

# Review Essay

## Comparison-Shopping in the Marketplace of Rights

*Abortion and Divorce in Western Law: American Failures, European Challenges.* By Mary Ann Glendon.\* Cambridge, Mass. and London, England. 1987. Pp. 197. \$25.00.

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### I. INTRODUCTION

In her justly famous essay on abortion,<sup>1</sup> Judith Jarvis Thomson evokes the image of a small child who lives with his mother in a little house that frames their tragic conflict. Mother, we are to understand, owns this house and resides in it peacefully until some malignant cause not of his own devising renders the child metastatic. Larger and larger he grows, until he is about to crush his mother against the crumbling walls of her house. At times when the abortion issue seems ready to engulf our politics and our law, the perfected horror of Thomson's vignette visits itself upon my memory with renewed force.

As if fueled by powerful contaminants within the bloodstream of American society, the abortion issue, like the child in the vignette, has become a malignancy. It has fused the public to the private. It has caused policy to

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1. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

stagger under the weight of principle. It has promoted strange alliances.<sup>2</sup> It has occasioned terrorism.<sup>3</sup> All at once, it is a religious issue, a gender issue, a moral issue, a class issue, a race issue, an age issue. We cannot stop legislating and adjudicating about it,<sup>4</sup> or talking and writing about it,<sup>5</sup> or imagining and even imaging it.<sup>6</sup> Much like slavery before it, abortion has become an epic controversy in which the very soul of our disquiet republic seems capable of bursting.

For the past fifteen years these metastatic, obsessive, melodramatic tendencies have been focused through a single, powerful lens: the mesmeriz-

2. Among the numerous groups which have formed to conduct either pro-choice or anti-abortion activities, the anti-abortion groups seem a far more creative and flamboyant assemblage than their pro-choice opponents, even allowing for the highly traditional religious organizations that may constitute the single most powerful element in the mix. The anti-abortion groups include Operation Rescue, which specializes in picketing, demonstrating, and if possible, physically obstructing abortion clinics; the Christian Motorcyclists Association, whose 28,000 members ride and preach for Jesus and against abortion; the Feminists for Life of America, which seeks legal and social equality through both a Human Life and Equal Rights Amendment; the Committee to Resist Abortion, which is attempting to mobilize a nationwide anti-abortion income tax boycott; and the Ultamatist Life Society, which sponsors respect for life forms through abortion opposition and vegetarianism. See 1 ENCYCLOPEDIA OF ASSOCIATIONS 1064, 1484 (23rd ed. 1989); *Christian Motorcyclists Take Their Ministry on the Road*, Boston Globe, Aug. 30, 1988, at 13, col. 2.

3. See, e.g., *Two Women Charged as Accessories in Bombing of 3 Abortion Offices*, N.Y. Times, Jan. 3, 1985, at 17, col. 1; *U.S. Asserts Clinic Bombings Aren't Work of Single Group*, *id.* (article notes F.B.I. report of 30 attacks on abortion clinics between May, 1982 and January, 1986, then quotes F.B.I. spokesman's statement that F.B.I. not "intensively involved because the bombings are not regarded as 'terrorist.'").

4. The years since *Roe v. Wade* have seen no lack of effort on the part of Congress as well as a number of state legislatures to enact abortion-restrictive legislation, which other governmental actors have then sought to vouchsafe in the adjudications that have inevitably followed. Some of this legislation has been of a single-issue variety, such as the federal funding restrictions upheld in *Harris v. McRae*, 448 U.S. 297 (1980) and the Utah parental notification statute upheld in *H.L. v. Matheson*, 450 U.S. 398 (1981). Some have involved multiple constraints on the abortion right, such as the Pennsylvania statutes rejected in *Colautti v. Franklin*, 439 U.S. 379 (1976), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). Some of the most recent statutes can be read as creative attempts on the part of their drafters to exploit the successes and overcome the failures of the predecessor statutory generation. Thus, the Missouri statute the Supreme Court will review this term in *Webster v. Reproductive Health Services*, No. 88-605 (U.S. filed Sept. 11, 1988), appears designed to capitalize on the legacy of *Harris* in its attempts to shunt the use of state-controlled human and physical resources, while attempting to vault the failed effort of the *Colautti* and *Thornburgh* statutes to circumscribe the medical determination of viability.

The attempt to keep the American judiciary and, if possible, the American public awash in wave after wave of abortion litigation contains many carefully-molded features. These are laid out, as a set of highly self-conscious strategic maneuvers, in P. CUNNINGHAM, E. GRANT & D. HORAN, *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* (1987).

5. It is impossible to quantify our discussions and debates about abortion other than to note that the only way to begin to avoid them is to abjure all contact with the media, most church groups and the majority of college campuses. As for our written propensities, a single window into them is offered by the listing in *BOOKS IN PRINT, 1987-1988* (Subject Guide, Vol.1, A-C) of 120 titles on abortion—up 33⅓% over the previous year's list.

6. The imaging of abortion received a direct implant into the nation's conscience with the 1985 distribution of the graphic film "The Silent Scream", followed by President Reagan's equally graphic endorsement of it: "If every member of Congress could see 'The Silent Scream,' they would move quickly to end the tragedy of abortion." See *A False 'Scream'*, N.Y. Times, Mar. 11, 1985, at A18, col. 1. Garry Trudeau accepted the challenge of re-depicting the film's central image in *Doonesbury*, "Silent Scream II", *NEW REPUBLIC*, June 10, 1985, at 9, in which the abortion of a fetus ("Let's call him Timmy") occurs within the first 12 minutes of conception. The imaging of fetuses continues, most recently on the part of Project Young One, Inc., of Racine, Wisconsin, which distributes lifesize plastic replicas of first-trimester fetuses.

ing lens of *Roe v. Wade*.<sup>7</sup> In a manner that seems extraordinary, even for a society that treats its courtrooms as the battlefields of many of its most bitter domestic wars, *Roe* has become the governing metaphor of the abortion conflict, the ritualized adversariness of litigation having been translated into a heavily financed and organized “pro-life” versus “pro-choice” contest; claims of right, the ballistics of each side; winner-take-all, the object of each renewed encounter; and always, in the background, *Roe*—the symbol as well as the reality of the battle lost or won.

The same political and social forces that have been waging war over abortion have drawn into its resultant miasma problems that, while linked in disparate ways to abortion, have been ill-attended, perhaps because of it. These problems include our rate of adolescent pregnancy;<sup>8</sup> the privatization of the baby “market”;<sup>9</sup> our burgeoning population of women, unmarried or formerly married, living with their children in poverty;<sup>10</sup> and, above all, the lack of any coherent, principled policy-making centered on the allocation and distribution of public and private resources to children.

Now, after this decade and a half of misused rhetoric and disused opportunity, perhaps we shall begin to search for some means to bind the splinters of our national conscience so we may rescue our children and their nurturers from the draining exigencies of the abortion conflict. To

7. 410 U.S. 113 (1973).

8. As of 1978, one out of every ten female adolescents in America became pregnant. See S. REP. NO. 161, 97th Cong., 1st Sess. 5 (1981). Our adolescent pregnancy rate is the highest in the industrialized world. See Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Wetoff & Wulf, *Teenage Pregnancy in Developed Countries: Determinants and Policy Implications*, 17 FAM. PLAN. PERSP. 53 (1985).

9. The privatization of a market in babies includes the sale or barter of babies and infants on any basis intended to effect their permanent transfer without prior legal authorization. Related phenomena include the transfer of fertilized and unfertilized eggs, the use of wombs for the gestation of another woman's fertilized ovum and paid surrogacy of the sort brought to public attention in the Baby “M” case. While no single study has undertaken to compile statistical and demographic data on these phenomena, it is widely assumed that all of them are on the increase. For a variety of analyses of existing or recommended responses, see M. FIELD, *SURROGATE MOTHERHOOD* (1988); *Forum: Adoption and Market Theory*, 67 B.U.L. REV. 59 (1987); Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

10. Nearly 13 million American children—one child out of every five—live in poverty, as defined by the United States government. Of these children, approximately 6 million live in single-parent, female-headed households—a rise of 110 percent since 1970 and a statistic continuously on the rise. See Beller and Graham, *Child Support Payments: Evidence from Repeated Cross-Sections*, 78 AEA PAPERS AND PROCEEDINGS 86 (1988).

Despite the long-term social and economic problems that impoverished women and children haplessly perpetuate, popular and academic writing has focused on these matters to an insignificant extent in comparison to the attention that has been lavished on the abortion issue. Moreover, although abortion-related concerns bleed into political debates about welfare, academic writing about abortion seldom incorporates hard information about its social, economic and political backdrop.

Professor Glendon's treatment of abortion is curiously bifurcated along these lines, with greater concern evidenced for the interplay between social reality and rule-making in her discussion of continental law than in her discussion of American law, despite her passing reference to the idea that “[a]bortion as such should be viewed in the context of other laws relating to mothers and children” (p. 53). While the “Divorce Law” chapter seems intended to provide at least a partial context, its obvious exclusion of the entire population whose rights and responsibilities do not derive from marriage limits its utility for this purpose.

this end, we should welcome anyone who might study and then bring us news of the ways that other societies have been approaching the problems of generativity and responsibility that so threaten to overwhelm us.

Such a person is Mary Ann Glendon, whose credentials for this roving ambassadorship are unparalleled within the ranks of American legal scholarship.<sup>11</sup> In *Abortion and Divorce in Western Law: American Failures, European Challenges*, first delivered as the prestigious Julius Rosenthal Foundation Lectures at Northwestern University Law School, she offers us a pair of essays that compare our own law of abortion and some aspects of our law of divorce with the laws in eighteen countries within Western Europe and the United Kingdom. These essays are framed and linked together by introductory and concluding chapters that set her abortion and divorce-related arguments into a more critically ambitious philosophical and, as she would have it, hermeneutical perspective.

In its largest dimension, the work is just what we might hope: a clear and concise plea for a less divisive and encompassing struggle over abortion and a more coherent and consistent set of policies for the furtherance of children's welfare, studded with richly allusive, potentially beneficial examples of alternatives from comparative law. But Professor Glendon has outlined a strategy for the furtherance of these goals that means to repudiate enduringly valuable attributes of our jurisprudential tradition without providing an adequate practical or theoretical justification for her ultimate thesis that it is indeed this tradition that separates us from the beneficence other societies demonstrate toward children and, on her interpretation, toward the pre-born.

Moreover, the details she has drawn on to support her argument and some she has apparently chosen to discount give Professor Glendon's characterization of our political and legal system an oddly a-historical and a-cultural cast, as if she had developed that rarest of conditions, a reverse-ethnocentrism, from having so deeply internalized the predispositions of other cultures as to have significantly displaced our own. These proclivities, informed by an idiosyncratic blend of conservative conviction and radical feminist commentary, take Professor Glendon to a set of positions and recommendations I shall oppose vigorously in what follows, though I remain awed by the scope of her project and enthusiastic about the insights for family law that comparativism is able to generate.

My presentation and criticism of Professor Glendon's argument closely track the structure of her book. In Part II of this essay, I introduce the hermeneutical and philosophical themes that undergird her thesis and I

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11. Professor of Law at Harvard Law School, Mary Ann Glendon has written prolifically in comparative family law and is the author or co-author of several other books in the field. In addition to her wide lecturing abroad and service in international law organizations, she is Chief Editor of the *International Encyclopedia of Comparative Law* (Vol. 4). See ASS'N OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1988-1989, at 358-59 (1988).

raise some initial doubts about the methodological course she charts in the name of these themes. In Part III, I recapitulate her comparative survey of abortion law and her case for the burial of *Roe v. Wade* and take rather sharp issue with both her characterization of and her prescription for the American law of abortion. In Part IV, I turn with Professor Glendon to the questions of divorce grounds and child support and again find myself in disagreement, to some extent based on my experiences in the practice of law. In Part V, I revisit Professor Glendon's argument from hermeneutics and philosophy and, with the substance of her argument now available in retrospect, explain why I find that her deep critique of American law ultimately fails.

## II. PHILOSOPHY AND HERMENEUTICS: THE CONCEPTUAL FRAMEWORK

Emblematic of what ensues, Professor Glendon's start is elegant but problematic. At the outset, she announces her aim and, indirectly, her method by locating her project between two inspirational lodestars, one fixed in the intellectual firmament by Plato, the other by that contemporary luminary, Clifford Geertz. First, Professor Glendon calls upon Plato to establish the comparativist's claim to high ground within the domain of legal scholarship. It was in *The Laws* that Plato entreated the Guardians of any future State, as Glendon puts it, "to send out mature citizens to study especially good laws elsewhere, and to seek assistance from wise persons wherever they may be found. . ." (p. 6). The task of such mature citizens, like that of Plato's persona in this late dialogue, the anonymously termed Athenian Stranger, is essentially pedagogical. It is to train lawmakers to discover and appraise the essence of wise laws, the better to devise laws of their own that shall "create good will in the persons addressed and make them ready to receive intelligently the command that follows" (p. 7).

Professor Glendon's own pedagogical use of this invocation follows abruptly, for her introductory references to Plato end with the stark and rather startling announcement that in both England and America, "the view that law is no more than a command backed up by organized coercion has been widely accepted" (p. 7),<sup>12</sup> whereas on the continent, the

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12. It is not clear whether Glendon means to offer this "view" as "widely accepted" on a popular or an academic basis, or both. If the former, its empirical footing is probably difficult to establish, so one is left either to accept or reject her notion as a matter of intuition. If the latter, however, her contention is surely open to question, given three generations of scholarly developments that have included the legal realists' attack on formalism and, therefore, the received notions of positivism to which formalism was appended, see K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 179 (1960) ("Rules are not to control, but to guide decision,"), cited in Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 472 n.20 (1988); H.L.A. Hart's radical reconstruction of Austin's "command" theory, see H.L.A. HART, *THE CONCEPT OF LAW* (1960); Ronald Dworkin's radical reconstruction of Hart, in turn, see R. DWORKIN, *LAW'S EMPIRE* (1986); the Critical Legal Stud-

ancient Platonic precepts have been more directly incorporated into a "rhetorical method of law" (p. 7) by means of the inclusion within statutes and other important legal texts of language that reflects a "pedagogical aim" (p. 8).

Thus, a rhetorical-pedagogical inadequacy appears as the first pervasive American "failure" that Glendon asserts, although to do so she must sweep without apparent notice past our long-cherished tradition of judicial review, with its exacting requirements that judges describe and then justify the decisions they render within the system of law to which they must account—a process that would seem, plausibly, to comprehend a "pedagogical aim." Yet, inexplicably, Glendon's interest and attention remain fixed on statutes to the exclusion of all other emanations of law, not only here but in the many later parts of the essays where the rhetorical-pedagogical leitmotif reappears.

This linkage of statutory rhetoric and societal pedagogy, which relies on a primitive correspondence between what law says and what it does, gives way, abruptly, to Glendon's introduction of Clifford Geertz as her contemporary muse. In his Storrs lectures at Yale, she notes, Geertz spoke of law as part of a society's "distinctive manner of imagining the real" (p. 8),<sup>13</sup> and this, he added, should bring us to reflect on the ways that legal systems differ in the "stories they tell" (p. 8),<sup>14</sup> the "symbols they deploy" and the "visions they project" and should cause legal comparativists, in particular, to reimagine their task as "a venture into cultural hermeneutics" (p. 8).

Were it not for his pointed reference to comparativists, Glendon's sense that we need to be reminded of Geertz's charge would seem askew, coming at a time when one can hardly avoid being pelted from several vantages within the academy by treatments of law as "story,"<sup>15</sup> legal interpretation as an exercise in hermeneutics,<sup>16</sup> and the "visions" that law projects

ies Movement's sweeping indictments of law's legitimacy, coherence, and authority; and an eclectic assortment of scholars who have engendered a burgeoning interest in non-power-holders as initiators, rather than mere recipients, of jurigenerative activity, *see, e.g.*, Cover, *The Supreme Court, 1982 Term—Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988). Whether the criticisms embodied in these efforts go to the descriptive status of "law" as command, the normative status of the rule of law, or the monopolistic status of the coercive sovereign as jurigenerator, they surely fail to support the idea that academia is of the dusty, Austinian "view" that "law is no more than a command backed up by organized coercion."

13. The Storrs lectures have been reprinted in C. GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 175 (1983).

14. *Id.* at 173.

15. *See, e.g.*, D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U.L. REV. 105 (1987); Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988); West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

An earlier-published review of Professor Glendon's book elaborates a critique of her "interpretive technique" as a mode of storytelling. *See* Bartlett, *Storytelling*, 1987 DUKE L. REV. 760.

16. The most exhaustive exposition to date of the application of hermeneutics to law is contained

and that legal scholars, in turn, project onto law.<sup>17</sup> I shall reserve my more extensive doubts about the hermeneutical strand of Professor Glendon's argument, only noting for now that the methodology of "thick description"<sup>18</sup> for which Geertz is justly famous, with its profound, attendant concerns for the opacity of the ethnographic—the non-portable within culture, the constraints of "local knowledge"<sup>19</sup>—must return to haunt one's evaluation of the methodology Glendon sets in motion in his name.<sup>20</sup>

### III. ABORTION LAW

#### A. *The Comparative Context*

The chapter devoted to "Abortion Law" is the most descriptively and analytically complex. Here, Professor Glendon's thesis proves to be that our misguided devotion to women's rights and to "the extreme and isolating version of individual liberty the Supreme Court endorsed in 1973, at the instance of small elites" (p. 62)<sup>21</sup> have placed our present law of abor-

in the two-volume Interpretation Symposium published by the Southern California Law Review. See *Interpretive Methodologies from other Disciplines and Hermeneutics and Legal Interpretation*, 58 SO. CAL. L. REV. 1-275 (No.1) (1985) and *Philosophy of Language and Legal Interpretation and Constitutional Interpretation*, 58 SO. CAL. L. REV. 277-719 (No. 2) (1985).

17. Examples of recent attempts at the visionary include Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); virtually the entire oeuvre of Roberto Unger; and, in a more traditional mode, Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1744-89 (1988).

18. Geertz's best-known example of the methodology of thick description is contained in C. GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, in *THE INTERPRETATION OF CULTURES* 412 (1973). He provides a valuable explication of his method in *Thick Description: Toward an Interpretive Theory of Culture*, in *id.* at 3.

19. It is not, I hesitate to add, that Geertz's focus is on cultural particularities and peculiarities to the exclusion of generality and abstraction. Rather, the striking attribute of his work that bears attention here is its extraordinarily careful and sensitive separation of the particularistic acts of observation and description from the more generalized processes of cross-cultural interpretation and evaluation. His sustained concerns about methodology—his own and that of an interdisciplinary host of others—have led Geertz to formulate the inherent tension between the attempt to acquire "local knowledge" and to fit it within wider patterns of understanding in a multiplicity of dazzling utterances. See, e.g., C. GEERTZ, *supra* note 13, at 11-16 (1983).

20. See *infra* Parts III(A) and V. For a powerful critique of Glendon's book, arguing, *inter alia*, that Plato's essentialism and Geertz's interpretivism are in ultimate conflict, see Fineman, *Contexts and Comparisons*, 55 U. CHI. L. REV. 1431 (1988).

21. In this ringing assertion as well as elsewhere in "Abortion Law," Glendon characterizes *Roe* as conducive to an "isolating version" of liberty. This notion complements her description of "the voice we hear in the Supreme Court's abortion narrative" (p. 52) that presents us with an "image" of the pregnant woman as "autonomous, separate, and distinct from the father of the unborn child" and "insulated" by the Court from society's would-be efforts "to dissuade her or ask her to wait"—trapped, therefore, in a "distinctively American" form of "lonely individualism" (p. 52).

Nowhere in her portrayal, and by this I mean her entire rendition, does Glendon account for the Court's vision of the woman, however problematically it has come to be viewed, deliberating with her physician over the abortion decision. See *Roe v. Wade*, 410 U.S. 113, 153, 163 (1973). More broadly, it seems decidedly peculiar that Glendon's depiction suggests as the norm pregnant women without social resources—trusted friends, relatives, secular or sectarian counselors—and the capacity to make use of them, in that the Supreme Court has seen fit to deprive women of the necessity of consulting with their procreative partners or some imposed state agent concerning their abortion decisions.

Whether or not we are persuaded by Carol Gilligan's views of female interconnectedness, see C.

tion at the most radical extreme of the abortion-permissive countries she has surveyed. Moreover, she treats *Roe* as having stifled "prematurely" (p. 45) our ability to enter into majoritarian "compromises" over the abortion issue such as those she finds most countries in her survey to have adopted. Looking back to the legislative liberalizations that some states had initiated by the time *Roe* was handed down (pp. 47-49) and considering the evidence supplied by national public opinion polls,<sup>22</sup> Glendon argues, optimistically, that pro-life/pro-choice legislative "compromises" (p. 42) may be achieved once *Roe* "self-destructs" (p. 43).<sup>23</sup>

The devices, rhetorical and otherwise, utilized in the development of this argument bring to mind the sorts of tactics used by professional mediators to signal to hitherto-intractable bargaining agents that the time for compromise has arrived. Thus, one encounters Glendon alternately discrediting and ignoring elements of pro-choice and pro-life history or ideology, a procedure that permits her own argument to float, however briefly, above the familiar fray. She ostentatiously ignores, for example, the influence of the women's movement of the 1960's on pre-*Roe* progressive abortion legislation in this country, on the development of post-*Roe* abortion legislation in Europe, and even on *Roe v. Wade* itself.<sup>24</sup> To ac-

GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982), it seems intuitively unpersuasive that adult pregnant women, at least, can be understood routinely to forego advice, consolation, and other forms of assistance when making abortion decisions. Whether they feel "lonely" in the process of deciding is an empirically isolable matter that may have an obvious physiological basis—one, in any event, for which the Supreme Court should not be held responsible.

22. See *infra* note 46 (discussion of public opinion polls and their reliability on abortion issue).

23. Professor Glendon's word-choice—"self-destruct"—to describe the beclouded future of *Roe v. Wade* carries a peculiarly loaded charge, since it denies the responsible agency of the Justices who must personally execute *Roe*'s destruction, whether in a single act or by means of a more degenerative process. Moreover, like Justice O'Connor's prophecy that *Roe* "is on a collision course with itself," *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 459 (1983), which Glendon quotes immediately beforehand, the vivid suicidal image is an arresting inversion of the homicidal ascriptions common to abortion's ideological enemies. (For the usage "abortion holocaust," see, e.g., J. MCFADDEN ET AL., *ABORTION AND THE CONSCIENCE OF THE NATION* (1984)). Professor Glendon's locution is all the more arresting for its appearance in an argument centered on concerns about rhetoric and compromise in our treatment of the abortion issue.

24. If a full, documented history has been written of the national and international involvement of the 'sixties women's movement in abortion reform in the decade that ended with *Roe*, I have not succeeded in locating it. Nevertheless, an appreciation of the profound, strenuous, and even heroic efforts of particular women's rights activists and the associational entities they helped to create can be stitched together from a wide assortment of accounts. See, e.g., B. ABZUG & M. KELBER, *GENDER GAP* (1984); M. FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* (1988); B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963, 1983); B. HARTMAN, *REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL AND CONTRACEPTIVE CHOICE* (1987) and such early reportage as Diamonstein, *We Have Had Abortions: These 53 American Women Invite You to Join Them in a Campaign for Honesty and Freedom*, Ms., Spring, 1972, at 34; Gratz, *Never Again*, Ms., April, 1973, at 44; Kimmey, *How Abortion Law Happened*, *id.* at 48; see also H. BERGER, *L'AVORTEMENT, HISTOIRE D'UN DEBAT* (1975); Ladrière, *La Libéralisation de l'Avortement*, no. spec. de la Revue Française de sociologie, XXIII (1982); *France: La Libéralisation de l'Avortement*, in *ENCYCLOPEDIA UNIVERSALIS* 262, 262-67 (1975); correspondence from Mme. Simone Veil, Président du Groupe Libéral, Démocratique et Réformateur du Parlement Européen, to Jane Maslow Cohen, February 16, 1989 (on file with author).

compish this, she is forced to magnify the influence of other causal agents. Characteristic of this approach, her narrative concerning the pre-*Roe* development of reform legislation here and abroad overemphasizes, somewhat cynically, the pro-choice advocacy role of "the medical profession" (p. 12) and the highly transitory, however riveting, influence of the thalidomide "scandal," (p. 12) while failing even to mention the intense interest and excitement generated worldwide during the emergent decade of reform by the innovative American hybridization of the struggle for racial equality with the concern to secure for women rights over their generativity and, therefore, over their lives.

This erasure of the relationship between the liberal, rights-based feminism of the women's movement and the development of American abortion reform contrasts strongly with the prominence and apparent sympathy that Glendon accords the more recent radical feminist position on *Roe v. Wade* developed by Catherine MacKinnon.<sup>25</sup> Indeed, while Glendon withholds unequivocal support for MacKinnon's critique of the majority opinion in *Roe* as an example of "male ideology," she goes on to credit MacKinnon's wider denunciation of the privacy doctrine as a "wall" erected by men to screen their domination of women from public view (p. 52).<sup>26</sup> She even scatters support for the view—again, in repudiation of non-radical feminism—that the strongest advocacy of abortion "on demand" (p. 53) has come from men, portraying them for this purpose as a self-interested, self-serving subspecies for whom abortion is both a means of avoiding the child support they might otherwise be forced to pay (pp. 50–52),<sup>27</sup> and a means of livelihood (p. 50).<sup>28</sup>

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25. See MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45 (J. Garfield & P. Hennessey eds. 1984).

26. For Mackinnon's unfolded articulation of her position—"a right to privacy looks like an injury got up as a gift"—see *id.* at 51–54; see also C. MACKINNON, *FEMINISM UNMODIFIED* 96–102 (1987).

27. At one point, Glendon appears to objectify this view of men by citing some field research by the demographer Judith Blake (p. 51 n.216) and then by offering a "kinder explanation" in passing (pp. 51–52). Nevertheless, it is the harsher view of male self-interest and domination that more consistently underlies Glendon's argument, especially when its continued development in "Divorce Law" is fitted to the abortion section.

28. Here, in her references to the maleness and the assertedly unempathic arrogance and callousness of abortion doctors (p. 50), is one among a variety of places in the text where Glendon's observations seem remote from evolving aspects of American culture. In this instance, the remoteness involves inattention to the vastly growing numbers of female physicians and their recent wide entrance into medical specialties that pertain to reproductivity. See AMERICAN MEDICAL ASSOCIATION, *PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE U.S.* 46, 48 (1987); see also *Third of Medical Graduates are Women*, N.Y. Times, Oct. 20, 1987, at 69, col. 1.

The first national study aimed at determining who has abortions in the United States and their reasons for doing so was recently conducted by the Alan Guttmacher Institute. Published after Glendon's book, it does not speak to the abstract question of whether American men favor abortion choice to a greater extent than do women, but it strongly disproves her claim about their influence over women's choices. Of the study's 9,480 subjects, only 23% cited "husband or partner wants her to have abortion" as a reason "contributing" to their decision to have an abortion, and only 1% cited this as the "most important" reason for their decision. See Torres & Forrest, *Why Do Women Have Abortions?*, 20 *FAM. PLAN. PERSP.* 169 (1988).

This bleak, oppositional view of male ideology and real-world behavior will be echoed in Glendon's treatment of "Divorce Law," but not before causing her thesis an embarrassment she rushes past (p. 50), for it is two decades of male-dominated legislatures that have sought to chip away or to blast through *Roe v. Wade*, not to mention the male lobbyists, clergy, Congressmen and Supreme Court Justices who have led the anti-abortion forces of our time.<sup>29</sup> Yet Glendon's account of abortion law denies its liberal feminist past and present while suggestively affirming the only branch of feminist ideology consistent, at one margin, with her attack on rights-based individualism, an attack that forms the most unifying theme in this book.

Although the pro-life contingent is also reshuffled, it is treated with far greater delicacy. Its most profound moral assertion of a right to life for the fetus, irrespective of gestational age, is tactfully overlooked in favor of the assertion that "compromise" of the continental variety that Glendon proceeds to describe would likely attend a judicially-unfettered attempt to deal with abortion in the legislative forum where, she assures us, matters would surely improve if *Roe's* legislative usurpation were undone (pp. 46-50). Moreover, while no pro-life ideologue is prominently featured, in the manner of Catherine MacKinnon, Glendon assembles her anti-*Roe* argument into a chorus that includes the well-known misgivings of prominent constitutional theorists and the occasional moral philosopher (pp. 44-45, 50-51, 61). Leaning still more obviously in the pro-life direction, Glendon espouses the wrong-headed but deeply-cherished pro-life position that American abortion law treats all fetuses, even third trimester fetuses, as "disposable" (pp. 56, 61, 62), a position she derives from her concern that the United States has not "required"—on a national basis, apparently<sup>30</sup>—the regulation of late abortion (p. 22), untempered by any regard for other extant, often powerful sources of both legal and practical constraint.<sup>31</sup> Lastly, Glendon makes powerful use of rhetoric to offer pro-

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29. Contemporary American consensus candidates for inclusion in an Anti-Abortion Pantheon would surely include the Reverends Jerry Falwell and Pat Robertson, Cardinal John O'Connor, Senator Orrin Hatch, Representative Henry Hyde, Chief Justice William Rehnquist, Justice Byron White, and ex-President Ronald Reagan. With the possible exceptions of Bill Baird and Alan Guttmacher, it is much more difficult to summon an obvious list for nomination to an opposing pro-choice pantheon.

30. Given Glendon's enthusiasm for a return of regulatory authority over abortion to the states, her explicit antipathy toward a normative role for the Supreme Court in abortion matters, and her utter lack of attention in the abortion chapter to the question of congressional involvement, it is difficult to justify her criticism that "the United States" has not "required" the regulation of late abortion within the terms of her own argument. Here, as elsewhere in these essays, Glendon's feel for the American scene seems to have been lost in the long trip home from a variety of closely-observed elsewhere.

31. Among the several layers of constraint that curtail the availability of late (third-trimester) abortion in the United States are highly restrictive state statutes prohibiting their performance for all but a narrow category of justifications, *see, e.g.*, ARIZ. REV. STAT. ANN. § 36-2301.01 (1986); FLA. STAT. ANN. § 390.001(2) (West 1989); ILL. ANN. STAT. ch. 38, para. 81-25 (Smith-Hurd 1988-89); 18 PA. CONS. STAT. ANN. § 3210(a) (Purdon 1983); UTAH CODE ANN. § 76-7-302(3) (1978); state

lifers her sympathy; she sends them a well-understood bouquet through her prominent deployment of the term "innocent life," in lieu of "the fetus," as the argument winds toward conclusion (pp. 46, 62). I do not mean to suggest that the rhetorical choice last-mentioned or the earlier moves I have recounted should be read as a wholly or even largely calculating bid for the endorsement of radical feminists here or conservative politicians there. Rather, Professor Glendon's entire discussion of "Abortion Law" leaves no doubt that, despite her invocation of radical feminism, the true force behind her attack on *Roe* is her commitment to "innocent life."

But the tension between this commitment and her professed desire for judicially unconstrained state-by-state "compromise" tears the argument in "Abortion Law" asunder, for whether or not our pluralistic society should base its law and public policy on the credo of pre-natal innocence, one cannot successfully resolve our abortion conflict at the level of prescription by positing, on the one hand, that fetuses have moral deserts because they are "innocent," their "disposable" status a wrong, and, on the other, that any majoritarian compromise that consigns some fetuses to destruction while marking others for salvation would suit. Indeed, it should be obvious that paying out arguments in defense of "innocent life" is rights-talk, even if it is often robed in priestly garb,<sup>32</sup> while the further cloaking of those arguments in the mantle of majoritarianism cannot disguise the most fundamental problem to which Glendon's abortion account gives rise, namely, the unmet need for a morally coherent constitutional theory that would allow innocent life to be snuffed out at the hands of legislators, rather than judges.

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statutes providing criminal sanctions in the event of their performance, *see, e.g.*, N.Y. PENAL LAW § 125.05(3) (McKinney 1987); PA. CONS. STAT. ANN. § 3210(a) (Purdon 1983); the need to perform these procedures in costly hospital settings; the unwillingness of many public as well as private hospitals to perform late abortion; the stringency of private third-party payment regulations that pertain to abortion; and the extreme limitations imposed upon the use of federal and, often, state funds for the payment of any, and especially late, abortion. *See, e.g.*, Pub. L. 100-436, § 204, 102 Stat. 1699 (1988); 28 C.F.R. § 551.23(b) (1987); 42 C.F.R. § 36.53-54 (1987); MO. ANN. STAT. § 188.205 (Vernon 1989). Because of these circumstances, among others, fewer than 1% of all abortions performed in the United States are carried out in the third trimester. *See Abortion Surveillance: Preliminary Analysis—United States, 1984, 1985*, 260 J. AM. MED. A. 3410 (1988). Indeed, figures, based on Center for Disease Control annual statistics, reveal that 89.3% of all abortions occurred during first 12 weeks of gestation; only .8% are performed at or after 21 weeks. *Id.*

Glendon's total inattention to these facts seems to me the starkest example of what I have termed in Part I her reverse-ethnocentrism. Whatever heightened moral concerns one may bring to the issue of late-term abortion, the statistical rarity of its incidence, together with some appreciation of the serious maternal or fetal health problems that usually necessitate its employment, should play a tangible role in the evaluation of the practice. Professor Glendon's denunciation of late-term abortion in America, untethered to any facts that reflect its incidence in an otherwise descriptively-centered argument, promotes a regrettable misunderstanding of American abortion in a book that may be destined for a wide international readership.

32. The Roman Catholic derivation of pre-natal "innocence," for example, is discussed in J. NOONAN, *THE MORALITY OF ABORTION* 7-50, esp. 19, 24, 29, 40, 47 (1970); *see also* Discourse of Pope Pius XII, "Discorsi e radio messaggi di Sua Santità Pio XII 13.415" (Nov. 26, 1951), *reprinted in* O'Donnell, *Abortion II*, 1 NEW CATHOLIC ENCYCLOPEDIA 29 (1967).

Moreover, this unmet need for theoretical coherence is exacerbated by Glendon's intense but theoretically isolated hostility toward *Roe v. Wade*, which leaves the reader unsure whether a politics unconstrained by the Supreme Court—or perhaps by any judiciary (state constitutions and courts are scarcely mentioned)—would satisfy the conditions of her argument, regardless of its substantive outcomes; whether fetuses, all or only the viable, should be rights-bearers, if anyone is; whether she actually favors the domestic adoption of one or another of the European statutes, abortion subsidies and all, that she describes; and whether she truly believes that pro-fetus/pro-child/pro-nurturer state legislation is part of a package deal that women should expect, if only they sat ready, at some legislative bargaining table, to trade away the abortion rights they were duped by self-interested, irresponsible men to accept in its stead.

What is clear in the midst of this theoretical elusiveness is that a carrot intended to lure at least some pro-choicers and pro-lifers toward a mutually optimistic assessment of their post-*Roe* legislative future is Glendon's discussion of the statutory law of abortion in her surveyed countries. This discussion is organized around two principal foci. One is a descriptive, comparative survey of the abortion laws of 18 countries,<sup>33</sup> enhanced by an appendix that provides a concise synopsis of each. The other is a much more elaborate treatment of the French abortion law of 1975, which appears in full translation in a second appendix, followed by a similarly extended discussion of the West German analog of *Roe v. Wade*.<sup>34</sup>

To heighten understanding of our comparative position after *Roe*, Glendon arrays all of the laws she has surveyed across a spectrum that begins with the two that totally ban abortion (p. 13); moves to the "moderate" ones that permit abortion "for cause" on either "soft" or "hard" grounds<sup>35</sup>—the overwhelming majority, she finds; moves again to those

33. These are Austria, Canada, Denmark, Finland, France, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, West Germany, and the United States. Additionally, there is brief mention of the abortion laws of Belgium and Ireland, where abortion is strictly prohibited, subject in each case to a defense of "necessity" (p. 13).

34. Professor Glendon discusses the West German decision, Judgment of Feb. 25, 1975, 39 BVerfGE 1, in considerable detail (pp. 25–32, 33–39). She seems highly sympathetic toward its outcome—a declaration of the unconstitutionality of a liberalizing abortion statute, enacted over strong opposition, on the basis that "developing life within the womb' is constitutionally protected" (p. 26). Moreover, the narrowness of the Constitutional Court's holding clearly appeals to her on process grounds (pp. 27, 34). While her pointedly contrasting treatment of the breadth of judicial review here and in *Roe v. Wade* lends support to the process-based portion of her argument, the sensitivities that influence judicial review of the post-War, post-Hitlerian West German Constitution's life-protective clauses, together with their etiology, seem to me to circumscribe, though they do not exhaust, its analogic utility. For this reason, I have omitted discussion of the West German decision here. For a review of Glendon that focuses intensely on her treatment of the West German abortion decision in challenging her treatment of rights, see Wessel & Segal, *Book Review: Abortion and Divorce in Western Law: American Failures, European Challenges*, 8 PROBATE L.J. 349, 355–59 (1988).

35. While Glendon distinguishes, for purposes of her over-all tabulation, between those statutory grounds she terms "hard"—ones that "involve serious danger" to the pregnant woman's health, danger of fetal defect, or rape or incest—and those she terms "soft"—those dependent on "a variety of circumstances which pose exceptional hardship to the pregnant woman" (Table 1, p. 14)—her exten-

that regulate "strictly" after an early, permissive period (pp. 15-22); and concludes where there is no "required" regulation at all, even after fetal viability (pp. 22-24). Based upon this odd construct, which observes the existence of national statutory law abroad but ignores the existence of state statutory law at home,<sup>36</sup> the United States stands alone, and objectionably so, at the last-mentioned place on the spectrum. (table I, p. 14)

There follows a detailed exposition of the "moderate" 1975 French abortion law, as amended in 1979. What we glean is that French law is a hybrid that permits any woman an in-hospital abortion, funded largely through public means, during the first ten weeks of her pregnancy, provided that she is "in distress" (pp. 15-17, 21, 156)—the catch necessary to trip Glendon's "soft" "for cause" criterion. It turns out, however, that it is the pregnant woman, not some independent arbiter, as our own law might lead us to expect, who is entirely responsible for making the "distress" determination, provided that she may do so only after having "a consultation" regarding abortion alternatives with a governmentally approved caseworker (pp. 17, 156). Once the woman has completed this one-time, mandatory information-gathering, abortion is her entitlement, as Glendon acknowledges (p. 15), though she still places significant weight on the existence of the "soft" causal "requirement."

After the tenth week of gestation, however, abortion is available only upon two physicians' certification that the pregnancy poses a serious danger to the woman's health or that "there is a strong possibility that the unborn child is suffering from a particularly serious disease or a condition considered incurable at the time of the diagnosis" (pp. 17, 157). As amended in 1979, the French law contains an additional, noteworthy attribute: It speaks of a "national obligation" to provide "information on the problems of life and of national and international demography [and] family-oriented policy" (p. 16). This responsibility falls on the government, which "shall take all the measures necessary to promote information on birth control on as wide a scale as possible (p. 16)."

The net that folds French law into the "moderate" category also contains the Italian law, abortion-permissive for a yet-more-liberal ninety days (p. 148); the West German law, which requires a doctor who will not perform the abortion to confirm that the pregnancy poses "a serious danger to the life or physical or mental health of the pregnant woman, which cannot be averted any other way the woman can reasonably be expected to bear" (p. 146); and the abortion law of the Netherlands,

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sive discussion does not rely on this distinction. Indeed, she is careful to note that in at least some countries, the ease with which abortions can be obtained bears no relationship to the statutory determinants on which her spectrum of comparative abortion law is based. *See, e.g.*, pp. 14-15, 18, 21, 60-61.

36. *See supra* note 31 and accompanying text.

which requires a physician to furnish information about abortion alternatives and to render a finding of justifiability (pp. 148-149).

From even this cursory inspection, it becomes obvious that before we could join in any meaningful assessment of whether these laws reinforce or impede a pregnant woman's ability to abort, we would need to pierce their statutory veils. Then, even while stopping short of Geertzian thick description, there is much we would want to know before concluding that what the law says is a complete and accurate representation of what it does. Do French women forego previously intended abortions on account of the information they are required to receive? How restrictively do West German or Dutch physicians apply their respective mandates? How do the per capita abortion rates among women in the "for cause" countries compare with those where women are entitled to abortions "on demand" and how is contraceptive availability to be taken into account in analyzing these rates? Do pregnant European adolescents have the same statutory entitlements as older women? What levels of pre- and post-natal public subsidies are actually provided in the surveyed countries? Do abortion rates correlate inversely with these levels?

But information such as this, crucial to evaluative judgment which should not depend on bare statutory formulae, is not featured in Glendon's study. Nor is information provided on the prevalence of "abortion tourism"<sup>37</sup>—a matter of particular interest as to the continent, where distances are small, public transport is cheap, fast, and ubiquitous, and the notion of a transnational European "community" is just now coming of age.<sup>38</sup>

Indeed, anticipating the concern that what matters is the bottom line, Professor Glendon treats her rhetorical-pedagogical theme as a trump.

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37. Glendon mentions abortion tourism *en passant* (pp. 12, 48, 150) but never pauses to evaluate its social and political significance with regard to either the women nationals of the abortion-tolerant and abortion-restrictive countries of the United Kingdom and Western Europe or with regard to the possible revival of abortion tourism within the United States in the wake of post-*Roe* re-regulation. This problem, with its likely exacerbation of existing differences in abortion access along class-based lines, could become especially acute if my prediction about access to implantation inhibitors in the United States proves either delayed or wrong. See *infra* notes 57-67 and accompanying text.

For some indication of the prevalence of abortion tourism in Britain and Europe, see Henshaw, *Induced Abortion: A Worldwide Perspective*, 18 *FAM. PLAN. PERSP.* 250, 250-54 (1986). For a particularly poignant account of the practice and its exigencies, see Clines, *Calling London Urgently! (for Abortion Advice)*, *N.Y. Times*, June 15, 1988 at A4, col. 4.

38. In formal terms, the "European Community" is a series of conventions, accords, and three principal treaties, the most comprehensive of which establishes the European Economic Community (E.E.C.). They are designed to achieve a vast amount of economic integration and countenance liberal population movement among their twelve nation-signatories by 1992. See, e.g., D. LASOK & J.W. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* (4th ed. 1987). While the Treaty establishing the European Economic Community expressly states that it "shall not preclude prohibitions or restrictions [by member states] on imports, exports or goods in transit justified on grounds of public morality . . . [and] the protection of health and life of humans," Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 36, 298 U.N.T.S. 11, the grand-scale promotion of the transnational movement of persons and goods within the E.E.C. is likely to reduce the transaction costs of abortion tourism and eventually give rise, perhaps, to a transnational statutory unification of abortion law itself.

She concedes that there may be no actual correlation between the European statutes she prefers and the "sav[ing] [of] any fetuses" (p. 59). Nonetheless, she advocates on behalf of the "message" (p. 59) these statutes communicate "that abortion is a serious moral issue and that the fetus is entitled to protection . . . even though [they] permit . . . abortion under some—even many—circumstances" (p. 61). The force of this trump depends on the questionable proposition that a community is improved by laws that announce moral concerns only to countenance behavior at stark odds with those concerns. We shall wrestle with this claim more strenuously in Part V.

But even without reference to underlying realities, we need return to two matters that the statutes seem to signify on their face, matters that once again belie the extreme position in which Professor Glendon has placed the United States. The first is that most of the countries in the survey, other than the United States, explicitly authorize the abortion of any fetus found to have "defects", "disease", or "damage" either in late pregnancy or throughout its duration (pp. 145–154). Unlike the United States, where late-term pregnancies do not automatically or even easily surrender to judgments such as these,<sup>39</sup> where damaged fetuses are increasingly likely to be treated as patients—sometimes over the objections of the women carrying them—even if they have not attained constitutional recognition as persons,<sup>40</sup> and where we have just come through our first national regulatory battle over the treatment of severely handicapped neonates,<sup>41</sup> the countries Professor Glendon holds up as a collective "chal-

39. *Roe v. Wade's* trimesterization makes no reference to a third-trimester justification of abortion on such grounds, see 410 U.S. at 163–65, although the regulatory freedom granted the states as to third-trimester fetuses does not prevent them from authorizing late abortions on welfare-related grounds. As of 1984, eight states authorized abortions on explicitly these grounds. One of them limited such abortions to the first trimester, however. See George, *State Legislatures Versus the Supreme Court: Abortion Legislation in the 1980's*, 12 PEPPERDINE L. REV. 427, 472 n.280 (1985).

40. As of 1980, the preface to one of the leading obstetrical textbooks began sending its users the following signal:

Happily, we have entered an era in which the fetus can be rightfully considered and treated as our second patient. In this edition, we have sought to do just that. Fetal diagnosis and therapy have now emerged as legitimate tools the obstetrician must possess. . . . We are of the view that it is the most exciting of times to be an obstetrician. Who would have dreamed—even a few years ago—that we could serve the fetus as physician?

J. PRITCHARD & P. MACDONALD, *WILLIAMS OBSTETRICS* vii (16th ed. 1980).

Unfortunately, the revolutionary promise of early intervention and treatment has occasionally ended in unhappily and even tragic outcomes in which legal decision-making has played a highly controversial role. See, e.g., *In re A.C.*, 539 A.2d 203 (D.C. App. 1988) (currently awaiting decision on rehearing) (pregnant, comatose woman dying of cancer forced to undergo Cesarean section).

41. The federal regulatory battle over treatment for severely handicapped neonates began in the wake of the Indiana "Baby Doe" case, in which that state's Supreme Court refused to allow third-party intervention to save the life of an infant afflicted with Down's Syndrome after his parents refused to authorize life-saving surgery. See *In re the Treatment and Care of Infant Doe*, No. GU 8204-004A (Ind. Cir. Ct. Apr. 12, 1982), *appeal dismissed as moot*, No. 1-782 A 157 (Ind. Ct. App. Feb. 3, 1983). In response to a substantial public outcry, the Reagan Administration attempted to fit such infants within the confines of section 504 of the Rehabilitation Act of 1973. See 48 Fed. Reg. 9630 (Mar. 7, 1983); 47 Fed. Reg. 26027 (June 16, 1982). The Administration's initial, hasty attempts, issued in violation of the Administrative Procedure Act, 5 U.S.C. §§ 551, 706(2)(A) (1982),

lenge" to the United States appear much more willing than we are to consign the "defective" fetus to the "disposable" status for which she excoriates American law.<sup>42</sup>

A wider point of difference swamps the neat categorization Professor Glendon's descriptions intend. It is that, from Austria to the United Kingdom, from nearby Canada to remote Iceland, the woman who seeks and is otherwise entitled to a legal abortion will have it performed by a physician, in a hospital, paid for largely or entirely by her government.<sup>43</sup> It may well be that her decision to undergo abortion will be easy to implement only in early pregnancy, rather than as late as *Roe* has authorized. It may also be that she will have to consult someone, wait a day or a week, or in some instances share her decision-making capacity with the physician of her choice. But finally, her government will support her abortion decision in the two most equality-promoting ways that governments can—by providing her with the safest procedure available in her society and by helping to pay for it. We must not let the mesmerizing glare of *Roe v. Wade* obscure the fact that American abortion law is, as a matter of distributive justice, a comparative "failure,"<sup>44</sup> though distributive justice is not the point of Professor Glendon's comparisons.

### B. *The Domestic Context*

But anticipating, as does Professor Glendon, the Supreme Court's evolving membership, let us consider the likeliest legislative scenarios were *Roe*, indeed, to "self-destruct." Should we buy Glendon's carrot of "compromise"? The answer may depend on who "we," her potential buyers, are. Given the ambiguities of her text, the answer may also depend upon whether she is attempting to sell us one carrot or, in fact, any of the

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met judicial opposition in *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983), and, eventually, were defeated. See *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986).

Meanwhile, Congress entered the fray by enacting the Child Abuse Amendments of 1984, which attempt to proscribe the withholding of medical treatment, including for these purposes nutrition and hydration, from seriously ill newborns under standards subject to stated exceptions. The standards, which are more conciliatory toward a variety of interested constituents than were the initial "Baby Doe" regulations, are, perhaps as a consequence, more ambiguous. See 45 C.F.R. § 1340.15 (1987).

42. Professor Glendon's discussion of the foreign law treatment of fetal defects contains an especially provocative reference to the basis for Spanish judicial deference toward this excuse for abortion: "[T]here is the notion that what the pregnant woman can be required to sacrifice for the common value is related to what the social welfare state is ready and able to do to help with the burdens of childbirth and parenthood" (p. 39). This sort of humane concern for the allocative burden of child-rearing and its relation to the abortion issue would seem to be worth arguing for *a fortiori* in an American legislative as well as judicial context. While Professor Glendon has not incorporated this proposal within her argument for compromise, it seems valuable enough to be resurrected for consideration.

43. See, e.g., French Law No. 75-17 (January, 1975), Art. L-162-2, quoted by Glendon at pp. 17, 20, 156.

44. This position, including an attempt to invigorate its constitutional dimensions, is interestingly, though non-comparatively, elaborated in Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

several she seems to proffer.<sup>45</sup> Since my own preference is for the carrot represented by the engagingly pragmatic French abortion statute, I shall attempt to answer the question by examining Professor Glendon's premise that, were the Supreme Court to return abortion regulation to the states, statutes on the model of the French would likely achieve passage here.

In order to conduct this examination, I shall lay aside the reliance Professor Glendon places on public opinion polls as mirrors of either the demotic or the legislative will.<sup>46</sup> Instead, I shall focus on political and legal developments in the years following *Roe* as checks on her assessment that it is the Supreme Court's hyper-protective women's rights orientation that has usurped the popular desire for compromise involving the abortion issue, compromise that might have led us—that might in the immediate future lead us—to enact a statute very like the French. On this basis, my answer is very different from the affirmative one Professor Glendon suggests.

Recall that one of the principal intentions of French law is to help prevent the use of abortion as a means of birth control by effectuating the wide dissemination by government of information concerning other means of contraception. Has *Roe v. Wade* blocked any such effort here? Absolutely not. What positions have we adopted to further a preventive abor-

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45. One of the most intriguing aspects of Glendon's abortion argument is its diplomatic attempt to befriend readers of quite different persuasions on the abortion question by advancing various notions of "compromise" that do not necessarily build toward a single vision of the compromise that might follow a decisive repudiation of *Roe*, but seem designed to induce optimism about the post-*Roe* climate nonetheless. Since Professor Glendon is convinced that majoritarianism deserves our allegiance in some way that judicial review does not, she treats the possible return of abortion regulation to the states as providing the appropriate, judicially-conceded ground for compromise—a process-based victory for compromise, without more. Moreover, since Glendon may truly consider anything other than a nationwide pure win or loss of the abortion right for women as entitled to the status of compromise, even if it were to produce a state-by-state checkerboard of moral statuses for the fetus, a second variant on "compromise" understands the term to refer favorably to the substantive compromises that state legislatures, the experimental laboratories of federalism, might offer up. Another reading, not necessarily discordant from these two, suggests that Glendon is genuinely enthusiastic about the "moderate" European abortion statutes she has studied and sees one or more of them—she seems to want us to take our pick—as compromises we should be ready and able to obtain once *Roe* is put aside. In these ways, Glendon's reticence to define either "compromise" or her own substantive position, other than her hostility to *Roe*, gives rise to a number of possible interpretations of the reconciliation she aims to advance. Throughout, it remains interesting that Glendon refuses to treat the Court's trimesterization approach as a potent compromise of the very interests she seems content to see balkanized, so long as this is accomplished by legislative means.

46. There is an entire literature devoted to the design, generation, and reliability measurement of public opinion sampling techniques, including polling, from which one gleans, even on the briefest tour, that complexity attends each of these aspects in turn but that, among them, reliability is not the least complex. A useful discussion is found in Roper, *Are Polls Accurate?*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Mar. 1984, at 24; see also Milbrath, *The Context of Public Opinion: How Our Belief Systems Can Affect Poll Results*, *id.* at 35.

A fascinating example of the way that rhetorical shifts can affect outcome reliability is provided by a recent public opinion poll on abortion conducted by The New York Times and CBS News. When individuals were asked, "should there be a constitutional amendment prohibiting abortions?", a majority responded in the negative. When individuals were asked whether they would favor a constitutional amendment "protecting the life of the unborn child," some 20% of them changed sides. See Clymer, *One Issue That Seems to Defy a Yes or No*, *N.Y. Times*, Feb. 23, 1986, at 22, col. 6.

tion policy? At the local level, raging, sometimes hysterical debate has stifled efforts to provide sex education and family planning education that include contraceptive information for those most lacking, yet urgently in need of it: adolescents.<sup>47</sup> At the state level, there have been almost no discernible efforts.<sup>48</sup> At the national level, the newly-departed Reagan Administration mounted a campaign that mimicked its war on drugs and AIDS by declaring in favor of abstinence, and a more heavily implemented campaign to (a) deny federal funding to family planning agencies that even discuss abortion<sup>49</sup> and (b) fight for government's right to counsel only in favor of childbirth, without mention, even in the severest cases of "pro-family" impropriety (incest, for example) of abortion as a possible alternative.<sup>50</sup>

A second prominent feature of French law—one that surely avoids the necessity of most mid-trimester abortions, which are more dangerous to women and, for many, a more wracking compromise of the moral status of the fetus than are earlier ones—is the financial incentive it offers to women who abort within the first ten weeks of pregnancy. Everyone familiar with American abortion law is aware that the Supreme Court has refused to hold that the right to abortion subsumes a right to exercise that right by means of public subsidy, leaving Congress the free hand it has exhibited ever since *Roe* to restrict the use of federal funds for almost all abortions.<sup>51</sup> Absent federal reimbursement,<sup>52</sup> the majority of states have

47. When a special panel convened by the National Academy of Sciences conducted the nationwide study that resulted in the report *RISKING THE FUTURE* (C. Hayes ed. 1987), it found very little evidence of pregnancy prevention programs, or even of sex education programs that contain contraceptive information, being taught in American schools. See *id.* at 266-76. For a striking account of the Catholic Church's opposition to such programs, see Nyhan, *An Abortion Mine Field*, *Boston Globe*, Jan. 24, 1989, at 13, col. 1.

The most widely-voiced objection to sex education and counseling that involves contraception for school-aged persons is that it might encourage the initiation of sexual intercourse. As to the relationship between contraceptive counseling, sexual initiation and pregnancy, the experience of other Western industrialized countries might be of value: although U.S. teen-agers have been found no more likely to be sexually active than their European counterparts, the pregnancy rate among our teenagers is twice as high as the rate in Britain, France or Canada, three times the rate in Sweden and seven times that of the Netherlands. Moreover, it has been established that industrialized nations with the most easily accessible contraceptive services for teenagers and the most widespread formal and informal sex education programs have the lowest rates of teenage pregnancy, abortion and childbearing. See HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, 100TH CONG., 2D SESS., PUBLIC POLICIES AND OUTCOMES: A FACT SHEET OF INTERNATIONAL COMPARISONS (1988).

48. A notable exception is the state of Wisconsin's Abortion Prevention and Family Responsibility Act. See 1985 Wisc. Act 56; see also Donovan, *Will Grandparent Liability Help Curb Teenage Pregnancy?* 18 *FAM. PLAN. PERSP.* 264 (1986).

49. See Adolescent Family Life Act, 42 U.S.C. §§ 3002-3010 (1982 & Supp. III 1985).

50. See 53 Fed. Reg. 2922, 2945 (January 28, 1988); 42 C.F.R. §§ 59.8, .10 (1988). In suits brought in several cities, federal judges enjoined the enforcement of these regulations. See *Planned Parenthood Fed'n v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *appeal docketed*, No. 88-1279 (1st Cir.); *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988).

51. See *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). The most extensive analysis of these cases, containing a thoughtful attempt to locate them in the constitutional debate over welfare rights, remains Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights*

also seen fit to restrict abortion subsidies,<sup>53</sup> and some have gone even further to restrict abortion access, mooted the question of choice for the poorest and the otherwise least resourceful pregnant women.

Two other features of French law noted by Professor Glendon are the "conversation" that a pregnant woman must have with a caseworker precedent to early abortion and a statutorily-imposed waiting period, the latter subject to a hardship exception. There is no doubt that both requirements fetter the woman's autonomy and that statutory restrictions of both types have made their way into American law only to perish in the Supreme Court.<sup>54</sup> But even Professor Glendon seems sympathetic with the Court's rejection of the statutes in question (pp. 19-20), which, on top of these restrictions, contained others designed to frighten the pregnant woman so that she would not choose to abort. Thus, we do not know whether coming legislatures and the Court's changing membership will read these cases as a form of pedagogy that intends interpositions of this variety to fly constitutionally—as I believe they might—if drafters forego the ideologically-loaded anti-choice baggage that has freighted those statutes the Court has already reviewed.<sup>55</sup>

We must, therefore, reject Professor Glendon's central premise that the eradication of *Roe v. Wade* would clear the way for "compromise" abor-

*Thesis*, 81 COLUM. L. REV. 721 (1981).

52. The success of the Reagan Administration and powerful members of Congress at spear-heading the blockade of federal funds for abortion from 1977 to the present has been almost total. Since that year, amendments that carry the surname of their original proponent, Rep. Henry J. Hyde (R., Ill.) have been attached to the annual appropriation bills for the Department of Labor and the Department of Health and Human Services. As of fiscal year 1985, federal funds could only be used for abortions if the life of the pregnant woman would be endangered by carrying the pregnancy to term. The rarity of this circumstance—or, at least, the rarity of its successful and timely demonstration—is indicated by a total federal expenditure in that year of \$312,000—less than one percent of the public funds spent on abortion. See Gold & Macias, *Public Funding of Contraceptive, Sterilization and Abortion Services, 1985*, 18 FAM. PLAN. PERSP. 259 (1986).

53. As of fiscal year 1985, only 15 states and the District of Columbia implemented the policy of paying for all or most *medically necessary* abortions for indigent women, but, of these, five did so only under court order. Twenty-nine states echoed the federal policy of paying for abortions only in the case of life endangerment. None of them paid for any abortions during fiscal year 1985. In most of the twenty-nine, pregnancies that resulted from rape or incest did not qualify. *Id.* at 263-64; see also Table 3 at 263.

54. Cases that have generated constitutional review of mandatory waiting periods have included *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) and *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S. Ct. 479 (1987). Cases that have engendered Supreme Court review of statutes that prescribe the substantive content of information to be provided pregnant women in the context of eliciting their "informed consent" to the abortion procedure have included both *Akron* and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

55. Presently pending in the Supreme Court is *Webster v. Reproductive Health Service*, No. 88-605 (U.S. filed Sep. 11, 1988), which entails review of a statute containing the requirement that, prior to obtaining her consent to abortion, a physician must "inform" the pregnant woman "of the probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed." See MO. REV. STAT. § 188.039(3) (Vernon 1989). While many court-watchers predict that *Webster* will prove the beginning, if not the complete occasion of *Roe's* demise, it is not obvious that even a Court increasingly hostile to *Roe* will validate the tortuous exercise that the state of Missouri has required here.

tion legislation of the sort that France has produced. The fact is that times have changed, attitudes have hardened and pro-life politics have assumed power since the pre-*Roe* enactment of the legislative reforms that Glendon exhumes. A fresh state-by-state survey details the strength and hold of pro-life sympathy on the current legislative front.<sup>56</sup>

But even this account is a weak lens through which to view the future, for its all-too-familiar bifocular emphasis on courts and legislatures obscures the *mises-en-scène* of the coming chapter of the abortion conflict: private industry and the marketplace. It is there that I believe we must look to understand the near-anachronistic nature of the debate that Professor Glendon and I have been re-arguing and the future that most likely belongs to the abortion issue instead.

### C. *The Market Context*

The increasing incidence of infertility among would-be parents in Europe as well as the United States has generated research efforts to create chemical stimuli to fertility. One promising product of these efforts is RU 486, a French discovery, that, by blocking the reception of progesterone, can act on and significantly reduce endometriosis, the third leading cause of infertility in the United States.<sup>57</sup> This same blocking ability creates a host of other possible uses for RU 486, including the efficacious treatment of certain forms of breast cancer; reliable dilation of the cervix, reducing the need for caesarean sections; and the termination of first trimester pregnancies on a ninety to ninety-five percent safe and effective basis in private, non-clinical settings, without surgery.<sup>58</sup> Now that preliminary trials by the World Health Organization have been completed, widespread

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56. A bare month after the publication of Professor Glendon's book and shortly after Justice Powell's resignation from the Supreme Court, the National Abortion Rights Action League (NARAL) published the results of an in-depth, state-by-state analysis of the likely legislative scenario in the event *Roe v. Wade* is either overruled or substantially limited—the same phenomenon that provides the genesis of Professor Glendon's assessment of the likelihood of legislative "compromise", which she summarizes as follows: "If the issue were returned to the states today, it . . . seems likely that a very few states might return to strict abortion laws, a few more would endorse early abortion on demand, and the great majority would move to a position like that of the typical middle range of European countries. . . ." (p. 49).

NARAL's study produced a far different set of predictions, based upon a careful analysis of each state's legislative response to abortion over the 15-year period since *Roe* was decided and each state legislature's political and ideological make-up as of the time the research was compiled (1986-1987). Employing these measures, the study's over-all conclusions are that "access to legal abortion will be significantly restricted, if not denied, in at least half the states," with extremely mixed, sometimes unpredictable results in the others, and that state legislatures have not been responsive to pro-choice majorities, as indicated by both public opinion polls and, in many states, ballot initiatives on abortion. See NARAL, *BEYOND ROE: THE STATUS OF REPRODUCTIVE CHOICE IN THE FIFTY STATES* 2, 11, 13-18 (1988). (The state-by-state analysis is found at 23-97.)

57. For an English language translation of some of the reported French research on RU 486, see Couzinet, Le Strat, Ulmann, Baulieu, & Schaison, *Termination of Early Pregnancy by the Progesterone Antagonist RU 486 (Mifepristone)*, 315 *NEW ENG. J. MED.* 1565 (1986).

58. See *Influence of Abortion Critics Barring Sale of Drug in U.S.*, *N.Y. Times*, Feb. 22, 1988, at A1, col. 3.

distribution is slated for women in France, England, Sweden, the Netherlands and China,<sup>59</sup> where it is reasonable to speculate that RU 486 will virtually replace surgical first trimester abortion. At the much-publicized insistence of the government, distribution has already begun in France.<sup>60</sup>

The American response to RU 486 has been uniquely different. Since, by law, federal funds cannot be used to support research on abortion, only one study of RU 486, privately funded, has thus far been completed.<sup>61</sup> More to the point, no American-based drug company is willing to produce RU 486 at present, despite its multiple life-enhancing potential uses, and the West German company which holds the option rights to apply for F.D.A. approval has declined to do so. The reason? Right-to-life politics, which do not confine themselves to the legislative arena on which Professor Glendon has remained focused.<sup>62</sup> When the Upjohn Pharmaceutical Company began conducting research on pharmacological pregnancy preventatives, the National Right to Life Committee, which claims 2,000 local chapters, undertook a boycott of the company.<sup>63</sup> Upjohn and the rest of the pharmaceutical industry got the message. That message, out of the mouth of a National Right to Life spokesperson is, "[D]eath drugs designed to kill unborn babies have no place in America."<sup>64</sup> Thus it is that RU 486, a drug which could improve women's fertility and even save some of our lives;<sup>65</sup> a drug which, by lowering the costs of first trimester

59. For a brief moment last October, it appeared that the distribution of RU 486 would be "suspended" just after it had begun because of "pressure" from anti-abortion groups. See *Drug Maker Stops All Distribution of Abortion Pill*, N.Y. Times, Oct. 27, 1988, at A1, col. 6. France's Minister of Health then went on television with the declaration: "From the moment Government approval for the drug was granted, RU 486 became the moral property of women, not just the property of the drug company." With this, on behalf of the French Government, a principal in the company that developed RU 486, he ordered distribution to recommence. See *France Ordering Company to Sell its Abortion Drug*, N.Y. Times, Oct. 29, 1988 at A1, col. 6. The company spokesman immediately responded, "We are relieved of the moral burden weighing on our group. For us the problem is now solved." *Id.* at A5. This pas de deux must be seen as a model of political, rather than moral, choreography, a fascinating example of a kind of adroitness that has escaped development here.

60. The intricacies of the struggle over distribution of RU 486 in France, to date, are described in Greenhouse, *A New Pill, A Fierce Battle*, N.Y. Times Magazine, Feb. 12, 1989, at 22.

61. See *Influence of Abortion Clinics Barring Sale of Drug in U.S.*, *supra* note 58, at A13.

62. Professor Glendon mentions in passing the possibility that early abortion may become "a matter of controlled substances" (pp. 49-50) without offering any comparison or evaluation of the American versus European responses to this change or its fundamental importance to the abortion debate.

63. It is an interesting artifact of current pro-choice, pro-life politics that the pro-life movement has been as successful as the RU 486 story to date indicates. It has deployed as but one weapon in its arsenal a products boycott and threats, which get treated seriously, of further boycotts. The pro-choice movement, in contrast, seems either too polite or too disorganized to unleash a counter-boycott, or even to threaten one, or to campaign strenuously for support of the company's products in the marketplace—measures that, by neutralizing the force of any pro-life boycott, would give an American drug company both the groundcover and the economic boost that may be needed to sponsor RU 486's or some similar agent's introduction into the American market.

64. *Influence of Abortion Clinics Barring Sale of Drug in U.S.*, *supra* note 58.

65. It is tempting to observe the sad, if not embittering, correlation between low-level research funding and "women only" afflictions. A book which usefully reprints a graphic cartoon series that traces the saga of a man who discovers he has endometriosis, only to fall victim to the poverty of available responses, is M.L. BALLWEG, *OVERCOMING ENDOMETRIOSIS: NEW HELP FROM THE EN-*

abortions, eliminating the need for most second trimester ones, and disposing of the business on which abortion clinics thrive, is itself a potent compromise of the abortion issue, will not see approved distribution in the United States in the foreseeable future.

My own view is that just as there have been herbal abortifacients in use in rural societies since time immemorial and coat-hanger and back-alley abortions in our own, there will be RU 486 or other implantation inhibitors<sup>66</sup> available in this country, whether we choose to "see" and approve their distribution or not. How could it be otherwise, in a country in which the importation, manufacture, and dissemination of illicit drugs have become far more powerful than are any extant, or foreseeable, methods to control them and where, unlike the drugs that are the literal opiate of the people, the morality of fertility stimulants and inhibitors is a complex world of principle apart? The very existence of a private, safe, non-costly, easily duplicable implantation inhibitor such as RU 486 must ultimately change the texture, indeed, the very nature of the abortion issue by placing the question of early abortion beyond the control of courts and legislatures and into the hands of the most private of legislative, as well as nurturant, bodies: women.

However the institutional life of *Roe v. Wade* plays out, its normative essence—that early abortion should be a woman's choice—must migrate sooner or later outside rhetoric, beyond debate and into the marketplace, where it will become incapable of judicial or legislative retraction. Absent the sort of societal death and resurrection that the Canadian poet-novelist Margaret Atwood has recently seen fit to conjure,<sup>67</sup> early abortion must evolve into the same genre of private, though contextually and culturally conditioned, choice as whether I shall follow a religious life, how I may respond to my moral failures, and if I will learn from my past mistakes. While I am optimistic over the eventual availability in this country of RU 486, its pharmacological progeny and its relatives, I am just as surely

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DOMETRIOSIS ASSOCIATION (1987).

66. So far as I know, the term "implantation inhibitor" is my own. Unlike the barrier methods of pregnancy prevention known as "contraception", RU 486 acts by preventing the reception of the progesterone that is secreted after fertilization, thus disallowing the body's preparation of the uterine lining for implantation. Therefore, the moral, political, and even the rhetorical status of RU 486 is unlike that of contraceptives that prevent fertilization. Its intervention at the post-fertilization/pre-implantation stage of pregnancy suggests it may also be entitled to a different status from abortion, which terminates the development of an implanted embryo. Use of the term "abortifacient" is both inaccurate and more loaded than I would prefer, though "post-coital contraceptive," the alternative most commonly employed, is loaded in the opposite direction politically and is somewhat more inaccurate. For a useful discussion of some of the physical and metaphysical aspects of RU 486, see Cahill, 'Abortion Pill' RU 486: *Ethics, Rhetoric and Social Practice*, HASTINGS CENTER REP. Oct.-Nov., 1987, at 5.

67. Ms. Atwood's recent novel, *THE HANDMAID'S TALE* (1986), offers us an America purged of its ambivalence toward the abortion issue—and much else—by a fundamentalist religious revolution which has overthrown democracy, the family, anti-establishmentarianism and the private-public distinction in service of a newly-rigidified culture enslaved to the twin values of domination and fertility in service of the meta-values of religiosity and ongoingness.

pessimistic that our government will legalize their distribution in the near future. Because I am also pessimistic about the likely passage of a reasonable number of "compromise" state abortion statutes of the French variety, I regret the loss of support for women, confidence in women, and concern for women that the post-*Roe* legislative era seems likely to reflect. A great deal of misery could be borne by a great number of women during a potentially long moment in our history if the safety of *Roe* disappears soon and the safety of a pharmacological alternative to legal abortion arrives late.

For this reason, among others, I regret the minimal attention Professor Glendon has accorded the comparative treatment of sex and family planning education and pregnancy prevention in her surveyed countries. Interstitially, her discussion provides hints of the efficacy outside the United States of these means to avoidance of the high-pitched, overpopulated tragedy of circumstance that abortion has here become. While the moral and political paths to new modes of dealing with these matters might be no easier to traverse here than that of abortion regulation itself, our unsystematic, haphazard attention to them could have provided a comparativist like Professor Glendon with an opportunity to reshape current awareness. Because "Abortion Law" is shaped instead around Professor Glendon's intemperance toward *Roe v. Wade*, this opportunity to move outside its immediate shadow to an extremely useful end has been unfortunately foregone.

#### IV. DIVORCE LAW

##### A. *Divorce Grounds*

Let us now turn to Professor Glendon's consideration of "Divorce Law". Here, Professor Glendon begins by sounding her now-familiar themes of rights-skepticism, male irresponsibility, and "democratic compromise," though the last of these appears to be an animal that has changed its spots since appearing in the previous essay.<sup>68</sup> Carrying forward a thesis of her mentor, the late Max Rheinstein, Glendon argues that the transformation of American divorce law from a "'democratic compromise'"<sup>69</sup> that appeared "strict . . . on the books" (p. 66), but was rather easily manipulable, to the present regime, liberally permitting non-

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68. Professor Glendon's call for the reimposition of fault in "Divorce Law" runs head-on into her espousal of majoritarianism in "Abortion Law." It is not the Supreme Court or judicial review, after all, that is responsible for no-fault divorce but the people's representatives in each of the United States. Of course, the people can make mistakes and there is no reason not to lobby them, as Glendon may be taken to be doing here. The problem, then, is a part of the theoretical elusiveness that surrounds Glendon's concerns about majoritarianism and various aspects of federalism. Her abortion argument leads one to suppose that she would be content if abortion rested in legislative hands, whatever the outcome, while her argument over divorce grounds is based on her distaste for the outcome itself.

69. Glendon cites M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 258 (1972).

consensual divorce on "no fault" grounds, is a pernicious mistake. This is so, she contends, because marital dissolution without fault-finding, combined with the removal of certain weaker brakes on the divorce system,<sup>70</sup> renders marriage "terminable at will" (p. 81). Moreover, no-fault "would appear always to relieve everyone of personal responsibility for the collapse of a marriage" (p. 79), allowing divorce to become a matter of right, in "the popular sense" (p. 81).

Glendon pauses long enough to note that the fault-based system had its costs, including the aggravation of bitterness in contested proceedings and the commission of perjury in uncontested, collusive ones, with a concomitant promotion of "disrespect" for the legal system (p. 65). Nevertheless, she holds, "[d]iscontent with fault-based divorce seems to have been felt more acutely by mental-health professionals and academics than by the citizenry in general" (p. 66)—a conclusion based on no cited support.<sup>71</sup> Related criticisms follow. Waiting periods of a year or less contribute toward the availability of divorce "on demand" (pp. 75, 81) in "most" (p. 81) American jurisdictions, depriving women of the bargaining chip they would have in negotiating if the timing of non-consensual divorces were statutorily extended. In no American jurisdiction may a judge deny a divorce on "hardship" grounds—another arrow in the quiver of divorce as a "right."

Unlike the detailed survey included in "Abortion Law," Glendon's presentation of the comparative law of divorce is pieced together from fewer and more disparate examples. This seems largely to result from her conclusion that, while there are differences between American and foreign law that support her critique, the practical effect of foreign law on the imputation of fault is, except rarely, the same as our own. Still, Glendon prefers what she finds elsewhere to our version of liberal divorce, whether her preferences run to lengthy waiting periods for non-consensual divorce, the possibility of utter denial for hardship or "the story" told by English and continental statutes when they abjure reference to no-fault, embrace the concept of marriage with explicit enthusiasm, or regret the necessity of divorce.

While this view of divorce grounds amounts to a free-standing argu-

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70. Two such brakes for the imposition or reimposition of which she argues in "Divorce Law" are a hardship defense and a requirement of lengthy delay in the case of non-consensual divorce. My counter-arguments are presented in the balance of this Part (A).

71. Glendon's view that no-fault divorce reform was the result of "discontent . . . felt" (p. 66) by a couple of narrow interest groups, rather than having been the need or desire of a wider and more representative body of "the citizenry in general" (p. 66) parallels her view that our present abortion law was endorsed by the Supreme Court "at the instance of small elites" whose position does not comport with the popular will, as indexed by public opinion polls. *See supra* notes 21 & 46 and accompanying text. For a detailed recounting of the politics of divorce reform, describing the involvement in the legislative process of a considerable variety of groups beyond those mentioned by Glendon, see H. JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988).

ment, it is developed here with an obviously instrumental regard for its relationship to the chapter's second half, which contains Glendon's critique of the child-related aspects of American divorce law. This relationship, she argues without cited support, is a causal one: a divorce process that fosters irresponsibility toward the dissolution of marriage promotes irresponsibility toward the welfare of children. Having thrown down this gauntlet, Glendon moves to what is fast becoming common ground for policy-makers and family law scholars—sharp criticism of the highly discretionary, shockingly low awards that have come to characterize the American judiciary's response to contested child support requests; the impact of such awards on the expectations that color private settlements; flaccid judicial review of such settlements; and grossly inadequate efforts to curb chronic defaults in the payment of the support that is awarded.<sup>72</sup>

Professor Glendon draws her constructive inspiration once again from foreign law. Her resultant proposals or endorsements include child support guidelines to replace the unstructured judicial discretion under which children have suffered, tax deductible status for post-divorce child support payments, and a "children-first" principle<sup>73</sup> to be applied to the allocation and distribution of family income and assets upon divorce. To these, Glendon adds her approbation of child support subsidies and collection devices on the continent. Moreover, since such subsidies and related welfare benefits exist wholly apart from divorce, she annexes a brief discussion of the child-related subsidies available in various European social welfare states to her discussion of those benefits that are specifically triggered by divorce.

Professor Glendon's efforts here—to elicit better policy-making concerning children, to include their welfare within the wider, public frames of our political life and to reveal to us models for these behaviors that exist elsewhere—are laudable, especially as children become, for the first and last time in this book, her direct focus. But, once again, my enthusiasm for her goals does not lead to a willingness to endorse the specifics of her program.

First, as a veteran practitioner of family law under both fault and no-

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72. The past decade has seen the publication of several studies of these interrelated phenomena, each, by happenstance, dealing with a different part of the country and all, despite quite considerable methodological differences, confirmatory of the misrule of law in the post-divorce governance of children's lives. See, e.g., D. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979), L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); McGraw, Stern & Davis, *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443 (1981-82); McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986).

73. In "Divorce Law," Professor Glendon actually treats "children-first" as both a principle, as I shall go on to discuss, and as a policy that would make the re-design of the lives of minor children the central concern of all divorce cases involving them. I have not given consideration to her policy proposal in this review because my responses to it would require a more complicated dissection than there is room for in the present format.

fault regimes, I part with almost every aspect of her empirical and normative "story" of no-fault grounds as a primary source of irresponsibility toward children. Rather, in my experience—a relatively standard experience that was commonly recounted to state legislators out of the mouths of lawyers, judges, and "citizens" whose concerns for divorce reform Glendon negates<sup>74</sup>—the punishing attributes of fault-based litigation acted as a shunt on the scarce resources of families and the legal system, deflecting time, effort, money, and energy away from children and the careful restructuring of their futures.

The directive to find fault functioned as a license for aggression, as efforts that commonly included the abuse of discovery were mounted to dredge up the behavioral sludge at the bottom of failed marriages.<sup>75</sup> Divorce fees reflected these efforts, whether successful or not, draining away funds from the parties' children (or, more accurately, redistributing them to their lawyers' children) in the service of what often proved to be a futile end, except where retribution, in the form of expense, humiliation or embarrassment, served as an end in itself. The futile end was the need to determine that one marital partner was "innocent" of any legally cognizable wrongdoing, while the other was "guilty" of a significant and unwarranted amount of it, for divorce law's ecclesiastical roots had been left dangling in a peculiarly uncultivated corner of the civil law. There, throughout its long, fault-based history, divorce law neglected to develop a theory of comparative fault or contributory fault or, indeed, a taxonomy of faults. Instead, the desiccated pre-modern "guilt"- "innocence" dichotomy was left, unaided, to fend off the intolerable pressures created by modern

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74. Support for my view is found in H. JACOB, *supra* note 71, at 383.

75. In my eye-witness observations of the use of discovery prior to no-fault, I frequently encountered the days-long or multiple-deposition "fishing expedition" into the hitherto-private lives of one or both parties to a failed marriage. Sometimes it seemed the deposition would replicate with exactitude the actual length of the marriage, in the manner of the infamous Andy Warhol 8-hour movie "Sleep". In these instances, the length of the deposition sometimes seemed directly related to—indeed, dependent on—the extent of the assets available to pay for it, rather than the heinousness of the marital conduct "discovered." Other techniques employed not infrequently included ferociously expensive private detectives, or, in cases where detectives were out of reach, amateur "plants." It was not an unknown practice for parties to use their own children, with or without the promise of monetary reward, to spy on departed mates.

Drawing judicial lines around abuse of process in this morass ranged between futile and impossible. Lawyers were at hazard, after all, if they failed to discover fault and that hazard did not end when a quantum of fault was discovered that would satisfy the statutory prerequisite, since greater amounts or more exotic data might influence the settlement potential of a case, as does damaging, admissible evidence in other types of litigation.

In at least those states in which "the conduct of the parties" is a statutory factor in the equitable distribution of marital assets, the search for bad conduct is still conducted through the back door of property disputes, rather than through the front door that fault grounds provided. *See, e.g.*, MASS. GEN. LAWS. ANN. ch. 208, § 34 (West Supp. 1989). Equitable distribution offers opportunities apart from this for the commission of financial mayhem through discovery. Still, old-style, fault-based discovery proved unjustifiably painful in ways that the discovery of financial resources more often does not. No one ought to invite its return for other than stupendous benefits to law or its subjects. Professor Glendon's argument for the return of fault falls far short of this test.

divorce's dual assimilation into the nuanced, self-conscious world of moral complexity and the teeming, aggressive realm of amoral advocacy.

Instead, practical solutions were concocted. Divorce tourism—the Nevada divorce, the Caribbean divorce—mushroomed as an option for those who could afford it, spawning a generation's worth of chaotic, doctrinally irresolute litigation involving the validity of these escape routes from the backyard hell of fault.<sup>76</sup> For the poorest, who could not afford to flee, there was at least accorded a constitutional right to be heard on the question of divorce, though Professor Glendon is unsympathetic to the Court's interpretive response (p. 78).<sup>77</sup>

Finally, there were the vast multitude of cases that ended consensually, however they may have begun. But due to the inexorable need to “prove” fault, even they did not receive a dignified burial. Tawdry, stylized fault-finding rituals, including those designed to introduce sham evidence, marked their demise, then to be memorialized on the public record, to the disgust or dismay of many of their participants, on both sides of the bench.<sup>78</sup>

None of this is to say there were not marriages in which one spouse's conduct appeared grievous; the other's, seemingly blameless. Nor is it to deny that some women—as well as some men—benefited by the presence of consent, and even collusion, as a bargaining chip. But the calcified defi-

76. The chief problem that plagued migratory divorce, as it was commonly known, was the problem of collateral attack: who had standing and under what circumstances to seek the non-recognition by one jurisdiction of a divorce judgment issued by another? By the time the wide adoption of no-fault divorce reduced the pressure to migrate, most of the possible changes on the problem had been rung. Courts, including the Supreme Court, had considered the full faith and credit aspects, *see, e.g.*, *Williams v. North Carolina (I)*, 317 U.S. 287 (1942); *Williams v. North Carolina (II)*, 325 U.S. 226 (1945); *comity, compare In re Steffke*, 65 Wis. 2d 199, 222 N.W.2d 628 (1974) *with Rosensteel v. Rosensteel*, 16 N.Y.2d 64, 209 N.E.2d 709 (1965); the interstate effects of *ex parte* divorce, *see, e.g.*, *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); and the basis for collateral estoppel, *see, e.g.*, *Kazin v. Kazin*, 891 N.J. 85, 405 A.2d 360 (1979).

77. The case decided by the Supreme Court in favor of an indigent's right to obtain a filing fee waiver in order to get a divorce plea heard was *Boddie v. Connecticut*, 401 U.S. 371 (1971). Decided before a great number of states had adopted no-fault grounds, it was the Court's sensitivity to state monopoly over the dissolution of marriage that seems to have occasioned its heightened concern, rather than a desire to “sanction” a constitutional “right to divorce” symmetrical with a “constitutional right to marry successively as many spouses as one wishes” (p.78), which is Professor Glendon's companion summary of the Court's one other significant doctrinal move in the direction of equal protection for the marrying poor, *Zablocki v. Redhail*, 434 U.S. 374 (1978). The Court's special solicitude for the nature of the states' marital monopoly and the dilemma of being caught in its lock-up was underlined only two years after *Boddie*, when the Court declined to render a similar holding in a bankruptcy case involving the same due process denial because of another filing fee requirement. *See United States v. Kras*, 409 U.S. 434 (1973) (no constitutional right to fee waiver in bankruptcy).

78. Toward the end of the fault-based divorce era in Massachusetts, the late Hon. Haskell J. Freedman served notice at a major gathering of divorce practitioners that he would hold in contempt any lawyer who brought before him any divorce case in which fault was sought to be based on what had become a standardized litany: the allegation that a husband had pushed his wife against the refrigerator. Professor Grace Blumberg has condensed this sort of experience into the view that lawyers are the principal winners under no-fault reform because they “and judges are no longer required to systematically compromise professional ideals in the routine management of divorce cases.” Blumberg, *New Models of Marriage and Divorce*, in *CONTEMPORARY MARRIAGE* 349, 352 (K. Davis ed. 1985).

nitions of "fault", the primitivity of the guilt-innocence dichotomy, and the demeaning nature of the formal and functional undertakings made it obvious that fault had outlived its role as the pivot of divorce law in this society.

Nor is the logic that underlies our experience on Professor Glendon's side. In most cases, fault-finding between adults is not congruent with doing right by children. The party "guilty" of marital misconduct may fail to support the children, but his failure may be involuntary. The guilty party may have a lesser income to tap than that of her spouse. The guilty party may be the better custodian. Neither party, or both, may be guilty of any form of wrongdoing. No matter: their capacities to meet the needs of their children, financially and in all other ways, should determine what they and what courts should do. Moreover, divorcing persons may feel more or less guilty, more or less responsible for the dissolution, and more or less responsible for their children, depending upon a congeries of factors more deeply related to their character structures, their cultural experiences, and their belief-systems than to the state's imputation or non-imputation of fault, while the public pronouncement of divorce norms may be a matter of direct, or even inverse, influence on them.

Despite the energy behind this rendition, nothing I have said about fault-based divorce bursts into the open as news. Indeed, that very fact—that fault-based divorce spluttered to a well-earned rest—counts against Professor Glendon's efforts to resurrect it within the first generation of its demise. It is because the pain of our experience with fault is both so recent and so powerful that her call for a return to fault-finding demands a heavier burden of proof than her arguments on its behalf have met.<sup>79</sup> Moreover, putting our own experience to one side, Glendon's exposition of European divorce law and its application describes no connection between the grounds on which divorces are obtained and their economic consequences for children.

The narrower reforms she would implement seem to me hardly less dubious propositions. To advocate that a "hardship" defense impose a hardship condition—the conclusive denial of divorce—appears resoundingly unjust without a discussion, absent in this book, of what types of hardship might demand such a draconian response. As for waiting periods for nonconsensual divorce, I do not see why this requirement, with its obvious potential as a bargaining chip, could not be a source of harm as well as good, burdening a reasonable party who holds any preference for

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79. Of course, not everyone who has thought about no-fault and the possible return of fault sees the matter as I do; there are others besides Professor Glendon who have had substantial second thoughts about no-fault. For two further views—one on each side—see Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 853-67; Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987).

expedition as much as it would burden an unreasonable one.<sup>80</sup> Lastly, a significant number of American jurisdictions have retained multi-year waiting periods for nonconsensual divorce, so that, whether or not the imposition of sustained delay is normatively sound, this aspect of divorce law cannot be counted an American "failure" for which foreign law provides a remedy.<sup>81</sup>

Indeed, while I do not contend that the state of American divorce law is rosy or that its statutory development is either satisfactory or complete, I come away from the first half of "Divorce Law" in no way assured that its recommendations form the basis for the pedagogical or practical improvements our law now needs. More importantly, Professor Glendon's fault-related proposals appear less of a help than a hindrance to the child welfare reforms to which the balance of the essay is devoted: statutory child support guidelines, tax deductions for child support, and a "children-first" impress on the post-divorce allocation of family wealth.

### B. *Child Support Reforms*

As to the first of Professor Glendon's child support reform recommendations, the matter is already in hand. The Congress, as she notes (p. 87), has enacted the carrot-and-stick Child Support Enforcement Amendments of 1984, which became fully effective at the end of 1987. These require that every state adopt child support guidelines of at least an advisory nature or lose its eligibility for federal AFDC funding.<sup>82</sup> This same legislation mandates the use of automatic wage-withholding for defaulting obligors, using the same funding condition as a goad, and has propelled the federal government even further into the business of child support collection—a noteworthy compromise of traditional notions about federalism and family law, although Professor Glendon does not observe its importance<sup>83</sup>—by authorizing the use of federal tax refunds to offset child sup-

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80. In arguing for lengthier waiting periods, Professor Glendon does not consider recent, insidious developments in the unwritten rules of scurrilous divorce negotiation. According to these "rules," some husbands who want to exit marriage on as close to their own terms as possible raise spurious claims to child custody, pursuing those claims—sometimes successfully—to improve their bargaining positions by wearing down their wives emotionally as well as financially. This maneuver, which could certainly be employed to gain the bilateral consent that expedited divorce requires, is discussed by several recent authors including L. WEITZMAN, *supra* note 72, at 237-43. Glendon mentions the problem elsewhere in her discussion but deeply discounts its potential significance (pp. 99-100).

81. Each year, Doris Jonas Freed, the doyenne of American family law, intrepidly tracks the statutory and doctrinal status of family law state-by-state. In her latest survey, co-authored by Timothy B. Walker, 18 states required separations of one year or longer as grounds for non-consensual divorce, 10 of them requiring between 2 and 5 years. See *Family Law in the Fifty States: An Overview*, XXI FAM. L.Q. 417, Table 1, at 441-42 (1988).

82. 42 U.S.C. § 667 (1984); see also 45 C.F.R. § 302.56 (1987). California has already gone beyond the federal standards by providing for *mandatory* minimum child support awards. See CAL. CIV. CODE §§ 4720-4732, as amended by Act of July 30, 1985, ch. 379 § 4, 1985 Cal. Legis. Serv. 394 (West).

83. The carrot-and-stick approach to federal involvement in the child support area, traditionally treated as a preserve of the states, is in its earliest stages of development, and it is still too early to

port arrearages.<sup>84</sup> The extent to which the guidelines federal law has elicited will effectively supplant the abysmally low child support orders that American judges have routinely awarded, so long as the judicial attitudes that have occasioned them remain rife, is not beyond argument but may be unfair to assess, as the guidelines are essentially new. Professor Glendon seems cautiously optimistic about them (pp. 88-89), even in the advisory form that the federal mandate permits, and here I shall follow her lead.

We part company again, however, over her second recommendation, a post-divorce tax deduction for child support (pp. 95-96, 102). Although I am painfully aware of the difficulties that obtain when all but wealthy divorced couples try to shape, maintain and, if necessary, enforce income transfers sufficient to support two households and their dependent members, Glendon's tax deduction for post-divorce child support payments cannot act on this situation without creating both moral hazard and significant cost, absent any reliable promise of social benefit to be derived in exchange.<sup>85</sup> As it happens, the present and foreseeable climate of tax policy and politics is so heavily suffused with antagonism towards consumption-oriented tax expenditures that this proposal is likely to prove as unadopt-

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evaluate its overall significance in combating both the poverty and inequity that afflict the latest generation of the children of divorce. Nonetheless, it is already apparent that the federal presence is improving the economic climate for these children. An interesting example of expeditious federal follow-up is provided by Brackney, *State Child Support Laws: Compliance with the 1984 Federal Amendments* (Office of Child Support Enforcement, Family Support Administration, U.S. Department of Health and Human Services, 1986), a study which both monitors compliance and also provides useful information to the states on how to achieve it.

84. As to the interception and application of federal tax refunds to child support arrearages, see 42 U.S.C. § 664 (Supp. IV 1986); I.R.C. § 6402(c) (West Supp. 1989). For similar treatment of the earned income credit, see *Sorensen v. Secretary of Treasury*, 475 U.S. 851 (1986). On the use of state refunds, see Brackney, *supra* note 83; for state-by-state statutory authorizations, see *id.* at 1-109.

85. Glendon does not make it clear whether she is recommending the utilization of the tax system to provide a pure subsidy for child support obligors, as would be the case if there were to be no commensurate attribution of income to caregiver-recipients, or whether she intends the transfer of child support to create taxable income to the recipients, parallel to the treatment of alimony under present law. While the lavish expense of a pure subsidy in favor of middle class and upper class divorced obligors bears the heaviest burden of justification in a nation of thirteen million children living in poverty, other problems abound. Horizontal inequity—the decision to favor divorced obligors over those in intact, child-supporting relationships—is one of them, made worse by the incapacity of a deduction to sort obligors who cannot otherwise pay from those who will not otherwise pay. Moreover, in anything other than a flat-tax system, the regressivity of such a proposal must be a serious concern.

Setting aside theory for practice, there is no available evidence that the existence of the alimony deduction produces compliance on the part of alimony obligors—indeed, the factual record on compliance is dismal—to the extent that a stronger and cheaper set of enforcement mechanisms might. Moreover, the practical wisdom of throwing expensive carrots rather than less expensive sticks at the problems of post-divorce default is strongly debatable, not least on the pedagogical grounds Glendon advances at other points. While the sensible symmetry of the second, deduction-offset-by-income scheme is a less expensive carrot, it suffers practical disabilities of its own. One is that the identical treatment of alimony and child support denies post-divorce couples the opportunity to derive the optimal taxable/non-taxable mix that is at least possible under current law. A second is that a shift in the burden of taxation to child support recipients shifts the likelihood that these recipients—generally women, often unrepresented or inadequately represented—will bear the ultimate burden of the tax, with reduction in the net child support available to them on that account.

able as any in the book,<sup>86</sup> even if such unwholesome aspects as its regressivity were to be redressed.<sup>87</sup>

The third of Professor Glendon's recommendations, a "children-first" principle, is by far the most novel, substantial, and, I find, controversial. Therefore, I most regret its appearance in "Divorce Law" in barest outline form. The idea that she delineates, based upon a 1984 modification of English law,<sup>88</sup> would grant to children a priority claim at the time of divorce to all parental income and assets for the purpose of having their "needs" satisfied.<sup>89</sup> Given Glendon's concern about the effects of formal divorce procedures on private settlement and her further concern to have judges carefully review parental agreements before accepting them, it is clear she intends this "children-first" principle to be applicable to out-of-court settlements as well (pp. 97-98, 103).

The first element about this "principle" worth noticing is that it is designed to perform a lot of heavy lifting. It is meant to displace the operation of marital property distribution statutes (p. 95). It is designed to set aside spousal support claims even, implicitly, under circumstances involving hardship (p. 95). Indeed, to be effective, in the manner that child support guidelines are desired by Professor Glendon and some of the rest of us to be effective, "children-first" must assume the role not of a principle but of a rule. Although Glendon chooses not to characterize it as such, "children-first" therefore must have the status of a claim of right, one that should be understood to displace the claims to support, property or both that women have been struggling to gain or retain throughout the no-fault

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86. For examples of current tax policy thinking, see McIntyre, *Fairness to Family Members Under Current Tax Reform Proposals*, 4 AM. J. TAX POL'Y 155 (1985); Thuronyi, *Tax Reform for 1989 and Beyond*, 42 TAX NOTES 981 (1989).

87. The regressivity problem could be assuaged by phasing out the child support deduction as income rises, perhaps using the dependency deduction of the Internal Revenue Code of 1986 as a guide. See I.R.C. §§ 1(g), 151 (1986). The equity problems inherent in the decision to subsidize are, however, intractable.

88. See Matrimonial and Family Proceedings Act, 1984, ch. 42 § 25(1). It will be interesting to see how this provision comes to be interpreted in repeated application, particularly on account of its recurvate elements. Section 25(1) tells judges that, in exercising their discretionary powers over divorce, they should give "first consideration" to the "welfare" of minor children. Subsection (3), which further elaborates the child-related factors for judges to consider, tells them to exercise their powers by having "regard" for the adult-related factors set forth in the preceding section, one of which is "the financial needs . . . which each of the parties . . . has or is likely to have in the foreseeable future. . . ." § 25(2)(b).

89. Professor Glendon outlines "children-first" as follows:

[T]he judge's main task would be to piece together, from property and income and in-kind personal care, the best possible package to meet the needs of the children and their physical custodian. Until the welfare of the children had been adequately secured in this way, there would be no question or debate about 'marital property'. All property . . . would be subject to the duty to provide for the children. Nor would there be any question of 'spousal support' as distinct from what is allocated to the custodial spouse in his or her capacity as physical custodian. In cases where there is significant income and property left over after the children's needs have been met, the regular system of marital property division and spousal support law could be applied as a residual system.

(p. 95).

era. Thus, the substance needed to define the actual workings of "children-first" becomes essential to meaningful assessment of its costs and benefits and essential, as well, to an assessment of the likelihood of its success in application when divorcing parties represented by counsel—as their children typically are not—set about to bargain in the shadow<sup>90</sup> of "children-first" in the 90 percent of all divorce cases that, as Glendon reminds us, are settled out of court.

But there is no way to tell from Glendon's abstract account how "children-first" is intended to operate on the ground. The English model, whose statutory provisos are extremely similar to those in both our Uniform Parentage Act and Uniform Marriage and Divorce Act, does not, without more, reveal differences which Glendon may wish to advance.<sup>91</sup> Moreover, the public benefits that help to defray in social welfare economies some of the most significant costs of raising children are unavailable here, thus widening the likely contours of "children-first" in the course of its intended transplantation. Moreover, questions of priority and entitlement abound. Should the children of a first marriage, or older children generally, have priority over those of a later marriage, or younger children generally? If law school for mother depends on public rather than private university for her offspring, who goes where? Is the family home to be held in a constructive trust for its middle-class child residents under "children-first"? Must present assets be set aside to defray all of the anticipated future expenses that children may spawn?<sup>92</sup>

Professor Glendon may be saving these details for another time and place, which is surely her right. A lecture series is entitled to move to the steady beat of the metronome that tacitly recalls its origins, leaving the reader inspired to probe further the ideas that are raised as it goes. The consequence that attends the conclusion of "Divorce Law," however, is that any full-scale evaluation of its most novel suggestion, a "children-first" principle, must await another day. Meanwhile, our recently launched experiment with advisory child support guidelines, a less radical

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90. We owe this phrase, with its valuable easement over a particular conceptual space, to Robert Mnookin and Lewis Kornhauser, who first introduced it in *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

91. Compare Matrimonial and Family Proceedings Act, 1984, ch. 42 § 25(3) with Uniform Parentage Act § 15(e), 9B U.L.A. 295 (1973) and Uniform Marriage and Divorce Act § 309, 9A U.L.A. 147 (1973).

92. It should be clear from these examples that, whether or not the potential intrusiveness into post-divorce reorganizations is quite as new or as powerful as I suggest, it seems considerable. Moreover, it enters a picture already disordered by a lack of clarity or consensus about the appropriate contours of private autonomy and public intervention into the child placement and child support aspects of these reorganizations. The disorder is further magnified when set against the norms we use to deal with non-divorcing families. Interesting pieces of this puzzle, as it exists outside of "children-first", may be found in *Childers v. Childers*, 89 Wis. 2d 592, 575 P.2d 201 (1978); J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983); and the most controversial of the semi-ubiquitous "Best Interest" trilogy, J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). (See also the Epilogue to the 1979 edition.)

but nonetheless far-reaching and salutary reform deserves our committed attention. Moreover, we have much to do to improve the workings of our alimony and equitable distribution statutes, though the second half of "Divorce Law" leapfrogs over our inequitable and inadequate support of the women whose children Professor Glendon seeks to aid.

#### V. HERMENEUTICS AND PHILOSOPHY REVISITED

The final chapter of *Abortion and Divorce in Western Law* constitutes a rather dazzling attempt to weave together the various argumentative, prescriptive, and interpretive strands of the chapters on abortion and divorce by re-framing their relationship to the philosophical and hermeneutical warp and weft of the Introduction. In it, Professor Glendon lays some eighteenth century political philosophy into her design in order to explain how it comes to pass that American law and public policy have placed so little value on "developing life" (p. 141) and "responsibility in personal relationships" (p. 141), while the continental and, to some extent, the English "story" have been so different. Swiftly, and with an enviable economy of language, Glendon shuttles back and forth from the European and English Enlightenment to ours, from the eighteenth century to the present, from politics to law to history and then to philosophy while we, fascinated, watch her bind all of this to the earlier material by means of a single narrative thread.

That thread is an attempt to explain that the relative indifference toward the welfare of fetuses and dependent children that Glendon attributes to our contemporary legal system is rooted in our unswerving allegiance to the idea and the ideal of the "free, self-reliant, self-determining individual" (pp. 116-117) within the philosophies of Hobbes, Locke and, due to a common oversimplification, Mill,<sup>93</sup> while on the continent the philosophy of Rousseau, among others, has continually nourished a more communitarian tradition, reductive of individual sovereignty but augmentative of responsibility under the aegis of a more child-protective state. In a final burst of artisanry, this thread is wrapped around and neatly tied to the rhetorical-pedagogical strand that has run through the entire text, as Glendon extols the 1789 Declaration of the Rights of Man and the Citi-

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93. While Glendon's economy of language and her compression of ideas in this summary chapter allow her to present a truly remarkable, panoramic view of the history of English, American, and continental political philosophy as a platform for some of her ideas about pejorative differences in these legal cultures, the retro-fitting that is needed to accomplish her didactic purposes entails a variety of costs. One is that the philosophy and influence of John Locke is essentially obliterated from the American tradition: he is never allowed to emerge from behind the shadow of Hobbes, an arrangement that is at odds with some long-established views, *see, e.g.*, G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 8, 14, 29, 48, 151, 162-63, 283-84, 289, 292, 348, 370-72 (1969). Moreover, Glendon's interesting commentary on Mill ends with reference to his forgotten sponsorship of state intervention against irresponsible parents, but her quotation from his elegant thoughts on parental responsibility (p. 123) redounds to the unattended detriment of her abortion argument.

zen and the Napoleonic Code for expressing a hortatory idealism within law, thereby fulfilling law's constitutive role within the Geertzian hermeneutical framework in a vocabulary that Americans with "the vision to imagine a better way to live" (p. 142) should cause our law to emulate.

It should be apparent, even from this bare rendition, that the aesthetic appeal of Glendon's summation is considerable. It should also be apparent that her argument here, as throughout, has a far more ambitious reach and is more stimulating than almost anything that passes under the banner of family law in the professional literature. But it should ultimately be apparent that her comparativist "challenge" places too much of history, law, politics, and private behavior beyond the periphery of her argument to be sustainable in its present, allusive form. This is nowhere more the case than in the capstone chapter under review.

However elegantly it fits her design, Glendon's narrative thread cannot bear the weight of her argumentative conclusion: that two dichotomous, plenipotential "isms"—individualism, in the United States, and communitarianism, in her other surveyed countries—are singularly responsible for the differences she has noted between abortion law; divorce law; the rhetoric of law; and the society-specific inscription of law-as-a-behavior-reinforcing-message-about-culture. For new reasons and ones that have already adhered as this theme has been rehearsed throughout the book, Glendon's dichotomous difference thesis finds itself enmeshed in severe difficulties of several varieties by the end of its final restatement.

For one thing, it has become clear to the reader that "individualism" and "communitarianism" have no fixed meanings in the text. Rather, Glendon treats the two "ism's" as the bloated slaves of her argument—now, causing them to appear as aspects of political philosophy; then, as value judgment; now, as behavioral cause; then, as social effect. Moreover, so vast is the descriptive status of the two that they appear to have been made to swallow all the other "isms" that could account for two hundred years worth of cultural difference,<sup>94</sup> as well as alternative claims and interpretations involving issues of cross-cultural origin, value, and meaning.<sup>95</sup> Indeed, although they are treated, superficially, as symmetrical (*our*

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94. These other "ism's" must surely include a significant, though culturally differentiated, role for Protestantism, Catholicism, secularism, capitalism, pluralism, elitism, and, particularly on the continent, both socialism and communism. Unconstrained by ism-itis, one would want to look deeply into the respective roles of interest-group dominated two-party politics in the United States and small-party coalition politics in Western Europe, among a host of other relevant concerns.

95. Glendon's stark claim that Anglo-American philosophy was the true progenitor of individualism is severely challenged on familiar social-historical grounds in 1 *A HISTORY OF PRIVATE LIFE* (P. Aries & G. Duby eds. 1987); 2 *id.* (1988), 3 *id.* (1989), and on more original literary-historical grounds in M. KUNDERA, *THE ART OF THE NOVEL* 67–68 (1986; English trans. 1988). Her ascriptions of negative value to some notion of individualism are undertaken without recognition of the culture-sensitive relationships of political individualism to, for example, its psycho-social other, personal individuation. While hardly a text on the subject, such Supreme Court cases as *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) participate in our recognition of this connection. Moreover, it seems especially odd

culture has demoted the private and communal self through individualism, while *other* cultures have improved themselves under communitarianism), the symmetry is only skin-deep: Glendon presents communitarianism uncritically, as a fount of wise governance, while she treats individualism as having developed a schizophrenic stranglehold on our culture, being responsible, on the one hand, for "self-reliance, individual liberty, and [a] tolerance for diversity" (p. 114) and, on the other, for "selfish indifference, isolation, and nihilism."

Glendon's cartoonish depiction of individualism as an outsized, ill-tempered hulk is meant to serve as an unmasking of the true villain in the last act of the play, the villain responsible for the "failures" of American law that she has exhibited to the reader in the earlier portions of the book. But the revelation of this scapegoat should not distract us from the unsatisfactory nature of the claims of failure themselves.

Let us take as an example the negative ascriptions of "selfish indifference," "isolation" and "nihilism"—individualism run amok, as it were—and superimpose them on two of the failed claims of the abortion chapter. One of these claims was that American abortion law represented an extremist position in regard to the protection of "developing life." On close inspection, however, the protectionism of Europe's abortion statutes translated more accurately into a generous welfarist buy-out of the demand for early abortion, coupled with an aggressive contraception and pregnancy planning policy, than into an institutionalized support of fetal life. Moreover, statistical evidence not adduced by Professor Glendon showed that relatively few American abortions take place late in pregnancy, while most abortions, on both sides of the Atlantic, occur within the first trimester. On these grounds, among others, the extreme distinction of Professor Glendon's comparative portrayal collapsed.

What do the ascriptions of "selfish indifference," "isolationism" and "nihilism" add to this shrunken picture? Is there any reason to believe that it is more "selfish" for American women to obtain the first trimester abortions they most commonly have than for French women to obtain them during this same gestational interval?<sup>96</sup> If there were any basis for

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for a comparatist to ignore the conventional shift in valences that tends to re-align the value commonly ascribed to individualism when our focus is the communitarianism of Europe's East rather than its West, even if East Europe was outside Glendon's purview here. Cf. Glendon, *The Iron Cage Comes to Your House*, HARV. L. BULL., Summer, 1988, at 32.

96. Though it is little more than an intuition, my sense is that, even if we were to remain as alert to cultural difference as a Clifford Geertz, we would discover more similarity than difference in the reasons that women in Glendon's surveyed societies ascribe to their choices of early abortion. My intuition is that if we were to interview a statistically significant sample of women in, say, the United States and France in groups controlled for age, health, wealth, education, and other relevant variables, we would hear that the abortion decisions of most of them were based upon a careful and sensitive balancing of their own present and future needs and those of their mates, children, and other dependents, if any. And it is my further intuition that if we were to hear them, many of us would believe that they had done well by themselves and by the rest of us, in both societies, and we would be moved, as a consequence, to tear up Glendon's indictment of pejorative cultural dichotomy and instead share

such an ascription, Glendon's study, focused as it is on the formal, public behavior of legislators and judges and utterly inattentive to the informal, private behavior of individual women in her surveyed societies,<sup>97</sup> could not prove it up.

Then what about her second primary assertion, that our stubborn adherence to rights theory—the distinctly American notion of an abortion “right” for women—demonstrates individualism’s antithesis to communitarian forms of compromise? Here, too, it turns out that Glendon has sounded the wrong alarm, for rights theory can accommodate fetal as well as maternal rights. And Glendon’s failure to consider the theoretical contributions of John Rawls and Ronald Dworkin,<sup>98</sup> among others, does not dim the affinity of rights-based liberalism for the sorts of distributive payouts she lauds European governments for providing. Is it “selfish,” then, or “isolationist” or “nihilistic” for American women to prefer personal autonomy, whether or not we term such autonomy a “right,” over their bodily functions and their life courses to the loss of control over their own welfare that might otherwise be required of them? Nothing in Glendon’s account persuades that such ascriptions are either useful or compelling. Certainly, nothing in her survey suggests the existence of comparative data that renders such a preference on the part of American women aberrant.

Once again—this time in her assault on rights theory—it turns out Professor Glendon has chosen the wrong target. What is needed, instead, but is sorely missing from her account is a carefully-honed critique of our national preference for privatized solutions to social and economic inequities and of the extent to which ours has become a non-welfarist, non-familistic, non-child-oriented state. This story would seem to have rather little to do with judicial review, women’s autonomy, no-fault divorce grounds, or the focus of Glendon’s final chapter, comparative political philosophy of the eighteenth century, and a great deal to do with the subject she most consistently avoids grappling with: contemporary American two-party, interest-group-dominated, debt-ridden, planning-deficient, non-visionary politics.

This powerful and painful avoidance of politics in favor of an argument based virtually everywhere else—in rhetoric, in law, in philosophy, in history—is a central lack in Glendon’s account. But it does not fully displace

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in the pandemic pain of the human condition.

97. Professor Martha Fineman takes issue with Professor Glendon over the latter’s focus on abortion as a “women’s issue” to the exclusion of any meaningful consideration of abortion as a “woman’s issue.” See Fineman, *supra* note 20, at 1441 n.13.

98. See J. RAWLS, A THEORY OF JUSTICE (1971); Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); and Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987).

concern over comparatively subtle flaws. One of these is the absence, in Glendon's treatments of individualism and communitarianism, of nuance.

It is fortunate that neither insight nor argument need favor dichotomy, so that we are not truly put to the choice of whether our version of individualism drives out communitarianism, while Europe's prepossessions are the reverse. The countries in Glendon's survey have not led lives so neat as to permit such generalizations on the basis of their social histories. Indeed, Professor Glendon has even provided a powerful example of the melding of both philosophies in the crucible of pragmatism—though not in her conclusion.<sup>99</sup> However individualistic, the United States has always given birth to separatist communities; indeed, it was founded of them. Its very pluralism—unrivaled by the countries in this survey—bespeaks a tolerance, however imperfect, of communities within the greater community.<sup>100</sup> Its absorption of over sixty percent of the budget of NATO has certainly not been the product of isolationist individualism.<sup>101</sup> In fact, at a level of generality no greater than Professor Glendon's, it could be said that by subsidizing the defense of Europe for the four decades since the last War, America has made it possible for Europe to subsidize its children, while our payment for guns abroad has made it that much harder to pay for butter for our own children at home.

On the other hand, the communitarian sensibilities of Glendon's exemplars have evidenced profoundly disturbing limits, both before and after the emergence of the modern welfare state, whether the Spanish Inquisition, the Holocaust, or the last-minute atrocities of the British Raj are taken as instances, or whether we consider, instead, less horrific, brutal or systematic maltreatments such as those of the French toward their North African "beurs," the Spanish toward Basque prisoners, or—at the level of mere, officially-invited hostility—the Thatcherite government toward homosexuals.<sup>102</sup> These examples bear particular notice in the context of an argument such as Glendon's that is firmly planted in the shade of rights-skepticism.<sup>103</sup> Indeed, it is one of the myriad of facts we need to

99. See her discussion of the "Nordic model" of child support and, more particularly, of Swedish child support enforcement practices, wherein she emphasizes both the extent of direct public funding and the strength of public enforcement of private contribution (pp. 85-90).

100. See the late Robert Cover's extraordinary examination of the tensions that inhere in our commitments to pluralism, religious diversity, and community in *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

101. See, e.g., NATO, Financial and Economic Data Relating to NATO Defence (Press Release) 3 (Dec. 4, 1986). The enormity of our budget deficit has provoked new argument about the utility of this allocation. See, e.g., *The False Promise of Burden-Sharing* (editorial), N.Y. Times, May 1, 1988, at 26, col. 1.

102. See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1988, at 212-14 (1988); Hodges, *Government by Tabloid: No Gays, Please, We're British*, Nation, Feb. 6, 1989, at 156.

103. To take a different measure of rights-skepticism in a European—here, West German—context, consider "Forfeiture of basic rights", Article Eighteen of the West German Constitution and its interpretation in a case handed down by the Constitutional Court only 3 months after its decision of the *Roe* analog Professor Glendon discusses at length (pp. 25-39). See 39 BVerfGE 334 (May 22,

keep in mind about Western European communitarianism<sup>104</sup> that, although it has spawned a variety of evidently stable welfare states, many with features worth emulating, each such state serves a population that is, in an important sense, familial. How much easier it must be to administer the child support laws of Sweden, where child-rearing practices and child-related values are likely to be relatively uniform, than to try to administer them in America, where representatives of all the world's peoples are raising the children next door. And it is surely important to a comparative study of child welfare practices that many of the citizenship awards and even monetary subsidies that the European welfare states pay on behalf of children are intended to induce families to have more of them, since most European countries have experienced steady, and some, even precipitous declines in their birthrates for almost four decades, which has not been the story here.<sup>105</sup>

Moreover, the philosophical spine that Glendon's final chapter attempts to provide—that individualism explains our abortion and divorce policies, while communitarianism explains the continent's—cannot disguise the gap between description and analysis that is opened by this device, or the weak nature of the linkage between abortion law and divorce law she has attempted to forge through an emphasis on “cultural hermeneutics.”<sup>106</sup> That is to say, while Rousseau may have helped, in a singularly powerful

1975); see also Markmann, *Civil Liberties? Was is das? A Report from the German Federal Republic*, 1 CIV. LIBERTIES REV. 42 (1974). See Wessel & Segal, *supra* note 34, for their discussion of this case and its implications.

104. A more abstract, less fact-related counter to Professor Glendon's argument from communitarianism, supportive of the one I make here, is contained in yet another review of this book. See Francis, *Virtue and the American Family*, 102 HARV. L. REV. 469, 478-84 (1988) (arguing that Glendon's critique of rights is underdeveloped and subjects individuals and groups to possibility of majoritarian oppression). For a bracing overview of the debate that uses communitarianism to critique liberalism, see Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985).

105. While there seem to be no authoritative understandings of the reasons for the pronounced decline in European birth rates, there is agreement that the basis is multi-causal and goes far beyond the existence of safe abortion. See, e.g., C. McINTOSH, *POPULATION POLICY IN EUROPE: RESPONSES TO LOW FERTILITY IN FRANCE, SWEDEN, AND WEST GERMANY* (1983); *DEMOGRAPHIC TRENDS IN THE EUROPEAN REGION: HEALTH AND SOCIAL IMPLICATIONS* (J. Lopez, ed. 1984). It may be that policy-making concerning abortion within a given country at a given time is affected by the severity of the decline in the birth rate. It may be of some importance, for example, that the West German birth rate suffered an extreme decline—a drop of 50% between 1964 and 1977 in the “indigenous” (i.e. non-immigrant) population—within the period of the Constitutional Court's conservative abortion decision (1975). Glendon discusses this decision (which invalidated a liberal abortion law that had to be replaced by a much more restrictive one) approvingly and at considerable length (pp. 25-39), without mention of such potentially important contingencies as the staggering drop in the birth rate, of which the Court was undoubtedly aware. For data about birth rates in the countries within Professor Glendon's survey, see U.N. 1986 *DEMOGRAPHIC YEARBOOK*, U.N. Sales No. E/F.87.XIII.1., at 154-59, 563-72 (1988).

106. As I have attempted to suggest, this linkage might have been usefully strengthened by a greater emphasis on the relationship between comparative allocations of the public and private burdens assumed in relation to pregnancy prevention, abortion, pre-natal care, child welfare appropriations, and divorce-related child support levels and their enforcement—that is to say, a greater emphasis on what law does than on what it says, with a corresponding concern for preferred distributions of decisional authority over these matters at the local, state and national levels, and between courts and legislatures, in this country compared to others.

way, to create a cultural milieu favorable to the development of the modern welfare state, his influence does not explain either its development or its persistence. This exegetical gap is even further exacerbated by Glendon's lack of effort to explain how England, the home of Hobbesian, Lockean, and Millian individualism, managed to become not only a modern welfare state but one with abortion and divorce laws she treats as both formally and functionally compatible with the continent's, while being different from and preferable to our own.

Nor does a preference for communitarianism explain, without more, how and when a polity does or should choose between the moral claims of a fetus and those of a pregnant woman. Communitarian regard for the fetus is at least a matter of interpretation, implicating a "cultural hermeneutics" to the core, since the social welfare "compromise" that pays liberally for the destruction of first trimester fetuses and even more mature "defective" fetuses, while exhibiting arguably hypocritical conservationist tendencies toward the rest, does not explicate its philosophical origins or justifications by its terms. Indeed, the non-obviousness of a singular or dominant communitarian response to the foundational question, "are fetuses a part of the moral community?", leads me, in my present, communitarian-skeptical mode, to find that the most critical gap in Glendon's analysis involves her failure to account on any persuasive grounds for the particular conformation of liberal-to-conservative tendencies in abortion law as it has evolved within the social welfare states she has surveyed. By contrast, the existence of child subsidies, whether or not triggered by divorce, almost needs no account; these subsidies are at the very heart of a social welfare state, as are public medicine, state-sponsored day care programs, free university, and housing for the elderly, though economic as well as political factors may affect their implementation.

Cross-cultural hermeneutics, then, is a complicated inquiry, one that raises difficult questions for a thesis such as Professor Glendon's. Can the wise policy-maker and law-giver import pieces of a social welfare state—aims, ethos, expenditures, administrative workings and all—and leave the rest behind? While the various states of Europe may maintain differing abortion laws, is it as obvious that the moral status of women and fetuses should differ among these United States? Can we, and will we, continue to help pay for Europe's children if we undertake significantly greater publicly-financed responsibilities toward our own?

These questions are themselves the incarnations of wider ones for, as Glendon's treatment of abortion and divorce serves to remind, political entities treat the family according to political dictates. And policy-making obscures the divide between law and politics, for those who maintain that there is one. Thus, her concerns to improve policy-making in America open into questions we must ask ourselves, though she has not chosen to do so, about the future of the family in the mixed-welfare or even post-

welfare state that this country, with its staggering national debt, may attempt to become, and about those types and meanings of "family" in which our diverse and aging populace may be willing to invest.

The questions raised for law, in the narrower sense that Glendon deploys the concept of law, are no less complex. Indeed, they tie this last chapter of the book in knots, for if rights-based individualism under law has been our self-renewing Hobbesian/Lockean destiny these two hundred years, is it readily available to us to adopt the style or the substance of a different legal culture? Is not one of the points of a Geertzian endeavor to provoke a recognition of what is authentic and enduring and, therefore, not "disposable", to appropriate Glendon's term, within a particular culture?<sup>107</sup> And is not law itself a culture-within-a-culture, rendering the matter of appropriation—at least with regard to such culture-sensitive matters as abortion or divorce—a rather devilish business, from an import-export point of view?

These questions about the propensities of law within culture and law as itself a culture cause me to want a last word about the story-within-the-story of Glendon's argument: her reiterated concern with what law says about a culture, as distinct from how it directly operates within one. The odd thing about these portions of her thesis is that they are never laid out on level ground, where we could most easily benefit from the pedagogical effort she is expending. When Glendon quotes from the unquestionably inspiring preamble to the 1789 Declaration of the Rights of Man and the Citizen, for example, she does not hold the formulations she extols side by side with those that, by implication, she finds wanting in the preamble of our contemporaneous, equally constitutive text, the Constitution. As a result, the noncomparatively trained reader is denied the opportunity to observe the differences she is attending. Similarly, our abortion laws are never set alongside foreign ones, nor are our divorce laws held up to their counterparts, so as to marry the rhetorical critique she offers to the pedagogical aims she has announced.

Perhaps because her rhetorical critique lacks the graphic clarity of textual comparison, it tends to blur into her substantive arguments, despite the heraldic use of such terms as "hortatory," "symbolic," and "pedagogical" to signal its arrival. At times, moreover, the blur seems the product not of a lack of clarity but of the possibility that, as it weaves in and out of the discussion, the rhetorical-pedagogical theme is actually, sometimes subtly, changing shape. Thus does one glimpse Professor Glendon's text, when enrobed in this theme: (1) calling us to attend to the differential ways that law "imagines reality" (p. 15); (2) exhorting us to find that the substance of law influences conventional morality (pp. 8, 59, 62, 111, 142); (3) asking us to agree that literary style is "almost as important as

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107. See C. GEERTZ, *supra* note 13, at 180-83.

content” (p. 130); (4) advising us to hold that statutory text should “accommodate a plurality of views” (p. 131); (5) maintaining that statutory rhetoric should extend beyond behavioral commands to embody constitutive cultural ideals (pp. 59, 66, 107–108, 141); and (6) arguing for the enshrinement of two such ideals—fetal protection and marriage preservation—within statutes that also authorize their deposition (pp. 61, 109).

While these notions may belong to a single genre of endeavor, as Professor Glendon implies, she has not convinced me that this is so. Under her hand-crafted neo-Platonic umbrella, I find a program that lacks consistency and must engender controversy, as it extends shelter to both the unexceptionable and the vastly exceptionable of the premises and principles in our midst. How is a statutory embodiment of pluralism in the matters at hand consistent with the enshrinement of a particularized idealism? How secure is the foundational claim that law is better—more moral and, therefore, more satisfactory—if its professions of idealism are at variance with its very mandates?

Related questions vie for recognition. Are Glendon’s claims equally or differentially applicable to judicial exposition and to legislative draftsmanship? How should the language of solicitude be incorporated into our canons of statutory interpretation? Should statutory rhetoric be awarded as a literal form of honorable mention to the otherwise-losers of majoritarian contests? Do all losers (presumably, losing interest groups with divergent visions of the law) deserve these rewards or only some and, if the latter, how are we to choose them? Should aesthetic theory apply to law-making? How are cultural ideals best maintained? Does it matter which ideals? How do the uses of legal language affect legal pedagogy, including understandings and apprehensions about law in the wider culture?

Such questions are easier to come by than are their answers, for I do not mean to suggest that all of them are rhetorical or that the possible furtherance of culture-wide idealism—as opposed to faction-bound ideology—by the means Professor Glendon suggests is an idea we ought lightly to dismiss. But it is at least as clear from Glendon’s own account that legal language and legal pedagogy are capable of endless re-shaping in the crucible of politics as that they can be held aside, in a churning, pluralistic culture, for the more “lapidary” (p. 129) formulations of earlier epochs that she extols.

So I worry, from my liberal, pragmatic, and indubitably ethnocentric vantage point that the implant of rhetorical concern for the welfare of the fetus in otherwise abortion-liberal statutes would be either intolerably hypocritical as to the fetus or intolerably transgressive as to women. And I am more than dubious about the virtue of statutes used to proclaim that marriage is forever, while my hostility remains unabated toward the notion that we should re-instill a requirement for judges to find fault, on behalf of the rest of us, with persons picking up the pieces of their shat-

tered lives during divorce. Augmenting the sense of responsibility of divorcing persons toward their dependents does not lie, with assurance, in that direction. And it is awfully late for us to render the Constitution more textually familial, and unapparent what we would wish to say if we did. Thus, I return to the response I offered earlier: since rhetoric is the hand-maid of substance, enthusiasm for Glendon's rhetorical/pedagogical proposition, at all but the most abstract level, must remain contingent on the context and the content to which it may attach.

Despite these prolific reservations, I want to say that Glendon's attempt to instill in us a more self-conscious reverence for law-making and for the inculcation of idealism through legal texts is both lovely and poignant. I would prefer to see it refined and rendered more closely compatible with the culture of law as we know it, rather than handed us as an American "failure", but we would lose something fresh and potentially significant were we simply to ignore her concerns.

I should like to end by saying the same of the book as a whole. It is full of reverence for law and a genuine reverence for the family. These, together with Professor Glendon's vast erudition, profound commitment to comparativism, and belief in an abundantly conservative scheme of values, have led her to view our current positions on legal rights and wrongs concerning abortion, divorce, and statutory draftsmanship in a critical, highly stimulating manner that single-handedly raises the level of discourse about family law. There is no doubt that the marketplace of ideas is enriched by her argument.

Yet, engagement with her argument has left me convinced that the objects of her concern are not marketable in the ways that Professor Glendon would have us imagine. We cannot necessarily improve the lot of children, or any subset of them, by improving the lot of fetuses. Indeed, the inverse is far more likely. American women cannot gain better bargaining chips for themselves or their offspring at divorce by agreeing to barter abortion rights. We cannot cash in no-fault divorce grounds for the more willing assumption of financial liabilities. Our laws will not necessarily become fairer or better because they sound the harmonics of solicitude. It is not the existence of rights or our belief in them that prevents our re-birth as a contemporary western-Eurostyle welfare state.

Since history, politics, and law have deep-rooted cultural identities, the profound changes Professor Glendon interprets as "challenges" are no mere matters of "compromise". Rather than compromise our adherence to rights or treat them as objects of exchange, we should deepen and broaden our commitment to them, lest our true "failure" be the failure to make good their promise.