

1989

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Recommended Citation

Robel, Lauren, "Book Review: Abortion and Divorce in Western Law. by Mary Ann Glendon." (1989). *Constitutional Commentary*. 616.

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ABORTION AND DIVORCE IN WESTERN LAW. By Mary Ann Glendon.¹ Cambridge, Ma. and London: Harvard Univ. Press. 1987. Pp. 197. \$25.00.

*Lauren Robel*²

In this book, Professor Mary Ann Glendon contends that the American commitment to individualism and rights has deprived our law of compassion in the areas of abortion and divorce. She argues that while western European countries tell their citizens that their decisions about family are important to the larger society, American law takes extreme and damaging positions that isolate people at times when the community has an interest in their acts. Much of the book is a gentle and persuasive reminder that America lacks any semblance of a national family policy, an omission that looks heartless in comparison to Europe. But the solutions Professor Glendon embraces ignore many of the stories women have been telling about these issues that are centrally important in their lives. Her book, in effect, denies the complexities of women's lives in the same way that the larger legal culture does.

I

In the United States and most of western Europe, the past several decades have seen rapid expansion of the availability of legal abortion and divorce. Glendon begins by asserting that, when compared to most western European countries, the United States is anomalous in its treatment of these issues. As to abortion, we are extreme in our refusal to allow legislation on behalf of the fetus before, or to require it after, viability, and unusual in our insistence that a woman be allowed to determine whether to bear a child without legally-enforced consultation with the father, her parents (if she is a minor), or the state. As to divorce, the United States is extreme in its "carelessness" about the economic casualties of divorce and its notion of divorce as a right available when a marriage is no longer found personally fulfilling. Glendon argues that most western European countries, by contrast, conceptualize neither divorce nor abortion as matters of right, but rather use their statutory laws on these issues as occasions for "ongoing moral conversation." The result has been a willingness in Europe "to deal with those forms of economic dependency that especially affect women and children,"

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while the United States seems to lack the vocabulary even to begin talking about dependency.

Comparisons in the area of abortion serve to explain Glendon's point. With the exception of Ireland and Belgium, all of Europe permits abortion, with variations among countries in the amount and kind of regulation imposed. Of the twenty countries Glendon surveys, most occupy what she calls the "middle way . . . disapproving of abortion in principle, but permitting it for what the legislature has deemed good cause." The remaining six, including the United States, expressly permit elective abortion, at least in the first trimester.

In many respects, the scheme of regulation imposed by the Supreme Court in *Roe v. Wade* does not differ markedly from the scheme imposed legislatively by a number of European states (Austria and Denmark, for instance). Glendon argues, though, that the American position on abortion is more extreme than might first appear, because it emphasizes rhetorically the privacy rights of women, and discounts the societal interest in the fetus. Left alone, she argues, the states eventually would have enacted legislation similar to that in effect in the "middle way" countries. This political solution would have been superior to the judicially-imposed solution of *Roe*, because it would have avoided marginalizing opponents of abortion, and would not have led to our present sense of "embattlement" over the issue. Glendon attacks *Roe*, as did Donald Kommers before her,³ by comparing it to the 1975 decision of the West German Constitutional Court, which struck down Germany's liberalized abortion law because it did not give enough weight to the developing fetus's interest in life. Where *Roe* "embodies a view of society as a collection of separate autonomous individuals, . . . [t]he West German decision emphasizes the connections between the woman, developing life, and the larger community." *Roe*, then, represents the worst of the American liberal tradition: it isolates women from the community and from the fathers of their children, setting them adrift in the lonely world represented by constitutional privacy doctrine.

As an example of a country that in her view got it right, Glendon turns to France. The French Civil Code provisions on abortion begin with an affirmation of the value of human life, state that abortion should not be used as a method of birth control, and allow abortion during the first trimester only when the woman finds herself in a condition of "distress." Although no sanction supports

3. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 B.Y.U. L. REV. 371.

either of the latter legal messages (no doctor or board is required to determine whether the woman is in fact "distressed"), the message sent by the French code is, Glendon asserts, much different from the one sent by *Roe v. Wade*. Moreover, the French require that a woman considering abortion be given information about adoption, assistance organizations, and public benefits and programs available to mothers and children. Finally, the pregnant woman is required to participate in a counseling session "with a view toward enabling her to keep her child." Glendon views the French code provisions as a "humane, democratic compromise . . . pervaded by compassion for pregnant women, by concern for fetal life, and by expression of the commitment of society as a whole to help minimize occasions for tragic choices between them."⁴

Glendon uses comparatist techniques as a springboard for what she views as the larger project of defining the constitutive and interpretive aspects of abortion and divorce law. She is interested in working from the shape of the legal structure to the ideology it manifests in an effort to articulate the ways in which the legal world imagines the social world. By saying, with anthropologist Clifford Geertz, that law is both constitutive and interpretive, Glendon is making a claim about reciprocity: law not only interprets culture but transforms it through the act of interpretation. This claim leads to its own set of conclusions:

Because law is interpretive, we need to make an effort to understand what the totality of our legal regulations relating to family life is saying about our society and the way we view families, individuals, human life, dependency, and neediness in all its forms. Because law is also constitutive, it is incumbent on us to be attentive, intelligent, reasonable, and responsible in the "stories we tell," the "symbols we deploy," and the "visions we project."

Her large claim is that the American way of "imagining the real" is dictated by the political and social constraints of legal liberalism, and that American responses to the issues of abortion and divorce are stunted as a result. Rather than strengthening the connections between individuals, families, and society, liberalism—with its focus on rights and individualism—teaches Americans irresponsibility and disdain towards the helpless.

Glendon's concern about what our law is "teaching" society leads her to advocate that Americans model their law more closely

4. Gilbert Steiner, by contrast, describes French family policy as "essentially an income-maintenance policy that evolved out of a pronatalist policy now widely understood to be unsuccessful," and sees the contradictions in French policy as an indication of the "existence of two pressure groups with separate ideologies and goals—one dedicated to maintaining family life based on paternal authority, another committed to women's rights." G. STEINER, *THE FUTILITY OF FAMILY POLICY* (Brookings Institution, 1981).

after the Europeans, who have been influenced by Rousseau as well as Mill. She advocates a greater concern with the connection between welfare programs and family policy, and more support—both public and publicly-enforced private—for women with dependent children. More controversially, Glendon embraces not only a return to restrictive abortion laws, albeit with increased social services for pregnant women, but also a return to restrictive divorce laws, at least for families with young children. These changes—a kind of “back to the future” approach to law reform—would, she asserts, send new kinds of legal messages: that family decisions are of concern to a caring community willing to help shoulder the costs of these decisions.

II

In using abortion and divorce as her comparative examples, Glendon employs issues that have traditionally been extremely important to women. As she notes, there is much to decry in the way America’s legal choices have stymied women’s lives: women who have abortions unwillingly because their economic options are narrow, women who accept inadequate support awards because the legal system makes it terrifying to argue over money when custody might be at stake. But underlying this book are at least two faulty assumptions. The first is an overregard for the explanatory power of liberalism. The second is an underregard for the complexities of women’s experiences.

Legal liberalism goes only so far in explaining why the victims in Glendon’s book share the same gender. It is women who lose in the power arrangements surrounding the legal institution of divorce, as Glendon illustrates again and again. Even in the area of abortion, where *Roe v. Wade* could be viewed as a victory, the effect of pregnancy on women’s lives is conspicuously underplayed in the Court’s explanation of the abortion right (a circumstance that explains as well as any why poor women haven’t a right to free abortions). Why doesn’t Glendon mention the fact that women have tended to do badly in these areas on every level, rhetorical and existential? At some point, one has to ask why the actual consequences to actual women figure so little in the legal “stories we tell” and the “visions we deploy” about abortion and divorce, and at that point, a gendered tilt to the results must be acknowledged.

The reason I don’t like the “stories” the dominant legal culture tells about abortion and divorce is not because I find them alienating, but because of my sense that the process Glendon describes of interpreting and constituting has never truly been reciprocal: the

law has never incorporated the stories women tell about the meaning of abortion and divorce in their lives. Unlike Glendon, I think that the "constitutive" aspects of law have less to do with pedagogy than with power.

Glendon draws no such conclusion, however, despite evidence in its favor throughout the book. For instance, European efforts to create family policy that recognizes the effect of motherhood on a woman's earning ability, and to enforce paternal support obligations, are cited again and again in contrast to the United States's lack of an articulated family policy and lackadaisical attitude towards support. Yet Glendon notes, in passing and without comment, that families headed by women are "in a more or less precarious position everywhere." This refusal to confront the reality of power inequalities between men and women leads to some perverse conclusions. In the area of divorce, for example, Glendon notes that the system of judicial discretion in the award of support payments results in custodial parents, the vast majority of whom are mothers, bearing a disproportionate share of the expense of raising children after a divorce. In fact, divorce ordinarily precedes "a precipitous drop in [the] living standard [of] children and their custodial parent after divorce, while the noncustodial parent's standard of living typically rises." Glendon asks what accounts for "the discrepancy between the story told on the books and the one revealed by law in practice," and comes very close to stating that the reason has something to do with (male) judges' "reluctance to impose any significant burden on the absent father to support his children," a reluctance explicable only by reference to a web of gendered assumptions about men's and women's relationships and about parenting. Given the tilt that she all-but-acknowledges, then, how can Glendon conclude that we would be better off making it more difficult for people to divorce, imposing waiting periods and asking for "grounds"? She means to give (gender-neutral) spouses who do not want divorces, or who do but need support, some bargaining power, but in a system that is hardly gender neutral in results, how much better off does she expect the real female victims to be?

Her conclusions about abortion are astonishing for their one-dimensional presentation of the issues involved. Lynne Henderson has recently characterized *Roe* as "the case of the Incredible Disappearing Woman."⁵ Much the same could be said of Glendon's book. Underlying the book is an unstated "story" of what a woman is, and it is one that sounds familiar: a woman is someone who should not mind being a mother whenever she becomes pregnant, so

5. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1626 (1987).

long as society is willing to help her shoulder the “costs.” Glendon can empathize easily with women in situations of dependency, with mothers trying to provide for their children, with women forced to make unwanted decisions to end a pregnancy because they are unable to count on emotional or financial support from fathers. So can I: in fact, it is difficult to imagine people who do not find such stories compelling. But Glendon is completely unable to empathize with women who might need to end a pregnancy for reasons having to do with their own sense of who they are or want to become. She asks us to consider “what a set of legal arrangements that places individual liberty or mere life style over innocent life says about, and may do to, the people and society that produces them.” In framing the issue this way—as involving women’s “life styles” rather than their lives—Glendon trivializes the effect pregnancy has on a woman’s life, her hopes, her dreams, her future.

Glendon confronts none of the historical context of abortion in this country: it is as if the practice of abortion began with *Roe v. Wade*, which itself was merely an expression of legal liberalism.⁶ Attacking *Roe* is easy; it is almost a cottage industry in some circles. It is much more difficult to be eloquent about “ongoing moral conversations,” however, when one honestly faces the effect of an unwanted pregnancy on the woman whose body is involved, or discusses the inevitable effect that criminalization would have. We know a lot about this because abortion was illegal in most parts of this country fifteen years ago.⁷ For my part, I cannot find the French code provisions “humane” and compassionate. I don’t want to be counseled “with a view toward enabling [*me*] to keep the child” if “keeping the child” is an impossibility—emotionally, physically, or spiritually. To me, that sounds like cruelty, not compassion.

6. Nor is she much better at putting the other legal responses she examines into any sort of context. Steiner notes that in West Germany most family policy tilts toward keeping women out of the labor force because for the nation, “mother-in-the-home remains a value highly prized.” G. STEINER, *supra* note 4, at 180. Moreover, the family policy problem that many West German leaders believe is “most compelling is the decline in the birth rate.” Given this combination of attitudes, it is unsurprising that the West German court responded as it did.

7. Glendon the comparatist might have recognized a problem with returning to criminalization in her own data. While she notes that Romania went from a liberal to a strict abortion law in 1966, and that its abortion rate remains higher than ours, she fails to mention that the death rate to women from abortion has correspondingly increased dramatically. See Brief for the National Abortion Rights Action League et al., as Amici Curiae in support of Appellees at 16 n.9, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379). The NARAL brief has become justly famous for its honest autobiographical accounts of what abortion has meant to women, and I recommend it to anyone interested in this issue.

Professor Glendon ends her discussion of abortion law by saying that “[i]n the long run, the way in which we name things and imagine them may be decisive for the way we feel and act with respect to them, and for the kind of people we ourselves become.” I would ask that she think about whether we want a return to a world in which we imagine motherhood as compulsory, and whether that way of “imagining the real” might indeed be “decisive for the way we feel and act with respect” to women, with disastrous consequences for us all.

TOLERATION AND THE CONSTITUTION. By David A.J. Richards.¹ New York, N.Y.: Oxford University Press. 1986. Pp. xvii, 348. \$29.95.

MEN AND MARRIAGE. By George Gilder.² Gretna, La.: Pelican Publishing Company. 1986. Pp. xix, 200. \$15.95.

*Thomas P. Lewis*³

The only justification for reviewing these books jointly is the study in contrasts they provide. Professor David Richards's book is about constitutional law and judicial review. For academic philosophers, it may be an easy read, but most lawyers will find it a turgid, prolix, and abstruse exercise in hermeneutics. George Gilder's book is not about judicial review or the Constitution. It is a sharp, clear anthropological statement, grounded largely in Gilder's interpretation of empirical evidence about sex roles. Each book covers substantial territory not explored in the other, but there is some overlap of underlying subject matter. When they address the same topics, Richards and Gilder reach markedly different conclusions. Abortion and homosexuality, for example, are constitutional issues that both books discuss. What Professor Richards stoutly concludes are constitutional rights, to be freely exercised in the pursuit of personal wholeness, Gilder dismisses as the ingredients or symptoms of sexual suicide and societal ruin.

1. Professor of Law, New York University.

2. Gilder's book is a revision of his earlier *SEXUAL SUICIDE* (1973). In the Preface to *MEN AND MARRIAGE* he says that several prominent publishers had offered to reissue *SEXUAL SUICIDE*, but in every case called back later “to tell me—or imply strongly—that protests from feminist editors had balked them.”

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