Mary Ann Glendon's *Abortion and Divorce in Western Law*, Cambridge, Mass.; Harvard University Press; 1987; 197pp.

by Janet E. Smith

Most Americans would most likely await a compliment when they hear the claim "The United States is in a class by itself." But for many this expectation will be sadly dashed when they read these words in Mary Ann Glendon's Abortion and Divorce in Western Law and they learn that she is claiming that American abortion and divorce laws are the most liberal in the Western world and that they provide the least protection for the fetus and for the children of divorced parents.

About abortion she states: "Today, in order to find a country where the legal approach to abortion is as indifferent to unborn life as it is in the United States, we have to look to countries which are much less comparable to us politically, socially, culturally and economically, and where concern about population expansion overrides "both women's liberty and fetal life." (p. 24) Glendon supports her claim through an analysis of the abortion laws of twenty countries. She places each country into one of four categories: those allowing abortions until viability and not requiring regulation thereafter; those that allow elective abortions early in the pregnancy but regulate them strictly thereafter; those that allow abortions early in the pregnancy for circumstances that pose exceptional hardships for the woman; and those that allow abortions only when there is serious danger to the woman's health, the likelihood of serious disease or defect in the fetus, or when the pregnancy resulted from rape or incest. Only the United States fits into the first category mentioned; that of countries that allow abortion until viability and require no regulation thereafter.

The thesis of the first two chapters of Glendon's book is stated succinctly in the introduction: "When American abortion law is viewed in comparative perspective, it presents several unique features. Not only do we have less regulation of abortion in the interest of the fetus than any other Western nation, but we provide less public support for maternity and child

raising. And, to a greater extent than in any other country, our courts have shut down the legislative process of bargaining, education, and persuasion on the abortion issue. Divorce law in the United States is also distinctive in a number of ways. Divorce is as readily available in most American states as it is anywhere, but we have been less diligent than most other countries in seeking to mitigate the economic casualties of divorce through public assistance or enforcement of private support obligations." (p. 2)

Glendon analyzes in detail the abortion laws of only two countries, France and West Germany, but that is sufficient for her purposes. In the course of the comparison of these countries with the U.S. she notes that most other countries incorporate language protective of the life of the fetus into their abortion statutes; they allow greater protection for a viable fetus; they discourage the establishment of free-standing abortion facilities; they mandate more counseling and dissemination of information about alternatives to abortion; and they are willing to confront the question of the humanity of the fetus. Other countries attempt to discourage abortion by encouraging legislators to provide more welfare and child support.

The U.S. is unique in having its abortion laws be the result of the judicial process rather than a result of the "give and take" of the legislative process. And no other countries speak in terms of a woman's constitutional right to have an abortion. Indeed, the abortion legislation of other countries seems designed as much to protect the fetus as to secure the "rights" of women. In 1975 the West German Constitutional Court found that a liberal federal statute did not sufficiently protect human life, and explained its decision with explicit reference to the Nazi "final solution" that found so much of innocent human life expendable. Glendon (following Don Kommers for the most part) contrasts the West German decision based on a concern for the community with the discovery by the U.S. Supreme Court of a "right to privacy." The above recital of items that make the abortion laws of the U.S. unique does not exhaust the points that Glendon makes, but perhaps it suffices to show that the U.S. is indeed in a class by itself.

But it is not Glendon's purpose to prove this alone she seeks to determine the causes

for this fact and to discover if Americans might be well-advised to adopt some of the measures other countries take to make child bearing a more attractive choice. She speaks of "successful compromise" on the question of abortion. The kind of compromise she has in mind is a political one where the lawmakers strive to promote greater respect for life by the rhetoric used in the formulation of the laws that they write. She also urges that the state should provide for greater assistance for women during their pregnancy and afterwards. While she admits that compromise of the moral positions of those taking opposite sides in the abortion debate is most likely impossible, she expresses great admiration for the usefulness of political compromise: "These compromises, reached in the usual democratic way, are not entirely satisfactory to everyone. They distinguish between early and late abortions by drawing a line that is difficult to defend on rational grounds, and they weigh the competing interests in a way that is apt to be distasteful to pro-life and pro-choice activists alike. But the European countries have been able to live relatively peacefully with these laws without experiencing the violence born of complete frustration and without foreclosing reexamination and renegotiation of the issues." (p. 40)

She had spoken earlier of the French law as one that represents such a compromise: "The legislation as a whole is pervaded by compassion for pregnant women, by concern for fetal life, and by expression of the commitment of society as a whole to help minimize occasions for tragic choices between them. This commitment is carried out by provision of birth control assistance, and by comparatively generous financial support for married as well as unwed mothers." (p. 18) She thinks that such compromise is possible in the U.S. for polls have consistently shown that most Americans would not approve of most abortions. Furthermore, she agrees with Justice O'Connor's famous statement that Roe is on a collision course with itself since it both allows abortion but also acknowledges that the state has a compelling interest in protecting the fetus after viability and that medical technology is rapidly moving the point of viability further and further back.

Glendon is careful not to reveal her own position on abortion. At times she seems to

give some solace to the pro-choicers, for instance, in her observations that states would not have kept their strict anti-abortion legislation even had Roe v. Wade not overturned such legislation (p. 48). She thinks if Roe v. Wade is overturned, not many states will enact strict anti-abortion legislation. She also seems to offer consolation to pro-choicers with her observation that if individual states were to outlaw abortions, modern travel has made it possible for women to go to locations where abortions can be had (p. 49). She also laments that the basic policy decisions about abortion have been made by men. Yet, she does not make this claim to suggest that the laws would be more liberal if written by men. Rather, she believes men might be forced to bear more of the responsibility for the support of children were women's perspectives to be taken more fully into account.

In spite of her apparent even-handedness and even concessions to pro-choicers, one senses between the lines a desire for much greater and perhaps even complete protection for the unborn. Yet, she clearly does not think such is a possibility at this time. Thus her argument seems directed to pro-lifers, to urge them to work for more realistic compromise legislation. The following passage seems to reveal her agenda: "Many in the pro-life ranks, moreover, are beginning to realize that in our pluralistic society it may not be possible fully to protect fetal life. As they consider what laws have a realistic chance of being adopted and accepted, some are coming to the view that, between the doctrine of the abortion cases, under which unborn life is of little or no value, and a law which permits abortion only for serious reasons, compromise legislation is the lesser of evils." (p. 46)

Although Glendon's position is fully compatible with that of one who supports the long-term goals of outlawing abortion completely, I regret to say that I think her interim solution or compromise would not assist the ultimate achievement of these goals and that they would, unfortunately, more likely prolong the involvement of this country in abortion. Glendon hopes, it seems, to achieve several goals by her recommendation of compromise; she hopes to reduce the number of abortions at least somewhat and perhaps to prepare for an eventual further tightening of the abortion laws, to encourage public assistance for women in need, and

to secure greater public peace on the question of abortion. Let me explain why I think her proposal stands to do more harm than good. Let us take up this last goal first. Glendon's position here is a troubling one, for she seems to hold public peace to be of extraordinarily high value. Earlier in her discussion of the

abortion laws of France, she noted that the language supporting protection of the fetus seemed hardly effective, and she even acknowledged that the French legislation could legitimately be characterized as a "bouquet of platitudes." Nonetheless she seems pleased that this legislation may have contributed to defusing the opposition to abortion in France. Such seems a curious satisfaction. I would argue that countries with laws that are likely to keep the opposition to abortion alive are better off. The U.S. may be fortunate to have such a liberal law for it's more difficult to change a law that is drafted well but is ineffective.

In my view, Glendon's reasons for urging compromise are simply not adequate. She miscalculates what in fact will serve to bring about change in the abortion laws of this country and what kind of opposition pro-lifers face. Glendon does not mention the various "rescue" operations now active in this country (she may not have known about them when she wrote this text.) These rescues are clearly a threat to public peace, although the rescuers are completely non-violent. A claim could be made that rescues are just what this country needs for they provide a long-needed testimony to the conviction of the pro-life movement that abortion does indeed take a human life. Rescuers, at significant sacrifice to their own comfort, attempt to save babies at clinics much in the same way as one might jump in river to save a drowning infant. While long term solutions must certainly continue to be sought, rescuers do have the satisfaction of actually saving lives and perhaps of convincing others of the enormity of the evil of abortion. Those who seek compromise solutions run the risk of offering the lives of those dying today as sacrifices on the altar of some less painful, future solution to the problem of abortion.

Another part of Glendon's agenda seems to be to persuade pro-lifers that they should

be prepared to provide more public funding for single women with dependent children. She asserts: “If the state is once again to restrict the availability of abortion and to affirm the value of unborn life, it should **in all fairness** strive to help those who bear and raise children, not only during pregnancy but also after childbirth.” (p. 53, my emphasis) She states further: “The European experience leads one to wonder why pregnant women in the United States should be asked to make significant sacrifices (whether they abort or bear children), if absent fathers and the community as a whole are not asked to sacrifice too.” Earlier she had commended the laws of West Germany and Spain: “In both opinions . . . there 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)

She proceeds to demonstrate that the U.S. is behind other industrialized nations in the provision of family benefits and services. She demonstrates convincingly that the U.S. does not provide as much time for maternity leave, as much day care, tax benefits, and income supplements for childcare. In short she argues that our society is singularly anti-child in its social and economic legislation and practice.

I find several difficulties with the claim that “in fairness” societies that outlaw abortion must provide support for babies not aborted. Certainly, it seems wise and prudent for society to provide such support, for these women and their babies need help. But it is more an act of charity than justice to give it to them. What needs to be acknowledged is that women are usually in a condition of need as a consequence of their own free

choice to engage in sexual intercourse although they were not fully prepared to meet the responsibilities of a child. Still, although the women may have not proper claims on the state, their children may have such claims and the state should help provide for them. But care must be taken that there is no suggestion that because it denies women abortion, the state must then compensate women for choosing to give life. Rather, in outlawing abortion, the state will

have kept the woman from doing a great evil; in providing her with support, it will be performing an act of charity towards her, justice towards her child.

Moreover, it is simply not true that providing financial assistance will deter most women from having abortions. It is not a woman's financial situation that most often leads her to seek an abortion; it is the type of relationship that she has with the man who has fathered her child, or, in the case of minors, the type of relationship she has with her family. While more generous social legislation may assist women in doing a better job of raising their children (though some studies show that its corrupting influence has serious consequences), those who seek to restore respect for human life need to put their energies into finding ways to discourage relationships that cannot sustain a child and to finding ways to foster a stable family life in this nation.

Still, I do think it could be argued that society has an obligation to support the children of women who have sexual intercourse irresponsibly, to the extent that society is responsible for these pregnancies. I think that it is very arguable that our society shares a lot of responsibility for the unbridled sexual license of our times. The entertainment of our society, the type of sex education offered in many of the schools, and many of our social policies encourage and facilitate sexual intercourse outside of marriage. Insofar as society makes attractive sexual intercourse between individuals who are not prepared to be parents, it would seem to be obliged to assist those who take advantage of the liberties it encourages. Still, the wisest course would seem to be for society to take measures to discourage such activity.

Glendon argues that compromise legislation would be advisable for yet another reason. Glendon, following Plato in this regard, holds that law is a means to educate the populace, a means to persuade them of what is right and to lead them to virtue. Glendon notes that this notion of law has largely been lost in the U.S. and England, but that it still carries some influence in European nations. In her comparative study of the different laws concerning abortion and divorce, Glendon seeks to discover what "stories" different legal systems tell for

she thinks these stories reveal how different countries “imagine the real.” (I find reference to “stories” and to “imagining the real” both to be unfortunate choice of diction since both serve to make the human good seem relative and subjective.) The way a law is framed and the various provisions of a law suggest what values a society believes worthy of protection. As the above indicates, Glendon thinks and convincingly demonstrates that the laws of other Western countries do a lot better job of expressing concern for the fetus and of providing support for children. But she readily concedes that nonetheless these facts seem to have done little to reduce the number of abortions in these countries. (p. 59). In fact, a deficiency in her otherwise thorough study seems to be the lack of data on how effective compromise legislation is in reducing the number of abortions and on how many of the women aided by the state become more responsible in their child-bearing. Again, she seems to concede that they are not very effective, but some hard data would be welcome.

Glendon argues that compromise legislation will “replace strident discord with reasoned discussion” and that over the long run compromise legislation will help change the minds and hearts of the populace and impede demands for such practices as withholding treatment from newborns with defects. She tries to persuade pro-choicers that compromise will be beneficial since it will reflect more accurately the views of the American populace. There are difficulties with Glendon’s view that the way a law is formulated will help form the attitudes of the populace. Glendon draws upon Plato’s analysis of the laws in his late dialogue ”The Law• in her advocacy of writing laws in such a way that they not only define what is forbidden but that they help educate about what is good. This author has no quarrel with this laudable ideal, but disparities between the kind of society Plato envisioned and modern society make a transfer of his ideals into practice in our time next to impossible. Plato thought the law educated society in part because he had set up an elaborate system in his dialogue ”The Laws• for having the populace memorize the laws and to sing songs and tell stories that would reinforce the content of the laws. Sadly, law plays no such role in our moral formation. Few modern citizens are aware of how a law is formulated; they simply know what they can and cannot do.

In the second portion of her book Glendon applies the same method of analysis to divorce as she did to abortion. Again, she ably draws out the differences between U.S. divorce law and the laws of European nations. The U.S. is again unique in the liberality of its laws. For instance, whereas most countries require a lengthy waiting period of at least several years before granting a no-fault divorce, most U.S. laws require a separation of a year or less. The U. S. has even gone to the extent of speaking of divorce as a constitutional right as well as speaking of a right to as many remarriages as one wishes.

Although Glendon laments the ease with which divorce can be obtained, her chief concern is with the poor system the U. S. has for ensuring financial support for the dependent spouse and minor children after a divorce. She notes that the U.S. treats divorces of couples with minor children as exceptional when they are in fact usual. But little in our system is designed to protect the children and much works against their protection. U. S. law generally leaves the decision on financial support up to the discretion of the judge whereas European countries generally have formulas and tables devised to ensure support. The U.S. is also lacking means for adjusting support to cost of living and is particularly remiss in ensuring that child support is paid or that agreements made in the divorce settlement are kept. Other countries have public means of collecting support and means of providing support when collection is difficult. Glendon charges that most U.S. judges seek to protect the standard of living of the male provider in the household. She recommends a “children first” policy in the formulation of divorce laws and of tax laws. Her argumentation in this regard is most compelling. She claims that now divorce and tax laws protect the needs of spouses, if only poorly and inequitably, but that what really needs to be taken into account is the needs of the children.

In her review of divorce laws, Glendon again concludes that the U.S. is in a class by itself. “. . . the United States appears unique among Western countries in its relative carelessness about assuring either public or private responsibility for the economic casualties of divorce. More than any other country among those examined here, the United States has accepted the idea of no-fault, no-responsibility divorce.” (p. 105) Whereas all Western nations

have made divorce easier, only the U.S. (18 states and D.C.) and Sweden have eliminated fault grounds for divorce completely and have denied the courts any discretion in denying divorce. Nonetheless, Glendon shows that although some Western nations have provisions in their laws for denying divorce on occasion, they rarely exercise these provisions. Thus she concedes: “Like compromise statues on abortion, mixed-grounds divorce statutes are hard to justify in theory.” (p. 74) But, again, Glendon believes that such laws have merit in that they strive to retain respect for values society thinks important. She notes that in European nations divorce laws are nationwide whereas in the U.S. each state has its own divorce laws. European nations, then, are fully engaged in the formulation of these laws since there is a sustained public debate in the media about any changes. Such sustained public attention serves to educate the populace about the laws. Without an effort at educating the public about the content of the laws, one ought to remain skeptical about the impact of laws that express interest in stable marriages but do little to foster such marriages.

The third and final portion of Glendon’s book is an attempt to explain the greater liberality of American laws on these matters. First Glendon treats the reader to a succinct and fascinating history of the philosophical underpinnings of American law. She offers three explanations for the American phenomenon. 1) The Anglo-American tradition broke from its feudal roots long before the continent and the American populace in particular had little tradition upon which to build. 2) Furthermore, the tradition that it imported was quickly and easily influenced by the thought of Hobbes and Mill and thus upheld liberty and individualism and self-reliance as foremost values. 3) In the United States, unlike France, for instance, the legislature took a back seat to the judiciary; legal precedent and meaning in the U.S. was decided largely by the courts. She summarizes her comparative study of the French, German, and American legal systems in this way: “Legal systems on the French and German model have imagined the human person as a free, self-determining individual, but also as a being defined in part through his relations with others. The individual is envisioned, more than in our legal system, as situated within family and community; rights are viewed as inseparable from

corresponding responsibilities; and liberty and equality are seen as coordinate with fraternity. Personal values are regarded as higher than social values, but as rooted in them. This view of the world pervades court decision, statutes, social programs, and constitutional texts." (133)

Not only are the conclusions that Glendon draws provocative, it is a delight to read the observations of one who moves easily among the ideas of Hobbes, Mill, Rousseau, Kant, Tocqueville, Robert Bellah, Clifford Geertz, and Alasdair MacIntyre. In general, Glendon shows a familiarity with a wide spectrum of authors, from the classical and modern political theorists, comparative law specialists, and modern works on abortion and virtue that contributes a great deal to her analysis. One author whom I think she would find most helpful is Stanley Hauerwas who makes effective use of the language of "story" (with which, as noted, I am generally uncomfortable). He writes eloquently about how abortion conflicts with the story that Christians in particular would like to tell about themselves and he makes a most convincing case for the need for the community to demonstrate its love of life by providing for pregnant women in need. She might also have found useful the work of Steven Mosher who has written about the forced abortion policy of China for couples who have had one child. This policy shows a further extreme to which abortion legislation can go.

The conclusion of Glendon's book is an eloquent statement of a kind of wistful desire that laws when drafted well might be effective in forming the values of the populace. Yet, her conclusion seems to this reviewer to undercut her thesis along the lines suggested above. That is, her mentor in these matters, Plato, recognized that law had a pedagogical influence when it was part of an overall program to form the hearts and minds of the populace in a state where consensus was mandated, protected and promoted far more than any modern liberal state could conceive of; he had an elaborate program of indoctrination and carefully controlled any questioning of the laws of the state.

In her conclusion, Glendon notes that in our fragmented society the best that laws can

do is to reflect and enter into the kind of dialogic search engaged in by a pluralistic society trying to live together. She continues to urge compromise legislation but she has truly modest expectations for the good it can serve. Her final analysis of the European situation is this: "In their current approaches to these problems, which may at first seem to be mere political compromises, satisfactory to no one and shot through with inconsistencies, a conversation is going on about the right way to live" (p. 140). It seems that we are in a sad state indeed when the best we can hope for is a conversation, in hopes that the conversation will help us find some common ground upon which we can build a society that will preserve the values of family and community.

Glendon is not given to excessive optimism; her well-written and well-researched book is a worthy attempt to explain how American law came to be unique in its liberal permission of abortion and divorce and to suggest ways that we could edge back from the precipice upon which we find ourselves. Good men and women, however, can and do differ on whether this is better achieved by inching along by the baby steps of compromise legislation or whether giant, vigorous, and forceful steps are needed to escape the rapid erosion of our respect for life and for the good of faithful and stable marriages.