BOOK REVIEW

STORYTELLING

ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES. By Mary Ann Glendon.* Harvard University Press, Cambridge, Massachussetts and London, England, 1987. Pp. 197. $25.00.

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I

In *Abortion and Divorce in Western Law: American Failures, European Challenges,* Mary Ann Glendon compares the law of abortion and divorce in the United States with that of several Western nations, especially Great Britain, France, West Germany and Sweden. From these comparisons she argues that the United States is extreme in many respects—extreme in the extent to which the rights of the pregnant woman are protected and the fetal life is ignored, extreme in the failure on the part of state legislatures and Congress to provide sufficient family support so that women have a realistic alternative to abortion, extreme in the availability of divorce virtually on demand, and extreme in the failure to ensure adequate postdivorce economic support for dependent spouses and children.

Glendon is concerned not only with the more conventional aspects of comparative law—its "systems and functions" (p. 4)—but also with the law's "rhetorical activity" (p. 9) or "cultural hermeneutics" (p. 8). By rhetorical activity Glendon means both how law reflects cultural ideals and how law creates those ideals. Under this framework, the law helps people to (in the words of Clifford Geertz) " 'imagin[e] the real' " (p. 8) and stimulates virtue (pp. 6, 111). Glendon's principal interpretive technique is storytelling. Law, according to Glendon, "tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going" (p. 8). In *Abortion and Divorce in Western Law: American Failures, European Challenges,* Glendon attempts to identify and compare the stories

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told by different Western nations about abortion and divorce, suggesting that some stories, and thus some laws, are better than others.

Glendon finds the story told within American law about abortion extremely unsatisfying. She criticizes our laws allowing "abortion on demand" for totally disregarding society's interest in fetal life. She further criticizes the absence of public resources for pregnancy and child care, which, she contends, translates into an absence of any practical alternative to abortion for many pregnant women. To this American combination of permissive laws and inadequate public support, Glendon applies her method of storytelling: "A Martian trying to infer our culture's attitude toward children from our abortion and social welfare laws might think we had deliberately decided to solve the problem of children in poverty by choosing to abort them rather than to support them with tax dollars" (p. 55).

Glendon finds important contrasts to the American approach in European solutions to the abortion issue. Abortion is legal in most continental countries only for cause, such as maternal distress or fetal abnormalities. Such restrictions on abortion, however, are only loosely enforced. In addition, economic support for women during and after pregnancy make childbearing and childrearing a less costly, more acceptable choice. Glendon focuses on the contrasting symbolism of the American and European approaches: while American abortion law reflects the triumph of women's liberty rights over a nonperson/fetus (p. 19), abortion law in other Western nations communicates a message of active societal concern for fetal life along with compassion for the pregnant woman and a commitment to minimizing the impact of her "tragic choices" (pp. 15-20, 33-39).

Glendon finds a similar pattern in American divorce law. In this country, she argues, divorce is available virtually on demand under no-fault grounds that contain very short waiting periods. In these laws, Glendon sees a story of selfish, anticommunitarian individualism, in which marriage is viewed basically as a means of individual self-fulfillment (p. 108) and divorce as "a normal process of transition and adjustment" (p. 107). Under Glendon's analysis, the Continental model interprets marriage differently. Waiting periods for divorce on no-fault grounds are longer, fault plays a bigger part in divorce and support determinations, and, in some countries, a party may defend a divorce action on grounds of hardship. Such rules reinforce the ideals of responsibility, permanence and commitment rather than individualism, freedom and self-fulfillment (pp. 69-75, 80-81, 106-09).

With respect to support of dependent women and children who are victims of divorce, Glendon again finds strong contrasts between the

stories told by American law and those told by the law of other Western nations. Glendon is critical of laws in this country that give judges in divorce proceedings considerable discretion in support matters, leading to unpredictable, often unrealistic support awards and manipulative out-of-court settlement negotiations. The story told is that children matter hardly at all in divorce; they are but "shadowy characters in the background" (p. 108). In contrast, she argues, support awards in other Western nations are more adequate and more predictable; in addition, social support networks in these countries tend to provide more fully for women and children (pp. 89-91).

The solutions Glendon recommends in each of these areas draw heavily from what she considers the better alternatives found in European law. With respect to abortion, she advocates a combination of stricter legal controls on the availability of abortion along with lax enforcement of those laws (pp. 49, 58-62). Likewise, she argues that fault and hardship should play a larger role in divorce and that longer separation periods should be required to obtain a no-fault divorce. Finally, she sets forth a "children-first" set of recommendations to deal with the economic consequences of divorce. Glendon would separate cases involving dependent children from other divorce cases; spousal support and property division in those cases would be secondary to assuring the welfare of the children.[1]

Glendon justifies these recommendations within the rhetorical framework of storytelling. Strict abortion laws, she argues, would strengthen the symbolic value of life and community by telling a better story about those values. At the same time, allowing women who really want abortions to get them would tell a companion story of compassion. Stricter divorce laws would strengthen the ideal of marriage as a durable, life-long commitment between two people, while strict child support laws would tell a story of responsibility, a story that children matter and should be well cared for. All of these improvements, she argues, would tell a better, more humane story than the one now told in American abortion and divorce law.

II

Glendon's tools and themes are familiar ones in recent legal scholarship. They are familiar especially within politically leftist or progressive circles. Storytelling, an ancient rhetorical tool, has been used effectively

1. Critical to her proposal is the curtailment of judicial discretion on support matters, so that postdivorce support (for both children and dependent spouses) becomes more predictable and realistic (pp. 94-103). Glendon also proposes special treatment for divorces terminating short, childless marriages to limit judicial discretion (pp. 103-04).

in recent years as an instrument of legal reform, particularly by feminists and Blacks.[2] This technique usually involves a narrative—sometimes true, sometimes fictional—meant to capture the reader's imagination and show through some particular context how things really are or how they could be, thus inspiring new ways of looking at an issue and, ultimately, new solutions to problems.[3] Glendon's work is a rather different brand of storytelling; she converts legal rules and legal consequences into symbolic statements about the normative social and political choices inferred by those rules. Thus, in lax divorce laws Glendon finds a story about marriage as a means of self-fulfillment for individuals that should be dissolved if it no longer serves this purpose, and in lax abortion laws she finds a story about pregnancy as a minor inconvenience that women are free to continue or end at their whim.

Glendon's notion that the symbolic values of the law create as well as reflect reality is also familiar among politically progressive legal scholars. It is a focus shared by radical feminists who expose the patriarchal assumptions underlying liberal legal doctrine,[4] by members of the Critical Legal Studies movement who uncover the power relationships hidden within neutral legal constructs,[5] and by those in the law-and-society movement who study the relationship between law and societal norms.[6]

The particular values and themes Glendon articulates will sound familiar, as well, to legal scholars sympathetic to progressive causes. She stresses virtue and community and finds deficient the rhetoric of rights that place too much value on the individual, on autonomy and on self-

2. *See, e.g.*, S. ESTRICH, REAL RAPE 1-3 (1987); Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); *see also* Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) (describing law as narrative); West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 146 n.3 (1985) (listing examples of legal scholars making use of narratives).

3. *See, e.g.*, S. ESTRICH, *supra* note 2; Bell, *supra* note 2; Williams, *supra* note 2.

4. *See, e.g.*, C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 149 (1987); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 427-32 (1984); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

5. *See, e.g.*, Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 999 (1985); Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83); Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109-13 (1984).

6. *See, e.g.*, Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987); Sarat, *Studying Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427 (1977).

fulfillment.[7] She also uses the theme of law as conversation, which is in vogue among scholars seeking more egalitarian models in the law.[8] Like these other scholars, Glendon sees law as an occasion for dialogue and conversation about the right way to live. If law is looked at this way instead of as neutral, nonmoral rules aimed at regulating behavior, she argues, we would be more open to compromise and to accommodating the opinions and values of others (pp. 140-41).

Although Glendon's rhetoric will sound quite familiar to scholars on the left, the agenda she promotes will not. Her call for greater societal commitment to adequate economic support for families with children is a popular item on the progressive agenda,[9] but her program for more legal impediments to both abortion and divorce is decidedly conservative. Those who have been attracted to these new themes and tools may well ask: does Glendon's work mark a failure or weakness of these ideas as tools of progressive reform? Or has Glendon simply misused them?

The answer is that the rhetorical forms Glendon uses are powerful but, like other rhetorical devices, indeterminate and thus not easily confined. These devices touch nerves in a way that makes the agenda that they are used to serve appealing in certain ways. But for the same reason that these devices appeal to us, they are likely to have appeal and utility beyond any particular agenda. To the extent that a way of thinking can uncenter us—leading us from where we are to where the storyteller wants us to go—storytelling does so because it has a degree of universality. The universality gives it the potential to serve different, even contradictory purposes.

Storytelling is indeterminate because storytellers looking at the same legal landscape may tell quite different stories. Glendon, for example, finds abortion clinics in this country to be a "vast profit-making industry" (p. 20) serving isolated, autonomous, rights-holding individuals (pp. 33-39). But could she not just as easily have seen these clinics as the only realistic access to abortion for poor, desperate women who could not afford hospital abortions or abortions by private physicians, or as a com-

7. For similar views, see Regan, *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073; Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); *see also* Selznick, *The Idea of Communitarian Morality*, 75 CALIF. L. REV. 445 (1987) (defining the implications of a communitarian morality).

8. *See, e.g.*, Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1881 (1987); Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 622-23 (1986); *see also* Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76-77 (1986) (appellate judging as "dialogue").

9. *See, e.g.*, M. EDELMAN, FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE (1987); Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983).

passionate alternative that stands between teenage pregnancy and a vicious cycle of welfare and unemployment? Similarly, while Glendon maintains that laws that combine fault and no-fault grounds for divorce reflect a story of commitment to the ideal of permanent marriage, she could have seen, instead, a story of hypocrisy and flagrant abuse of the judicial process, or a story of government intermeddling in private misery. There are, in other words, many stories to tell. The questions, as always, are: who gets to tell the story and what agenda will the telling serve.

Storytelling is particularly indeterminate when used as a predictive device. Glendon assumes that stricter abortion and divorce laws would tell a story that would set high normative ideals for the protection of life and the sanctity of marriage, while escape clauses and lax enforcement of these strict laws would tell a story of compassion. Even from the limited perspective of symbolic values from which she writes, however, such a gap between the law's rhetoric and how the law is enforced could just as easily breed disrespect for the underlying values that the law represents. Thus, such reform could be more destructive than supportive of the prolife and profamily values that Glendon seeks to promote.

Our country's experience with divorce law would seem to bear this alternative prediction out. Glendon appears nostalgic about the "democratic compromise" to divorce that predated no-fault divorce—strict fault-based divorce was the law, but easy mutual divorce was available in practice (p. 66). The democratic compromise, however, did not hold; divorce law fell into disrepute as parties obtained divorce by collusion or, if they had the resources, by "moving" to other states.[10] The result was a weakening, not a strengthening, of the values strict divorce laws were intended to support.[11] Such a phenomenon has occurred in the child support area, as well. Far from raising the norms of responsibility by noncustodial parents towards their children, the gap between existing support laws and their enforcement[12] has given the message that child support obligations need not be taken seriously.

10. *See* Wels, *New York: The Poor Man's Reno,* 35 CORNELL L.Q. 303, 303-04 (1950); Note, *Collusive and Consensual Divorce and the New York Anomaly,* 36 COLUM. L. REV. 1121, 1128-32 (1936).

11. *See The 1966 Report by the Governor's Commission on the Family,* in FAMILY LAW: CASES AND MATERIALS 267, 268-70 (J. Areen ed. 1985) (giving as a reason for no-fault divorce recommendations in California the need to reverse erosion of the family taking place under a fault-based divorce regime).

12. *See* D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 71-72 (1979). Glendon notes with alarm this phenomenon with respect to child support (pp. 86-87), but apparently it does not make her suspicious of the parallel "compromises" she recommends with respect to abortion and divorce law.

Additional difficulties can be found in Glendon's particular brand of storytelling. Narrative storytelling blends specific factual contexts with prescription. In this respect, storytelling may reflect, in a way academic writing often does not, the way in which description and prescription are not distinct categories of rhetorical activity but rather two concepts that are intricately bound. The difficulty with Glendon's *acontextual* brand of storytelling is that without the factual framework of a narrative, her prescriptions do not have sufficient descriptive or explanatory weight. Indeed, although her policy preferences are clear, it is hard to pinpoint why she thinks the stories she prefers (and the law that would tell those stories) are any better than the stories (and the accompanying law) that we now have.

One justification she offers for preferring different stories is that our current ones do not represent our culture well (pp. 62, 108, 113-14). Thus, with respect to abortion, she assumes that legislatures in this country would have gotten around to a more European solution if only courts had left them alone (pp. 40-50) and that such a solution would better reflect the existing consensus in our country (p. 58). Her complaint about divorce law is that it ignores stories that "are still vigorous in American culture—about marriage as a union for life, for better or worse, even in sickness or poverty; stories about taking on responsibilities and carrying through; and about parenthood as an awesome commitment" (p. 108). These observations are puzzling given her concession that the American story of individualism and isolation "is recognizably related to other stories that we like very much" (p. 114) and given her conversational model of law, which presupposes that the existing law already tells the story of who we actually are (pp. 139-42).

In explaining why American law developed in such different ways from the law of other Western nations, Glendon stresses the unparalleled heterogeneity of American society, the absence of obstacles in this country to the spread of theory and practice of individualism (pp. 115-34), and the "legal coincidence" of no-fault terminology in American divorce reform arising from the parallel reform of insurance law (pp. 79-80). But if she has correctly analyzed why Americans tell "extreme" stories, she has undercut her thesis that these stories are not accurate ones. In explaining why we tell the stories we tell, she has also explained why the stories we tell *are,* for better or worse, our own.

What Glendon probably means is that she does not like the conversation we are having—she does not like the "American story about marriage" (p. 108) told in our no-fault divorce laws or the American habit of thinking in terms of contrasting rights (pp. 39, 131) reflected in our debate on abortion. If so, her objections to American law are rather more

conventional than she would have us believe. They are objections not to our ignorance that the law tells stories, but rather to what those stories are; they are objections not to our method of conversation, but rather to what we say.

Glendon seems to claim that we can eliminate the dilemmas presented by abortion and divorce. She thinks we can eliminate them by conversation, by compromise, and by finding the law that tells the right story (pp. 138-42). On this count, I think she is mistaken. Dilemmas are dilemmas because we have come to believe or desire things that are in tension with other things we believe or desire. Thus, abortion is a dilemma for many of us because we have come to believe both that the fetus has properties of life deserving of at least some of the considerations we ordinarily extend to living beings and that the ability of a woman to make free and uncoerced decisions with respect to the use of her body for reproduction is an important, positive value. If we could be talked out of either of these beliefs, the tension presented in the abortion issue presumably would disappear. Glendon does not refigure the abortion and divorce issues, however, in a way that will make the basic tensions underlying them disappear. Becoming more conversational, and understanding the symbolism of our laws, may lead some readers to favor the solutions or compromises that Glendon advocates, but it is too much to claim that these methods can eliminate the dilemma.[13] If continental law is better than ours, it is not because it is more "conversational" than ours (*see* pp. 140-41) or better at " 'imagining the real' " or telling us "stories about who we are" (p. 8). Neither is it likely that continental law is better because it describes us better than our own law. It is preferable to Glendon because the European conversation is more to her liking; because the values Americans express in their laws are inferior to those expressed by other Western nations; because, in the end, abortion and divorce in this country are just too easily available and economic support for families too parsimonious for Glendon's taste.

Glendon's voice is an articulate one in the American debate on abortion and divorce. Her contribution should be seen, however, for what it is: a plea for a particular "version of morality" (p. 36), a point of view about how the law can best promote its values, a set of recommendations about how different forms of human distress should be weighed against each other. Glendon's views are views about changing our attitudes and

13. Richard Rorty helps to put into perspective claims of having found a method that actually resolves a fundamental human problem with these words: "The notion that some one among the languages mankind has used to deal with the universe is the one the universe prefers—the one which cuts things at the joints—was a pretty conceit. But by now it has become too shopworn to serve any purpose." Rorty, *Texts and Lumps,* 17 NEW LITERARY HIST. 1, 3 (1985).

ideals to be more like those of other Western nations. These views, though effectively wrapped in rhetoric about stories and community and conversation, are not of a different order than other points of view on these subjects. Storytelling exposes insights; it may also hide them. One thing it does not do, however, is allow us an easy escape from our fundamental moral dilemmas.