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Charles Donahue, Jr.

COMPARATIVE FAMILY LAW: LAW AND SOCIAL CHANGE?

*Charles Donahue, Jr.**

STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE. By *Mary Ann Glendon.* Amsterdam and New York: North-Holland Publishing Co. 1977. Pp. xxvi, 347. Dfl.120.00; $48.50.

Professor Glendon has been unfortunate in her choice of publisher. North-Holland printed her manuscript in one of the cheapest possible fashions[1] with a minimum of or no editorial work[2] and set the price at a level which can only be regarded as extortionate. Their theory apparently was that they can drain the highest possible rent from the book if they price it at a level which is within the reach of only a few (decreasingly few) libraries and those lawyers who mistakenly think that the book will give them tips on how to solve the matrimonial problems of their jet-set clients. Review copies of the book are accompanied by the most churlish letter I have ever seen in what has always been a churlish genre. How the public should react to this I cannot say without openly advocating violation of the International Copyright Convention, but the means to break this unconscionable monopoly are close at hand.

It is particularly unfortunate that North-Holland chose to treat Professor Glendon's book in this manner, because Professor Glendon's is a book which ought to be read. It is not a treatise on family law in the four countries with which it deals, and those seeking treatise treatment should go elsewhere.[3] The value of the book lies not in its reporting of the law but in what it has to say about the law.

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* Professor of Law, University of Michigan. A.B. 1962, Harvard University; LL.B. 1965, Yale University.—Ed.

1. The book seems to have been set in cold type with an electronically justified right margin; it is offset (not very well, my copy has inking problems on pp. 34, 39, 99, 151, 155, 182, 223, 271, 291, 319), with the footnotes at the ends of the chapters.

2. *E.g.*, p. 37 n.88 "Note Lindon" should be "Note *Lindon*" with a page reference; p. 253 n.24 should cross-reference n.19, not n.18; "*Kidd*" who appears mysteriously on p. 331 nn.40, 43 is not in the table of short-form citations.

3. *E.g.*, G. BEITZKE, FAMILIENRECHT (17th ed. 1974) (W. Germany); P. BROMLEY, FAMILY LAW (5th ed. 1976) (U.K.); 1 J. CARBONNIER, DROIT CIVIL (11th ed. 1977); 2 *id.* (9th ed. 1972) (France); H. CLARK, THE LAW OF DOMESTIC RELATIONS (1968) (U.S.), all of which Professor Glendon has used.

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I

The first paragraph of the book announces its organizing theme:[4]

> Beginning in the middle 1960s, there has been an unparalleled upheaval in the family law systems in Western industrial societies. Legal norms which had been relatively undisturbed for centuries have been discarded or radically altered in the areas of marriage law, divorce law, the legal effects of marriage and divorce, the legal relationship of parent and child and the status of illegitimate children. At the same time, through other areas of law, not ordinarily thought of as "family law", such as public assistance, social security and tax laws, the State has come into increasing contact with aspects of everyday family life, and has assumed a number of functions formerly performed by the family.

It seems to me that this is not only an appropriate organizing theme but that as a general thesis, it is clearly correct. Not only does the mass of material which follows demonstrate it, but in the course of covering much of the same material in a seminar in comparative marital property law this reviewer had come independently to a similar conclusion. But it must be conceded that this thesis, though correct, is not particularly startling. It could have been demonstrated in the course of a long article. Indeed, such an article might have redressed the noticeable imbalance in the book between the first and second halves of the organizing theme: A great deal more is said in the book about the withdrawal of the state from the regulation of marriage formation and dissolution than is said about the intrusion of the state into functions formerly performed by the family.[5] The existence, then, of this book as a book must be justified by what Professor Glendon has to say about how and why this general change has come about.

When we come, however, to evaluate the contribution of this book to answering these latter questions, we begin to encounter difficulties. As answers to these questions, the pieces of the book do not quite fit together. Descriptive and analytic sections, in which the answer to the question "how" is buried, alternate with synthetic sections which search for the reasons "why."[6] Some, but not all, of the material in the descriptive sections is used in the

4. P. 1.

5. The latter point is discussed principally on pp. 272-96, with adumbrations on pp. 66-68 and elsewhere.

6. The general pattern of each chapter is: synthetic introduction, discussion of the law in each of the four countries, sometimes with the addition of material from the Scandinavian countries, particularly Sweden, and a synthetic conclusion.

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synthetic sections, and the reader is left puzzled as to why he was told everything he was told in the descriptive sections. Further, the themes of the synthetic sections, though many of them are telling in their own right, are never quite pulled together to allow the reader to judge for himself whether the promises of the first chapter have been fulfilled.

The author seems not quite to have come to grips with the problems of her underlying theory and methodology. The four-part opening chapter suggests that the book will examine the interaction of law, behavior, and ideology;[7] offers three "meditations" on the theme that the family in law and the family in society are never quite the same thing;[8] suggests that the book will examine small changes as well as large in order to demonstrate the validity of the opening generalization;[9] and closes with a justification, based on Kahn-Freund's *On Uses and Misuses of Comparative Law,*[10] for choosing England, France, West Germany, and the United States for comparison.[11] It is all fascinating but somehow not quite satisfying.

The reason why it is not quite satisfying is that we are not told how law, behavior, and ideology are going to be seen to interact; of what relevance it is to this interaction that the circles of the family in law, the family in society, and the family in religion do not completely overlap; whether small changes are going to show something more than that the opening generalization is a powerful one; and why one would choose legal systems with similar underlying societies and institutions to illustrate anything as general as the interaction of law, behavior, and ideology. Perhaps most puzzling is Professor Glendon's use of Kahn-Freund's essay. If we are seeking to borrow an idea or rule from another legal system, Kahn-Freund warns, we should look to the legal systems of societies like our own. But the purpose of Professor Glendon's book is not to urge the adoption by one legal system of elements from another. Indeed, with a few exceptions, mostly toward the end of the book,[12] she eschews prescription entirely. Her purpose is to show that despite some differences in detail all four countries

7. Pp. 1-4.

8. Pp. 4-15.

9. Pp. 15-17.

10. Kahn-Freund, *On Uses and Misuses of Comparative Law,* 37 MOD. L. REV. 1 (1974).

11. Pp. 17-20.

12. *E.g.,* pp. 290-91, 295-96, where she seems to come out pretty strongly for more legal support for the "victims of divorce."

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are headed in the same direction and to ask why this is happening.

Apparently the purpose of choosing these four countries is to control for some variables so that the explanatory power of others can be isolated. But we are never told precisely what variables are being controlled for. Perhaps we are to regard the legal institutions of the four countries as being roughly similar, since legal institutions, somewhat surprisingly, are not singled out as one of the elements in the interaction which we are to examine.[13] But there are almost as many differences in the legal institutions in the four countries as there are similarities. True, all have popularly elected legislative bodies, a politically responsive executive, and a judiciary somewhat isolated from political forces, but the roles and procedures of each, particularly the last, are quite different in the four countries, and the legal profession and systems of legal education are markedly different, as is the way in which reform of private law is achieved. Professor Glendon notes that there are great similarities in the economic structure and range of political views in the four countries.[14] Apparently she intends to control for certain kinds of variance in family behavior (those determined by industrialized economic structure) and ideology (by excluding Marxist countries and those in which the Church plays a heavy political role),[15] but why these sources of variance in behavior and ideology and not others are controlled for and what other sources of variance remain is not discussed.

Throughout five long chapters on the law of marriage formation, of the formation of marriage-like groupings, of the relationship among family members in an on-going marriage, of the dissolution of marriage, and of the consequences of dissolution, the reader is left to puzzle why the pattern of withdrawal and intrusion announced in the opening chapter is occurring. Out of these pages the general thesis seems to emerge that given the diversity of family relationships of the citizenry of the modern industrial state and given a political commitment to individual liberty, rough equality of the sexes, law-making by elected legislative bodies guided by a politically responsive executive, and a broad social welfare system, family law will withdraw from regulation of the marriage relationship itself but will increasingly intrude

13. *See* p. 18 where Professor Glendon shows her own awareness of the problem; *cf.* pp. 182 n.7, 208, 215, 239 n.73 for the importance of a single individual in some law reform efforts; p. 34 for quite extraneous political circumstances leading to law reform.

14. Pp. 18-19.

15. P. 19.

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into what were formerly family economic and social functions. Put another way, the thesis of the book seems to be that at least in family law, social behavior and social ideology are the independent variables and the law, including the specific body of rules, general legal ideas, and the behavior of professionalized legal institutions, is the dependent variable.

That this is the underlying thesis of the book is suggested in a number of places,[16] although it is never stated quite so bluntly as I stated it above. If this is the thesis of the book, it is not quite proved by the book's contents. In the first place, the descriptive chapters show a considerable diversity among the four countries, the explanations for which must be sought in the dependent variable: different legal institutions and ideas, different starting points in the law, etc.[17] But that is not the main problem. If Professor Glendon has correctly identified the central tendency of family law in the four countries, then her explanation may still be a valid explanation of that tendency. But we cannot tell if it is because the descriptive chapters of the book do not always separate the independent variables from the dependent or from each other. Nor do they always define whose behavior and whose ideology is being discussed. Thus, not only the way in which changes in behavior and ideology have produced changes in the law, but even that they have, remains unclear.

The reason why one cannot separate the dependent from the independent variables is that much of the evidence given for behavior and ideology is derived from legal sources.[18] That the number of divorces has markedly increased in all four countries is not, as Professor Glendon herself suggests,[19] evidence that a greater proportion of marriages break down now than did in the past, but simply that more people are obtaining legal recognition of the fact that their marriages have broken down. Similarly the fact that in 1965 the French legislature was unwilling to change a provision of the Civil Code that the husband was head of the family but was willing to do so in 1970 is not necessarily evidence that the ideology of the French about the family had changed in the five-

16. *E.g.*, pp. 60-61, 78-85, 113-16, 134-37, 191, 227-31, 235, 304, 320-23.

17. *E.g.*, the lowest common denominator effect of migratory marriage and divorce in the United States; *see* pp. 50-51, 228.

18. *E.g.*, pp. 29-31 on the operation of the French family consents system; p.198 on the failure of the English reconciliation system; *cf.* p. 149, where a stunning generalization on how people spend their money has no support at all.

19. P. 191. I can find no support for the statement about nineteenth-century America in the reference given in n.10, but it may be true.

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year period, but simply that legal ideology had changed.[20] At a number of places in the book it is suggested that it is the behavior and hence the ideology of powerful elites, not those of the whole population, which has changed. Since legal elites are part of the power elite, so the argument seems to run, the behavior and ideology of legal elites, and hence the law, have changed as well.[21] But the evidence in the book does not allow us, as a general matter, to postulate the priority of change in behavior to change in social ideology, nor to assume a general change in either the behavior or ideology of the power elite,[22] and hence the change in the ideology of the legal elite (which is quite well documented) and in the law cannot be explained by the evidence offered here.

Still another difficulty with the explanation of the general change is that the four countries do not operate independently of each other. That social ideologies influence one another across national boundaries is not fatal to the explanation. We can take social ideology as a given, wherever it comes from. But legal ideologies and specific provisions of law are also borrowed across national boundaries, particularly in the European countries with which Professor Glendon is dealing, and that leads to the possibility that one country may have borrowed rules from another quite independently of the social ideology or behavior within the borrowing country.[23] This means, again, that what is dependent and what is independent cannot quite be proved as a general matter from the evidence given here.

Quite a different explanation of the overall change appears at the end of the book: Possibly, the final pages suggest,[24] the explanation is not that there has been a marked change in behavior or social ideology but that there has been one in legal ideology. Legal elites, including legislators, now believe that family law ought to reflect the behavior of the citizenry as a whole. Since behavior is plural, the law should be changed to reflect the lowest common denominator. Most people continue to get married; many of those marriages break down. The law will allow those who want to to get married and will dissolve the marriages of

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20. Pp. 116-18.

21. *E.g.*, pp. 60-61 on the emergence in the United States of a "right to marry"; pp. 78-85 on the social acceptability of cohabitation; pp. 202-04 on *les deux Frances;* pp. 320-23 summarizing the whole book.

22. The latter is best demonstrated in the case of increasing lack of disapproval for informal marriage in the United States, pp. 91-92.

23. This point is made, perhaps a bit too generally, in Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79 (1976); *see* A. WATSON, LEGAL TRANSPLANTS (1974).

24. Pp. 317-20.

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those who want them dissolved. Those who do not get married but live together in a way that approximates marriage will have a law approximating marriage. Only where the welfare of one of the parties (in a rather narrow economic sense) or of the children (in a somewhat broader sense) is at stake will the state attempt to compel one of the parties to do something he does not want to do, and even here the tendency is for the state to look after the other party's or child's welfare itself.

Now if the underlying cause of the overall change in the law is one of change in legal ideology, we must seek the causes of that change in ideology. But at this point the book ends, and at this point the failure at the beginning of the book to explain the mechanism of change becomes crucial. Since we were not told that it is a change in legal ideology that lay at the bottom of the general tendency, we did not examine the intervening evidence for the causes of this change. Returning to the evidence we find that it is not explained because the legal and the social are not kept separate. It may be that changes in the behavior and ideology of the citizenry generally or of elites caused the changes in legal ideology, but as we noted above, the evidence does not allow us to state that as a general matter.

I am inclined to think, and there is some support for this in the book,[25] that the change in legal ideology is that product not so much of changes in behavior or social ideology but of two very powerful and interrelated ideas, associated, at least in this country, with legal realism: the notion that law disassociated from its enforcement is not law ("[F]or legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it . . . .")[26] and a habit of thinking about law in terms of its effect on behavior (Roscoe Pound's "social engineering"),[27] accompanied, at least occasionally, by empirical inquiry into whether the imagined effect is actually taking place (Underhill Moore's parking tickets).[28] If it is true, as Professor Glendon suggests, that large numbers of people in our four countries have always married and dissolved their

25. This may be the principal point of pp. 320-23.

26. Holmes, *Natural Law,* 32 HARV. L. REV. 40, 42 (1918), *reprinted in* O. HOLMES, COLLECTED LEGAL PAPERS 310, 312 (1920); *see* 2 THE POLLOCK-HOLMES LETTERS 212-14 (M. Howe ed. 1942).

27. *See* R. POUND, INTERPRETATIONS OF LEGAL HISTORY 141-65 (1923).

28. Moore & Callahan, *Law and Learning Theory: A Study in Legal Control,* 53 YALE L.J. 1 (1943).

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marriages without reference to the law,[29] the first idea would suggest that the law, at least as to those people, is not law, and the second idea, while suggesting some legitimate state purposes which could be fulfilled if the law could be made to affect behavior, would also suggest, through empirical inquiry (of which Max Rheinstein's is probably the best known),[30] that marriage behavior is probably not affected by legal change. Hence we change the law because it only states a series of principles which are not enforced and which probably cannot be generally enforced within the confines of our legal institutions and our general notions of individual privacy and worth.

Working hard to penetrate the mask of Professor Glendon's objectivity,[31] I discern that this is what she believes is the position a modern secular law ought to take.[32] I am somewhat less sure that she thinks the adoption of such ideas has in fact led to the change in legal ideology which she describes. I am certainly not prepared to say that this constitutes either a complete explanation of what has happened in Western family law in the last generation or a compelling prescription for what ought to happen. (I find, for example, that the proposition that a law which is unenforced is not a law raises a rather uninteresting definitional problem and that the proposition that the law should not state a principle which cannot be enforced or can only be sporadically enforced raises a profoundly difficult moral problem.) But I can go no further with what Professor Glendon has given us.

Thus, Professor Glendon's book is for this reader unsatisfying, because the author does not fully treat the numerous theoretical and methodological issues which her material raises. It remains, however, a very interesting book because of the numerous theoretical and methodological issues which it does raise. Professor Glendon is not afraid of the big idea, and if all of her big ideas do not quite fit together, some of them are very perceptive and all of them are worth thinking about.[33]

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29. Pp. 4-15.

30. M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 277-307, 444-69 (1972). To this we might add the great acceptance of psychiatric and psychological explanations of human behavior, a phenomenon with which Professor Glendon does not really deal.

31. Rheinstein compliments her for objectivity (p.x), but I wonder if anyone can be fully objective on this topic and whether more explicit separation of fact from values would not have led to a more objective book. *E.g.*, pp. 28, 68, 291.

32. This I take to be the general thrust of ch. 7.

33. As a teacher of comparative marital property, I was particularly taken with Professor Glendon's ideas on the general trends in that area, pp. 140-43, 264-72.

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II

As I noted above, a great deal of this book is descriptive and analytic material on the laws of the various countries with which it deals. We must ask therefore whether this material provides a good foundation upon which further studies can build. The issue is not whether Professor Glendon's book is as good as the primary material or even whether it is as good as the sum of the secondary material for each country. We should not expect a book of this scope to provide the same information as all the sources which went in to make it up. Nor should we expect Professor Glendon to have conducted sociological field work in all four countries or even to have exhausted the primary legal materials on all the issues which the book covers. The question here is much more modest: Are Professor Glendon's summaries of the secondary material and what primary material she does use accurate?

There seem to be three major sources of inaccuracy in the book: flat-out errors, confusions deriving from compression, and distortions arising from selective use of detail to support an overall point. The latter two problems seem far more serious than the first. In order to provide a check on just how serious, let me examine in some detail pages 305-15. I chose these pages, which deal with the legal history of marriage in the West from the Twelve Tables to the Council of Trent, because they cover material with which I am familiar. In fairness to Professor Glendon, she does not seem to be so comfortable with this material as she is with the modern comparative material, but the same kinds of problems can be found throughout the book, though not in the same profusion.[34]

34. *E.g.*, pp. 34-35: that a marriage by those under age without parental consent is valid in England is true, but the parental consent requirement may have some effect because of the relatively limited number of persons who may perform a marriage; pp. 41, 66: Drinan's reading of Loving v. Virginia, 388 U.S. 1 (1967), may be correct, but a prediction as to its effect on state marriage-initiation statutes should take into account the race-relations context of the decision; pp. 47, 54: the discussion of the proposed reforms in English marriage formation law bypasses the issue of the role of the Established Church which the Law Commission's proposals raised; p.73 n.114: even after the Fourth Lateran Council, c.50 (= CONCILIORUM OECUMENICORUM DECRETA 233-34 (2d ed. J. Alberigo 1962)), the canon law's incest taboo ran to the eighth, not the seventh, degree in the civil law computation (fourth in the canon); p. 93: that the Supreme Court will reconcile Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), and United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973), on the basis of numbers seems to me unlikely in the light of the rather obvious distinctions between the purposes of the ordinance in one and the statute in the other; pp. 104-05: the statement of the holding of Labine v. Vincent, 401 U.S. 532 (1971), is confusing because of the double meaning of "postpone"; p.141: the amount of change in American marital property law in the last forty years seems exagger-

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There are two flat-out errors on the ten pages: Professor Richard Helmholz spells his name thus[35] and the *Decretals* of Gregory IX were issued in 1234, not 1292.[36] Neither of these errors is serious. Far more common are the passages which are questionable or confusing. I noted nine: (1) Pre-Tridentine canon law, like Roman law, is said to have distinguished "between 'legitimate' marriages and those which though not disapproved are of lower status."[37] This apparently refers to the distinction between valid and legitimate marriages in pre-Tridentine canon law. But unlike the distinction between just nuptials and all other nuptials in Roman law, the entry into a valid but illegitimate marriage was not in canon law confined to those of a legally defined status and at least in the classical period of canon law illegitimate unions were certainly disapproved.[38] (2) It is true that marriage was not as significant in Roman law as it is in ours, but there were more consequences to marriage than the few that Professor Glendon lists.[39] (3) In Roman law, marriages between citizens and most non-citizens were still marriages, but not "just nuptials"; marriages between free persons and slaves were not marriages because a slave was incapable of marrying; and certain marriages across classes were invalidated by statute. To say that the law "imposed a kind of political taboo" on all such marriages misses

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ated; p.155: most of the states have not abolished dower and curtesy; the statement of the situation on p. 283 is more accurate (*see* C. DONAHUE, T. KAUPER & P. MARTIN, PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 653-54 (1974)); p.178: the antepenultimate sentence made no sense to me until I read the Bittker article; p.220: the topic sentence of the first paragraph is not quite correct as the next paragraph indicates; p.240 n.3: probably should have also mentioned the "Petrine privilege" (*see generally* J. NOONAN, POWER TO DISSOLVE 341-404 (1972)); p.246: the various statistical statements about income earning spouses in the United States cannot be reconciled unless we assume, which seems unlikely, that in 19% of husband-wife families only the wife earned income; p. 263: $100,000 is needed to generate $5500 p/a at 5 ½% only if the capital isn't exhausted; p. 269: the reference to protection of the marital home "in most American states" probably refers to the homestead laws (*see* C. DONAHUE, T. KAUPER & P. MARTIN, *supra*, at 656-58 & n.2), but the practice of holding assets jointly and doubts about dower (*see id.* at 635, 654) probably make the reality more like France; p. 288: the surviving spouse is not "everywhere protected against disinheritance" in the United States, unless we include as protection the homestead law and family allowance in states like South Dakota which have no dower or curtesy and no forced share (*see* S.D. COMPILED LAWS ANN. §§ 25-2-9, 29-1-3 (1976)).

35. P. 313 & n.39. The name is spelled correctly on p. xxi.

36. P. 312; *see* 2 CORPUS JURIS CANONICI 1 (A. Friedberg ed. 1881).

37. P. 305.

38. On the canon law distinction, *see, e.g.*, J. DAUVILLIER, LE MARIAGE DANS LE DROIT CLASSIQUE DE L'ÉGLISE 115-16 (1933); for the Roman Law, see sources cited in note 40 *infra*.

39. P. 306; compare Donahue, *The Case of the Man Who Fell into the Tiber*, 22 AM. J. LEGAL HIST. 8, 9 (1978) and sources cited therein. M. RHEINSTEIN, *supra* note 30, at 14-15, on whom Glendon relies, is considerably clearer and more accurate.

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the distinctions and, except in the case of the first, rather misses the point.[40] (4) *Confarreatio, coemptio,* and *usus* were not "forms of marriage"[41] in early Roman law but forms of acquiring *manus.* The first probably was also a form of marriage; the second may have been; the third could not have been.[42] (5) The dates given for the Emperors Constantine and Justinian[43] are apparently intended to be birth and death dates, rather than normal regnal year dates.[44] (6) The hesitations about the moral validity of divorce in Augustine's *Retractions* are quoted apparently to indicate that the Fathers of the Church had some doubt about the issue.[45] The most recent study of this admittedly controversial topic, however, suggests that the Fathers were remarkably unanimous on the proposition that divorce and remarriage was sinful.[46] (7) I know of no evidence that Christians had their marriages blessed in the first century.[47] Once the practice got started, however, there was, until the law was clarified during the pontificate of Alexander III (1159-81), some diversity of opinion in the West as to whether it was necessary for a sacramentally valid marriage, and it was required in the Eastern Church. It simply is not true of the entire period from the first to the sixteenth centuries that "the Church constantly stressed that blessing was not the essential factor."[48] (8) I know of no evidence that clandestine marriage *began* to be a social problem in sixteenth-century France and Spain.[49] All the evidence would suggest that clandestine marriages were regarded as a serious social problem throughout the

40. P. 306; again M. RHEINSTEIN, *supra* note 30, at 15-16, is more accurate; compare Donahue, *supra* note 39, at 11.

41. P. 307.

42. *See* P. CORBETT, THE ROMAN LAW OF MARRIAGE 86-90 (1930), on whom Glendon relies. I would be inclined to go further, being convinced by the arguments, in this regard, of E. VOLTERRA, LA CONCEPTION DU MARIAGE D'APRÈS LES JURISTES ROMAINS (1941). *See* F. SCHULZ, CLASSICAL ROMAN LAW 115-18 (1951).

43. P. 307.

44. Thus, Constantine (c.285-306-337); Justinian (c.482-527-565).

45. P. 309.

46. H. CROUZEL, L'ÉGLISE PRIMITIVE FACE AU DIVORCE (Théologie historique No. 13, 1971). For the meaning of the *Retractions* passage, *see id.* at 337-38.

47. P. 310. The earliest evidence is from the second half of the second century, and the most recent study finds it inconclusive. K. RITZER, FORMEN, RITEN UND RELIGIÖSES BRAUCHTUM DER EHESCHLIESSUNG IN DEN CHRISTLICHEN KIRCHEN DES ERSTEN JAHRTAUSENDS 52-69 (Liturgiewissenschaftliche Quellen und Forschungen No. 38, 1961).

48. P. 310. On the ambiguity in the pre-Alexander canonic sources on this topic, see Donahue, *The Policy of Alexander The Third's Consent Theory of Marriage,* in PROCEEDINGS OF THE FOURTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 273 n.79 (S. Kuttner ed. 1976) and sources cited therein; for the Eastern Church, see J. DAUVILLIER, *supra* note 38, at 422-33.

49. P. 314.

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High Middle Ages.[50] (9) Granted the ultimate wording of the decree *Tametsi,* it is hard to know who really "won" at the Council of Trent.[51] The losers included those who insisted that the Church could not change the requirements for a valid marriage and those who insisted that parental consent be added to the requirements.[52]

Most of the questionable character of these passages results from fitting the evidence to the overall pattern. Professor Glendon's main point in these pages is that marriage as a social relationship was largely unregulated in Western law until the Council of Trent or even thereafter—a point which I am not sure is one which can be sustained as a general matter. In the case of items 1-3 and 6-7, the shading favors this general point. Items 8 and 9 fit in with another overall thesis of the book, that law responds to changes in society, and our difficulty with these items points to a major problem of the book. Here the evidence that clandestine marriage was a new problem in Europe in the sixteenth century seems to be the fact that there was pressure for a legal change at the time of the Council of Trent. Once one realizes that the problem was much older than that, the actions of the Council require a more complex explanation. The remaining questionable statements are simply the result of compression and do not seem to bear any relationship to any particular thesis of the book.

The problem here is not Professor Glendon's competence. To do a book like this you have to stretch yourself pretty thin, and not surprisingly, some parts of the book are more accurate than the others. The problem here is more a problem of audience. A comparative work like this cannot summarize the whole of the vast body of law with which it deals. The selection must be made strictly according to what most tellingly illustrates the thesis with reference to the principal bodies of evidence which cut the other way. If Professor Glendon had been more selective, if she had been more argumentative, she could, paradoxically, have been more accurate. If Professor Glendon had not felt that she had to explain everything for a reader who knew nothing, she could have more clearly explained those things which she did explain.

So we have a flawed work, one which I cannot unqualifiedly

50. *E.g.,* on the efforts of the medieval English church to prevent clandestine marriage, see Sheehan, *Marriage Theory and Practice in the Conciliar Legislation and Diocesan Statutes of Medieval England,* 40 MEDIAEVAL STUDIES 408 (1978).

51. P. 314.

52. *See* Donahue, *supra* note 39, at 51-52 & n.244; Donahue, *supra* note 48, at 259-60 & nn.42-43.

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recommend to the general reader. On the other hand, despite the difficulties with compression, the book is well-written, draws on a great range of legal, literary, and sociological sources, and contains many telling illustrations of the overall themes. On the theoretical level there is food for thought, even if there is no compelling thesis. On the descriptive level Professor Glendon almost always finds an interesting pattern in her material—even if all of her patterns cannot stand the strictest of scrutiny.

The real value of this book, then, lies not in the answers it provides but in the questions which it raises, and here I can have nothing but admiration for Professor Glendon's work, for like that of her mentor, Max Rheinstein, it is truly pioneering. She is suggesting that in order to measure the impact of the law on a major social institution like the family we must look at all the bodies of law which impinge upon it, such as the law of succession and social welfare law, not just those things categorized as "family law." She has documented a major trend in her family law, one which exists in the four major countries of the West, and has asked why the trend has occurred. For the breadth of its vision and the questions which it raises Professor Glendon's book is one to which all future students of comparative family law will return.

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