*, pp. 13, 19, 46, 138-40, 198-205. For further discussion of her definition of and attitude toward individual autonomy, *see* notes 52-55 *infra* and accompanying text.

11. She discusses family law, succession law, employment law, property law, contract law and social welfare law.

12. *See generally* *THE HISTORY OF CHILDHOOD* (L. de Mause ed. 1974); E. SHORTER, *THE MAKING OF THE MODERN FAMILY* (1977); L. STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* (1977); König, *Sociological Introduction*, in 4 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* ch. 1, at 20-73 (1974); and the works by other European historians and historical sociologists that Glendon cites in chapter 1. The one remotely historical work on the American family that Glendon refers to is C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1977), a diatribe against the alleged invasion of the family by the "helping professions."

13. In discussing recent developments in contract law, Glendon relies on the work of Lawrence Friedman, Ian Macneil and, to a lesser extent, Grant Gilmore. *See* pp. 215-27.

tive state. It is fair to call both her history and her sociology "abstract" because her use of each remains general and imprecise. While Stone and Weber provide Glendon with some plausible bases for her excursions into comparative law,¹⁴ they serve her poorly within her main area of concern, modern America. She does not sufficiently demonstrate how recent trends in American family and property law depend on the historical and sociological categories she invokes to explain these trends.

What Glendon has to say about modern America is best understood and assessed if we begin with the basic historical matrix of her book. We can then move to her treatment of a more specific historical and sociological question central to her analysis: why have divorce rates risen? Within this setting, we can examine her discussion of how the law deals with divorce and its economic consequences. This will enable us, in turn, to address her claims about the reciprocal relationship between employment patterns and family law. This path through Glendon's book will show us how her conservatism and her distrust for "individualism" emerge from the shadows of Stone, then Weber, into the uncertain light of her own faith in the values associated with the traditional family. Although Glendon's program for how the law might help us recapture these values is in the end elusive, she nonetheless presents some illuminating and useful observations along the way.

I. HISTORICAL SOURCES OF MARITAL INSTABILITY

Lawrence Stone studied the social evolution of England from 1500 to 1800. He found that the open-lineage family groups whose wealth and status depended on land gradually gave way to a new patriarchal family type, less closely bound to kinship relationships outside the immediate nuclear family. As marriage became more directed to mutual affection and companionship, the family became structured around the husband-father as provider and decisionmaker; the wife-mother raised the children and maintained the home as a refuge from the outside world of acquisitive enterprise.¹⁵ The advance of industrialization, however, drew wives and to some extent children into the labor force. As economic conditions undermined the integrity of the family as a self-sufficient support unit, emotional ties within the family became both more intense and more fragile. The law, which had permitted termination of marriage before death only for serious

14. Glendon's frequent references to legal developments in various western European countries sometimes serve as a useful counterpoint to her discussion of American law, indicating how our legal response to changes in family and economic structure is similar to or different from that of other societies. Her most interesting comparisons are in employment law. The basic legal guarantee of job security that now prevails, at least in principle, in France and West Germany and to some extent in Sweden and England, is contrasted to the much more halting and uneven movement of our own legal system toward limiting the common-law doctrine of employment-at-will. See ch. 4. Also interesting are the examples she cites from Soviet bloc countries to illustrate how even the most massively supported state policies, such as the Soviet Union's efforts to increase the birth rate, are thwarted by "law-resistant" human behavior. See pp. 127-29. On the whole, however, Glendon's comparative legal analysis is disappointing. She reports but does not explain adequately the different responses of various societies to conditions common to all.

15. See generally L. STONE, *supra* note 12.

cause, eventually reflected this loosening of the family's economic and emotional bonds.

Glendon reports that a similar social transition took place in America.¹⁶ But she does not relate this conclusion specifically to our history, and tells us nothing about whether or when the family type described by Stone arose here and evolved in the nineteenth century, long after Stone's history had run its course. This failure is indefensible in view of the recent outpouring of scholarship on American social and family history, including the legal aspects of that history.¹⁷ Glendon could have drawn profitably upon these studies to help substantiate as well as qualify her claims about the general relevance of Stone's work to American history, and about the role of property and economic conditions in shaping family behavior and ideas about the law. Had she absorbed the findings of this scholarship, she might have been more sensitive to the texture and nuances of married life in nineteenth-century America,¹⁸ and to the complexity of the historical nexus be-

16. Glendon moves rapidly from her summary of Stone's historical model, pp. 11-14, to a discussion of the image of the traditional family embodied in the French Civil Code of 1804, pp. 14-17, then to a description of the "loose bonding" allegedly characteristic of the twentieth-century family, pp. 17-20, and then to a detailed discussion of American succession law and how it contrasts to spousal support law at divorce, pp. 20-29. She then returns briefly to the sixteenth century to illuminate her analysis of the significance of divorce in late twentieth-century America and Western Europe, pp. 29-36.

17. The best general introduction to this recent scholarship is C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* (1980). Degler has been justifiably criticized for his failure to analyze significant social and economic developments since the 1960's, and for the uneven quality of what he says about certain aspects of family life and domestic ideology in the nineteenth century. Nonetheless, he is quite persuasive in arguing that Stone's model is indeed relevant to the basic contours of American social history during the eighteenth and nineteenth centuries. And his analysis of the connections among the ideal of affection-based marriage, the improved status of women in the early nineteenth century, and the social recognition of the importance of the childrearing function is excellent. So, too, is his demonstration of how women were centrally involved in the late nineteenth century in efforts to control both sexuality and fertility. Degler's work is chiefly a summary of and commentary upon the specialized research of others, but it succeeds in setting forth the variety of ways in which women strove for autonomy within and from the patriarchal family long before the emergence of the new property and economic structure that Glendon credits so heavily for undermining family ties. He also shows how the increased participation in the work force by wives as well as husbands has often reinforced and not just challenged the traditional family structure. In addition to the specialized studies cited in Degler, other recent works relevant to Glendon's thesis include: N. BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN 19TH CENTURY NEW YORK* (1982), (a study of the Married Women Property Laws in New York State); M. NORTON, *LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800* (1980), especially valuable for its analysis of the role of Republican ideology in reshaping women's attitudes toward themselves and their families, *id.* at 228-99; M. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865* (1981); *THE AMERICAN FAMILY IN SOCIAL HISTORICAL PERSPECTIVE* (M. Gordon ed. 2d ed. 1978); and the influential and methodologically innovative study by Daniel Scott Smith, *Family Limitation, Sexual Control, and Domestic Feminism in Victorian America*, in *A HERITAGE OF HER OWN* 222 (N. Cott & E. Pleck eds. 1979).

18. See, e.g., works cited in note 17 *supra*; N. COTT, *THE BONDS OF WOMANHOOD: "WOMEN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977); A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1977); L. GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* (1976); K. SKLAR, *CATHERINE BEECHER: A STUDY IN AMERICAN DOMESTICITY* (1973); L. PERRY, *CHILDHOOD, MARRIAGE, AND REFORM: HENRY CLARKE WRIGHT 1797-1870* (1980); Smith-Rosenberg, *Beauty, the Beast, and the Militant Wo-*

tween different kinds of families and the industrial economy.¹⁹ She might have been less inclined, moreover, to idealize the traditional family and more willing to concede what Tamara Hareven insists: that "the family has never been a utopian retreat from the world, except in the imagination of social reformers and social scientists."²⁰

Confined by Stone's vision of social history, Glendon cannot adequately explain the historical phenomenon of principal concern to her, the marked increase of marital instability in late twentieth century America.²¹ Perhaps it is unreasonable to expect Glendon to answer so intractable a question as why divorce rates continue to go up and up. Yet she chooses to address the issue, in the same terms and with largely the same orientation as that of the social critics who were concerned by rising divorce rates in the 1890's.

A lively debate was then stimulated when the Census Bureau began releasing its first divorce statistics, showing sharp rises in the divorce rate²²

man: *A Case Study in Sex Roles and Social Stress in Jacksonian America*, 23 AMER. Q. 562 (1971).

19. Some of the best recent scholarship on the nexus between work and the family and on women's entry into the work force includes: S. KENNEDY, *IF ALL WE DID WAS TO WEEP AT HOME: A HISTORY OF WHITE WORKING-CLASS WOMEN IN AMERICA* (1979); A. KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982); L. TENTLER, *WAGE-EARNING WOMEN: INDUSTRIAL WORK AND FAMILY LIFE IN THE UNITED STATES, 1900-1930* (1979); W. WANDERSEE, *WOMEN'S WORK AND FAMILY VALUES, 1920-1940* (1981); Bodnar, *Immigration, Kinship, and the Rise of Working-Class Realism in Industrial America*, 14 J. SOC. HIST. 44 (1980). These works suggest that married women's work outside the home often went along with a strong commitment to family values and did not necessarily reflect a desire for autonomy.

20. Hareven, *Family Time and Historical Time*, DAEDALUS, Spring 1977, at 57, 69. Glendon cites Hareven's article, but not this comment. Instead, Glendon quotes with nostalgic approbation Hareven's reference to a traditional "familistic" ideology whereby "[c]ollective family decisions took precedence over individual preferences." P. 46 (quoting Hareven, *supra* at 64). In contrast to this, Glendon presents her own characterization of the sorry plight of the late twentieth-century individual, "constrained by the economic realities of the workplace, and 'liberated' not only from the confinement of networks of family and kin but from the support that those networks once provided." P. 46.

21. America has the highest divorce rate in the western world. About one million marriages now end in divorce each year. Although the divorce rate in this country has risen more or less continuously since the late nineteenth century, it is only in the past 20-30 years that the proportion of all marriages in any given year that eventually end in divorce has increased at a faster and faster rate. Glendon cites estimates that 30-40% of all marriages entered into in the 1970's will end in divorce. P. 29 n.67. A more recent estimate is that the proportion will be closer to 48%. U.S. NATL. CENTER FOR HEALTH STATISTICS, SERIES 3, NO. 19, NATIONAL ESTIMATES OF MARITAL DISSOLUTION AND SURVIVORSHIP (1980). In 1981, the divorce ratio was 109 divorced persons for every 1,000 persons who were married and living with their spouses. This is more than twice the 1970 ratio of 47 divorced persons for every 1,000 married persons. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 372, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1981, Table C and accompanying text (1982).

22. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE AND LABOR, MARRIAGE AND DIVORCE 1867-1907, at 11-12 (1909). The number of divorces in the United States rose from approximately 10,000 in 1867 to more than 25,000 in 1886, an increase of 157 percent. During the same period, the whole population had increased by about 100 percent. *Id.* at 12. During the 1890s, the number of divorces increased to over 50,000, a growth rate nearly three times the rate of growth of the population. *Id.* These reports do not provide any information about the rates of informal separation or desertion during the late nineteenth century. One of the striking features of this data is that it helped dispel the belief that legal divorce was largely a middle-class phenomenon. The 226,000 legal divorces granted between 1886-1906 were dis-

since the Civil War. Most commentators pointed to a combination of economic, environmental and personal reasons for the increase.²³ While a few observers approved the egalitarian potential of the economic emancipation of women,²⁴ most viewed female participation in the industrial work force as the incipient cause — mediated through urbanization, poverty and corruption²⁵ — of the destruction of traditional family life.²⁶ Most commentators, then, shared a view of life that Glendon now claims is characteristic of the 1980's: for good or ill, increasing reliance on employment rather than family relationships for economic sustenance will inevitably pull the family apart.²⁷

Glendon herself adopts an uncritical and general attitude toward the economic determinants of marital stability similar to that which pervaded the turn-of-the-century debate. She fails to assign consistent weights to the factors contributing to the fragility of the modern marriage. At some points she emphasizes environmental and economic conditions (pp. 17-19, 31-32); at others, she implies that divorce is the product of a pathological desire for individual "choice" or "liberation" (pp. 30, 44-45, 138-39). She firmly rejects the suggestion that either fault-based or fault-free divorce laws can have much direct effect on marital stability, but she argues elsewhere that some public laws designed to aid individuals may indirectly weaken families (pp. 125-38). She almost never admits that divorce might be a normal or healthy response by some women and men to their mutual failure to achieve the ideals of the genuinely companionate marriage.

Glendon's treatment of the link between the entry of women into the labor force and the divorce rate is unclear (p. 51), especially in light of the recent research findings on these issues by Cherlin, Ross and Sawhill, and others.²⁸ These findings strengthen the claim that increased employment

tributed among all social and economic groups roughly in proportion to these groups' representation within the population as a whole. *Id.* at 43. Interesting data and observations of the relationship between divorce and marriage rates between 1860-1920 may be found in P. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* (1959).

23. The turn-of-the-century debate on the causes and consequences of divorce is discussed in L. HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 27-83 (1980); W. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* (1967); M. KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 460-72 (1977).

24. The evolutionary socialist Arthur Calhoun, for example, forecast that as women gained access to "economic opportunity outside of marriage," the family would undergo "individuation," would no longer be "a forced grouping" and would move toward "ethical unity and spontaneous democracy." 3 A. CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY* 157-58 (1919). Similarly, feminist Charlotte Perkins Gilman predicted that women's economic independence would lead to more egalitarian, and thus healthier and more harmonious, marital relations. C. GILMAN, *THE HOME: ITS WORK AND INFLUENCE* (1903).

25. See, for example, the writings of sociologists Charles A. Ellwood and James P. Lichtenberger, as summarized by HALEM, *supra* note 23, at 57-59.

26. See, for example, the introductory section of J. SCHOUER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS* (5th ed. 1895), or the warnings of Congregational Minister Samuel W. Dike, an organizer of the National League for Protection of the Family, in L. HALEM, *supra* note 23, at 56, and W. O'NEILL, *supra* note 23, at 48-56.

27. According to one historian of American law, the family had become, by the late nineteenth century, little more than "a mere temporary meeting-place of individual wage-earners." 3 G. HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 227-28 (1904).

28. See Cherlin, *Work Life and Marital Dissolution*, in *DIVORCE AND SEPARATION* 151-66

by women may indeed be a cause of marital instability. Yet many scholars, including Cherlin, continue to believe that the primary impetus to separate from one's spouse comes from more elusive personal and emotional needs, encouraged by recent changes in attitudes toward the social acceptability of divorce.²⁹

In fact, for most of the population, it is not marriage itself that is unpopular; most people try it at least once. Rather, particular marriages are extremely vulnerable for more subtle and complex reasons than Glendon suggests. Many married women who work do not get divorced, or like most divorced men and women, are likely to remarry if they do.³⁰ High divorce rates for couples composed of two working individuals do not mean that the divorce rate is low among couples in which only the husband is a wage earner. And for those marriages that remain intact, many may hold together precisely because both spouses work. Equality between partners, higher income, and independent interests may sustain a relationship that would not long survive as a traditional marriage.

Although Glendon does not substantially advance our understanding of the causes of marital instability, she has much to say about the response of the legal system to both divorce and its economic consequences. This is the most important part of her book, and it is here that the limits of her analysis of the "new family" and the "new property" become most clear. She shows how the law has retreated from the task of keeping marriages intact, while it has at the same time increased its regulation of the economic aftermath of marital breakdown. This observation about the migration of the law from the center to the sidelines, so to speak, of the American family is of course sound.³¹ So, too is her point that this migration entails the taking over by public law of what had once been a matter largely for private law enforcement. Yet there are persistent ambiguities and dead ends in her account and in her attempts to clarify and choose among the alternative policies which these legal changes might suggest.

(G. Levinger & O. Moles eds. 1979); H. ROSS & I. SAWHILL, *TIME OF TRANSITION: THE GROWTH OF FAMILIES HEADED BY WOMEN* (1975). A recent survey of 300 women business executives, 66% of whom are earning between \$50,000 and \$125,000 per annum, found that nearly 17% of these women have been divorced. In contrast, less than 3% of a comparable group of male executives have been divorced. Most of the divorced women acknowledged that their careers were in part responsible for the break-up of their marriages. Only 40.7% of all these women executives are married, compared with nearly 95% of the similar group of male executives. Fowler, *Careers*, N.Y. Times, Nov. 10, 1982, at B45, col. 1.

29. See A. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 46-49 (1981); Klemesrud, *Survey Finds Major Shifts in Attitudes of Women*, N.Y. Times, Mar. 13, 1980, at C1, col. 1; *id.* at C6, col. 2. See generally Degler, *supra* note 17, at 144-77, 436-73.

30. Pp. 29-30. About five out of six men and three out of four women remarry after a divorce; most remarriages occur within three years after divorce. Recent studies suggest that there is a somewhat greater risk of divorce among remarried couples than for first marriages. See A. CHERLIN, *supra* note 29, at 29-31.

31. Virtually every family law scholar has noted that since the advent of no-fault divorce laws in the 1970s, a profound shift has occurred in the focus of matrimonial law from moral to economic issues. See, e.g., Dullea, *Wide Changes in Family Life are Altering the Family Law*, N.Y. Times, Feb. 7, 1983, at A1, col. 3; *Divorce American Style*, NEWSWEEK, Jan. 10, 1983, at 42-48.

II. SOCIOLOGY AND POLICY

These ambiguities and dead ends appear just as Glendon begins to say something different from what was said by the turn-of-the-century commentators. They were generally optimistic about the capacity of the law to attack the economic and environmental causes of marital instability.³² Glendon has had enough experience with the regulatory and public welfare apparatus initiated in the early twentieth century to doubt the old Progressive faith that the state could easily take over many of the tasks once performed by families, or that laws could bolster and revive shaky marital ties.

In place of the now discredited faith of the Progressives, Glendon offers the functionalist social science of Max Weber and of Weber's student and Glendon's own mentor, Max Rheinstein. In keeping with the insight of this tradition that the legitimacy of law is threatened as the divergence grows between statutory law and the law as practiced,³³ Glendon seems resigned to the widespread enactment of fault-free divorce laws. In America, fault-based divorce laws were never able to prevent marital instability or to reduce the rate or number of divorces granted by our courts. Even in countries such as Italy and Ireland, where secular and canon laws still attempt to sustain a view of marriage as indissoluble until death, marital stability has not increased. To the contrary, it is secular and religious laws that have had to accommodate to diverse patterns of marital behavior. Although the formal grounds for divorce have not been relaxed in either Italy or Ireland, their laws are being applied flexibly and expansively to particular cases in much the same way that our fault-based divorce laws were applied prior to the statutory reforms of the 1970's (pp. 120-25).

In America, according to Glendon, the law has attempted to salvage its legitimacy for determining the requirements for marital termination by becoming both more "realistic" and more "neutral" in its response to prevailing patterns of behavior and diverse social norms. But why didn't divorce law retreat sooner from its earlier and apparently futile effort to support the traditional model of marriage? As usual, Glendon's explanation emphasizes economic conditions more than ideology or changing attitudes. The same forces that she says promote marital instability — the declining importance of the conjugal family as a source of economic sustenance or as a status determinant for its members and the concomitant rise of new property entitlements — enable the law to withdraw from efforts to restrict the grounds for legal divorce. When the economic stakes are lower, it is easier for the law to pull back (pp. 32, 117, 139).

Glendon applauds one manifestation of this trend towards less law: the creation in a few states of summary proceedings for marital dissolution. Similar in function to the simplified proceedings now available in many jurisdictions for settling small estates at death, summary divorce is in her view a sensible way for couples with no children, minimal assets and a marriage of short duration to terminate their legal relationship. Much less

32. For a general description of Progressive attitudes on this subject, see Busacca & Ryan, *Beyond the Family Crisis*, DEMOCRACY, Fall 1982, at 79, 83-84; L. HALEM, *supra* note 23, at 49-51, 81-83.

33. See generally M. RHEINSTEIN, *MARRIAGE, STABILITY, DIVORCE AND THE LAW* (1972).

palatable to her is what she sees as a potential consequence of fault-free divorce: the apparent right of "unilateral termination" where one spouse exercises his or her "freedom of choice to dispose of the other."³⁴ Divorce law may be becoming more neutral; Glendon is not. She speaks as though people shed their spouses as casually as snakes shed their skins. It is indeed easier in a technical sense to obtain a divorce in the 1980's than it was as recently as 1960, but accounts of the divorce process suggest that the experience is extremely painful and that the emotional toll is high regardless of whether both spouses or only one wants to terminate the marriage and regardless of whether or not there are children.³⁵ Does her disdain for "unilateral termination" mean that she would not permit divorce in the absence of mutual consent of the spouses? She herself acknowledges that stricter divorce laws cannot compel people to live together or to love one another.³⁶ Perhaps her concern is that children will suffer if their parents can too easily shed each other. She is surely aware, though, that some judges will delay the granting of a divorce to a couple with children until they are convinced that the parents' marriage cannot be salvaged, and that some states set longer waiting periods after a divorce petition is filed for couples with children.³⁷

Glendon's claim that the easing of legal restrictions on divorce is the inevitable consequence of the dwindling economic significance of marriage is also troubling. Certainly, most American families do not support themselves with inherited wealth or with the income generated by tangible assets such as land or stocks and bonds. Nor are there many American families which are self-contained economic units producing their own goods and services. Yet most intact families *do* share income earned by their members and *do* support themselves. Even though the income that sustains family members is likely to be some form of "new property," its acquisition is typically made possible by the uncompensated homemaking and child-care services provided by both spouses or, as is still the case in most marriages, by the wife whether or not she is also employed as a wage-earner. And as Glendon admits in her final chapter, family ties continue to have a significant impact on an individual's level of educational and occupational

34. See pp. 32-36. Glendon perceives summary divorce as much less important than unilateral divorce. See p. 112.

35. See, e.g., J. EPSTEIN, *DIVORCED IN AMERICA* 11 (1974); Bernard, *No News but New Ideas*, in *DIVORCE AND AFTER* 3, 5 (P. Bohannon ed. 1971). See generally *DIVORCE AND AFTER*, *supra*; J. EPSTEIN, *supra*; J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP* (1980); R. WEISS, *MARITAL SEPARATION* (1975); Brooks, *Employers Offer Help in Divorces*, N.Y. Times, Nov. 22, 1982, at A20, col. 1; Cain, *Plight of the Gray Divorcée*, N.Y. Times, Dec. 19, 1982, § 6 (Magazine), at 89.

36. P. 125. Some observers predicted that the easing of divorce laws in some states after 1970 would encourage a veritable flood-tide of divorces; but as it turned out, the divorce rates in most states during the 1970's were roughly the same whether a state had enacted a no-fault law or not. See Wright & Stetson, *The Impact of No-Fault Divorce Law Reform on Divorce in American States*, 40 J. MARRIAGE & FAM. 575 (1978).

37. See, e.g., MICH. COMP. LAWS § 552.9f.

In every case where there are dependent minor children under the age of 18 years, no proofs or testimony shall be taken in such cases for divorce until the expiration of six months from the day the bill of complaint is filed.

achievement.³⁸ In other words, the decline in the role of the family as a determinant of an individual's social and economic status is by no means as clear nor as complete as Glendon's central thesis would lead us to expect. Further, her sketch of the catastrophic economic consequences of divorce indicates that the major burden is being borne by the public. A satisfactory explanation of the easing of the legal restrictions on divorce calls for more than Glendon's claims about lower economic stakes. If anything, it is the retreat of the moral aspects of divorce law despite the *increased* economic and social costs of divorce for both individuals and the public that needs to be explained.

Glendon has a great deal to say about the response of the law to the economic aftermath of divorce. She offers ample and sobering evidence, as has nearly everyone else who has written on this subject,³⁹ of the grim financial conditions in which many women and their children find themselves after divorce. With depressing clarity, Glendon depicts the sheer enormity and complexity of our contemporary spousal and child support crisis. Support laws are becoming "more realistic," she says, in their efforts to focus on practical problems and in not being too ambitious about the prospects for legal regulation of human behavior. These laws are also becoming more "neutral" with regard to gender-based obligations. In theory, if not in practice, wives as well as husbands are liable for post-divorce spousal and child support. Yet, in accommodating to different life styles and to competing values, the laws remain "ambivalent" and vacillate between ideals of community and those of self-sufficiency.

Despite this ambivalence, the law is clearly moving toward a greater emphasis on "individualism," and has come to reflect recent constitutional notions about personal life. In Glendon's view, hopes for reinforcing ideals of mutual devotion to the marital community may be shattered when the U.S. Supreme Court begins describing the marital couple as "not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up."⁴⁰ Finally, Glendon claims that because private resources are insufficient to care for the adults and children who are the casualties of "serial polygamy," public law, and especially welfare law, must of necessity displace private regulation of the financial consequences of divorce (pp. 52-57, 68-76, 108-11).

Glendon believes that property division at the termination of either legal marriages or informal cohabitations requires even more serious atten-

38. P. 229. See also C. JENCKS, WHO GETS AHEAD? THE DETERMINANTS OF ECONOMIC SUCCESS IN AMERICA 50-84 (1979).

39. See, e.g., BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, SERIES P-20 No. 374, POPULATION CHARACTERISTICS: POVERTY § 10 (1982); Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 165-66 (1982); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1249-53 (1981); *Life Below the Poverty Line*, NEWSWEEK, Apr. 5, 1982, at 20-28; Sheppard, *Single Parent Finds Inflation and Aid Cuts are Economic Stumbling Block*, N.Y. Times, Oct. 14, 1982, at A20, col. 1. For a sensitive discussion of how marital instability and poverty have an especially devastating impact on the Black population, see A. CHERLIN, *supra* note 29, at 93-112.

40. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

tion than spousal or child support. She observes, as she did in her earlier work, a marked divergence between the legal treatment of marriages that end in death and those that end in divorce.⁴¹ Modern intestacy law achieves a rare harmony with what remains of traditional ideals of the close-knit companionate marriage that lasts until the death of one of the spouses. Succession law's characterization of the "presumed intent" of the typical decedent is consistent with what empirical research shows about the actual intentions and behavior of married persons with regard to the disposition of their property at death. In virtually all American jurisdictions, the interest of the surviving spouse has gained ascendancy over the interests of other blood relations, including the decedent's own children. The one major exception to the increased deference of succession law to the interest of the surviving spouse is the growing legal recognition that all of the decedent's children or issue, whether born in or out of wedlock, should have at least some share of their intestate parent's estate.

If intestacy law responds to still viable ideals of marital closeness and mutuality, the laws governing property division at divorce exemplify, according to Glendon, the looseness and fluidity of the modern marriage. We lack consensus on the kinds of assets that should be subject to division at divorce and on the principles by which such division should be made. The various "equitable distribution" statutes applicable in most separate property as well as community property states amount, in Glendon's view, to "discretionary distribution" laws. Even statutes such as the Uniform Marriage and Divorce Act which list specific factors to be considered leave judges with a broad range of discretion as to what assets should be divided and how (pp. 60-62).

There are good reasons for Glendon's concern about clarifying the function of the law in this area. The difficulties of enforcing spousal and child support obligations have raised hopes about using property distribution at divorce as a way to achieve a "clean break" and to assure both spouses and their children, if any, some basic level of financial security. Further, as she notes, there is probably more property passing at divorce in this country now than is transferred at death (p. 57).

Glendon proposes to check judicial discretion over marital property distribution by employing a presumptive rule of equal division between the spouses of all assets acquired by gainful activity during the marriage. Her "rule of convenience" for a fifty-fifty split has much to recommend it (pp. 63-68). It is a compromise among competing principles and wisely acknowledges the limited capacity of judges to determine what weight to give "fault" or "need" or "partnership" or "contributory" or "restitutionary" principles in allocating marital assets. It avoids the fictional search for the "reasonable" intentions of the parties; the court can use the rule to divide assets while recognizing that at divorce the actual intentions of the parties may be to hurt each other. The rule discourages exploration in court of the intimate details of the marriage. Finally, the proposed rule offers a framework within which the parties can, if they wish, strike their own bargain.

One wishes that Glendon had gone further in her exploration of a fifty-

41. See M. GLENDON, *supra* note 1, at 247-89.

fifty rule to consider whether it could serve as a rule of principle and not merely one of convenience. The law may not be able to prevent the break-up of marriages, but it might continue to embody the companionate ideal by treating marriages for however long they last as integrated economic unions.⁴² The law could express a social commitment to assuring spouses some portion of the property coming into a marriage while it lasted regardless of the reasons for its termination. Federal tax and social security laws continue to give "entity" status to married couples; perhaps the same approach should be reflected in marital property law. The same principle might even apply to the division of assets at the termination of an informal cohabitation unless the parties could show explicitly that they intended to keep their property separate.⁴³ Thus, a fifty-fifty rule might be both "objective" in the sense of reflecting the actual behavior of most adult cohabitants while they lived together, whether or not they were married, and "normative" in the sense of expressing a view of how such relationships ought to be lived.

In addition to avoiding a sustained analysis of the normative implications of a fifty-fifty rule, Glendon unfortunately does not give a clear response to the crucial question that is now plaguing state courts: precisely how are assets acquired by "gainful activity" to be defined? Is she willing to include the assorted "new property" claims many courts are now adding to the marital kitty?⁴⁴ What about professional degrees and licenses? What about such "old" property as homemaking and child-care services provided by one or both spouses? At the very point where she could spell out systematically the implications of her underlying thesis about the changes in the law in relation to shifts in the structure of the family and the economy, Glendon backs off and offers instead a snide comment about the greed of matrimonial lawyers.⁴⁵

Another limitation of Glendon's proposed rule is that, as with most rebuttable presumptions, it invites litigation about the kinds of special circumstances that warrant a departure from a 50-50 division. Glendon herself favors giving a greater share of marital assets to the custodial parent whenever the divorced couple have minor children to support. She would

42. The argument that the law should recognize the marital couple as an economic unit functions to enhance the unit rather than the separate fortunes of either spouse is elaborated in Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977).

43. Blumberg, *supra* note 42, proposes a publicly-created status based on the duration of a relationship for handling the property and support claims of unmarried and married cohabitants.

44. Glendon characterizes as "imaginative" recent efforts to include pension benefits, seniority, social security or disability payments, educational degrees and the like as among the marital assets subject to division. But she does not spell out the rationale for including or excluding the value of such assets, nor the arguments for treating them as "property" as opposed to using these employment-related benefits exclusively as a source of income to pay child or spousal support. Pp. 67-68.

45. Glendon describes the "search for more property" as "the kind of law in which the matrimonial bar takes an abiding interest, but not the kind that needs the the most attention," pp. 67-68. Similarly she says, "the only intent effectuated and the only interest served by discretionary distribution laws are those of the matrimonial bar," p. 66.

defer the sale of the marital residence, assuming there was one, so that the custodial parent and the children could be awarded at least the use of the residence until the children are grown.⁴⁶ Again, one could go beyond Glendon's suggestions and argue that an appropriate expression of our society's commitment to the care of the children of divorce should be in the form of a statutory forced share of one-third to one-half of the marital property. Such a share would be used or invested for the benefit of the children while they are minors, then given to them outright at age eighteen, or turned over to their parents. From the perspective of children, the termination of their parents' marriage by divorce arguably should not be treated very differently by the law from termination by death intestate.

As for private ordering at divorce, Glendon concedes that most divorcing couples actually *do* resolve their differences about financial matters and even about child custody through private agreements. Most of these agreements are incorporated into divorce decrees after receiving only minimal scrutiny by the court. She remains skeptical, however, about the value of negotiations between the parties at the time of divorce. Her skepticism derives in part from her allegiance to the second major abstraction outlined at the beginning of this review.⁴⁷ She fears being thrust into the Weberian vortex, and is persuaded by the work of Friedman, Macneil and, to a lesser extent, Gilmore that modern contract law has become so regulatory and discretionary that there is very little residuary ground on which individuals can enter into genuinely free bargains (pp. 215-27).

Glendon underestimates the value, in the context of divorce, of the contract doctrine that survives. Classical contract doctrine has indeed been hemmed in by judicial desires to protect reliance, to assure "fairness", to protect against "oppressive" terms and to recognize adjustments made in the course of long-term relationships. This may mean a greater potential for the exercise of judicial discretion over contract terms than seems to have prevailed in the past; but some space is left in which individuals *can* negotiate about matters of particular concern to them. Why not harness the energy released by the personal drive for autonomy that Glendon is so uneasy about and encourage individuals to forge the terms of their own divorce settlements? Arguably, parties benefit from being able to resolve differences on mutually acceptable terms, and also from being able to establish their own rules for governing their post-divorce behavior.⁴⁸ There is even some empirical evidence that people *do* feel more committed to living according to the terms of an agreement they themselves have designed.⁴⁹

Glendon worries about what people might do if they are given more

46. Pp. 81-85. Glendon claims that our case law is already concentrating on the needs of children. For a contrary view, at least with respect to California cases, see Weitzman, *supra* note 39; *Divorce American Style*, NEWSWEEK, Jan. 10, 1983, at 42-48.

47. See note 13 *supra* and accompanying text.

48. Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956-58 (1979). For a more sweeping, and more questionable, argument in favor of the use of contract and bargaining principles during marriage as well as at divorce, see Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982).

49. See, for example, the self-serving but nonetheless interesting findings on the extent to which people who have reached a divorce settlement through mediation are pleased both with

opportunities to bargain about the terms of their divorce. Perhaps they will not share financial responsibilities appropriately, or will try to take advantage of each other's emotional vulnerabilities, or will use their children and their money as interchangeable bargaining chips. People may sometimes behave as Glendon fears, but one can instead ask, why should it matter if some people do not choose what others of us would choose? So long as the potential exists for judicial intervention to protect against abuses of the bargaining process, we should feel pleasure, not alarm, that people will take off in different directions. Glendon is caught between her desire to prevent judges from imposing their own notions of what constitutes a fair bargain and her perhaps equally strong reluctance to let individuals go their own way.

Glendon is certainly correct to insist that neither private ordering nor judicial enforcement of the private laws governing support and marital property will sufficiently ameliorate the financial disasters that so often attend upon divorce. She also offers sound criticism of public law, which she describes as similarly torn between divergent aims and methods, hampered by lack of funds and undermined by "law resistant behavior" (pp. 125-38). Not even the "new property" derived from an individual's occupational status can offer much hope because those who are most vulnerable to the financial exigencies posed by our present array of "new family" types are the least likely to have a secure niche in the labor force.

In discussing employment law, Glendon makes an intriguing comparison to family law. In the late twentieth century, she says, it is legally as difficult to shed an employee as it was in the nineteenth century to shed a spouse (pp. 4, 153, 199). She presents an excellent account of the demise of classic contract principles in modern American labor law, the rise of statutory and regulatory guarantees of job security for public and unionized workers and the recent barrage of judicial potshots at the traditional common-law employment-at-will doctrine.⁵⁰ Although she cites numerous examples of how an employer's apparent legal right to discharge an employee is being checked by statutes or by judicial notions of "good faith" or "good cause," she is also keenly aware of how far American law would have to go before our labor force could enjoy the kind of job security that prevails in such countries as France, Sweden or West Germany.

Glendon makes three observations about job-related status and benefits in America, each of which serves to demonstrate how limited the scope of this kind of new property may be. First is the problem of access. It is a notorious fact that blacks and women continue to have great difficulty get-

the mediation process and with the term of their agreements in J. HAYNES, *DIVORCE MEDIATION* (1981).

50. See pp. 143-76. Her discussion of labor law incorporates and expands upon the material that Glendon presented in an earlier article. See Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457 (1979). As Glendon and others have shown, judicially-imposed limitations on the doctrine of employment-at-will may only be of benefit to white-collar employees. See Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-10 (1979); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 337-38 (1974); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1837, 1844 (1980).

ting or holding secure or well-paid jobs. For women, the difficulty may be due not only to the legacy of sex-based or racial discrimination, but also to the perpetual tug between work and child-care responsibilities.⁵¹ This affects both the kinds of jobs many women seek and the kinds they are likely to get. Glendon's second observation is that even those men and women who do have a firm place in the occupational structure may find their situations precarious. As our most recent economic experience teaches us, workers with seniority are not immune to layoffs, plant relocations and other indirect effects of a severe recession. And, of course, the value of pensions and other deferred benefits may be eroded by prolonged inflation. Finally, Glendon notes that there is an "ambiguity" in the new property; employees may be locked into jobs in ways in which they would not be confined by tangible assets which could be sold or exchanged for other assets. Those who have attained some job security are reluctant to jeopardize it by moving from one position to another. The laws that enable people to acquire economic sustenance and status from their jobs may also have the ironic effect of making them the property of their jobs (pp. 192, 205). These jobs, moreover, may bring very little in the way of personal satisfaction. Glendon thus invites us to look upon a modern world inhabited by individuals cut loose from the emotional moorings of traditional family ties, and either wishing they had a job or bound to one they do not like. It is a world remarkably lacking in security and love.

III. FUTURE DIRECTIONS

Exactly what Glendon's book is supposed to add up to is not easy to determine. She demonstrates that contemporary family and employment laws embody inconsistent principles, and that these laws operate amid racial and sexual discrimination as well as amid the inequitable distribution of our society's wealth. But she is less successful in identifying a way out of our difficulties. Although she makes some specific proposals, it is not clear whether she favors more law, or less, to say nothing of what kind. She does not guide our assessments of future policy alternatives except to urge that we give priority to the welfare of unborn generations and that we not ravage our natural resources. She wants to support the function of childrearing but finds no program to recommend other than one which would remove "the disincentives to family cooperation" (p. 137). She does not tell us whether she thinks affirmative action programs are wise or foolhardy. She claims that family law has returned to the "ancient pre-occupations of all law, property and violence" (p. 118); but as we have seen, she does not sufficiently clarify how the law should define and regulate family property. And she is absolutely silent on how she thinks the law ought to respond to the physical abuse of spouses or children. Is this a situation toward which the law should be "neutral" or "realistic"?

51. Glendon writes with some sensitivity about the difficulties encountered by the many millions of mothers who are now trying to live with a dual commitment to their homes and their jobs, but she is not clear as to how or whether she thinks this dual commitment can be maintained. Pp. 129-38. For other analyses of the "home and career dilemma," see Friedan, *Feminism Takes a New Turn*, N.Y. Times, Nov. 18, 1979, § 6 (Magazine), at 40; Shreve, *Careers and the Lure of Motherhood*, N.Y. Times, Nov. 21, 1982, § 6 (Magazine), at 38.

Glendon seems to reject the New Right's determination to use the law to enforce personal morality, but this rejection may be due not to a principled dissent from the ideal of shaping human behavior, but to doubts about the practical feasibility of using the law to achieve this ideal. She herself is anything but neutral in her attitudes toward different life styles. This is evidenced by her cryptic comments on "privacy" and by her avoidance of any discussion of whether the law should or could regulate abortion. She does not explicitly repudiate the expansion of every individual's social and sexual freedom as a goal of the law. Nonetheless, one wonders what to make of her statement that the "liberated 20th century individual" is appropriately described by a figure of speech Engels directed against monogamy: the tapeworm "which has a complete set of male and female organs in each of its 50 to 200 proglottides or sections, and spends its whole life copulating in all its sections with itself."⁵²

Perhaps the most striking feature of Glendon's book is her disparagement of the liberties won since the eighteenth century by the citizens of democratic states. Only grudgingly does she ever admit that the greater autonomy of the modern individual is a genuine benefit. She is especially reluctant to acknowledge as "liberation" the liberties that have accrued to women and children. She is preoccupied with the fear that "freedom" from the bonds of the traditional family will lead to the new more formidable imprisonment of Weber's iron cage. Marx, too, she enlists in her portrait of modern society as a collection of isolated private cells, but Marx's aphorisms fit poorly into the essentially conservative interpretation of modernity that Glendon seeks to develop. The prophetic attacks on bourgeois individualism Glendon quotes from *On the Jewish Question* were interspersed with equally prophetic calls for a yet fuller emancipation that would enable individuals to connect with one another on terms not dictated by the institution of private property.

Glendon presents Marx as a critic of the modern ideal of privacy, but neglects to point out that Marx regarded the preenlightenment political order as private, too; the whole society was then the private world of the monarch or father.⁵⁴ The evils against which Marx railed were not, like Glendon's favorite targets, the products of the enlightenment. Marx assailed property itself, which he traces to the "latent slavery" of the traditional family of which Glendon is so uncritical.⁵⁵

Glendon's persistent suggestion that the law follows money might also be construed as a Marxist insight, but she does not exploit whatever potential this idea may have for sophisticated development. It is ironic, moreover, that a book that has downplayed cultural and ideological considerations while mechanically attributing changes in the family and in the law to shifts in the locus of property should, in the end, advocate not an

52. P. 139 (quoting F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 98 (1884)).

53. See Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 26-52 (2d ed. R. Tucker ed. 1972).

54. *Id.* at 44-45.

55. See Marx, *The German Ideology*, in *THE MARX-ENGELS READER* 159 (2d ed. R. Tucker ed. 1972).

economic and political solution, but a religious and spiritual one. It is to an order of "love and meaning" that Glendon calls us at the strangely incongruous climax of this otherwise nuts-and-bolts treatment of our society and certain of its laws. It is Aquinas, not Marx, who gets the last word (p. 243). Our mysteriously regenerated hearts, it would seem, are the links in the Golden Chain.