


12-1-1983

The New Family and the New Property by Mary Ann Glendon

Linda Lewin

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Family Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Linda Lewin, *The New Family and the New Property by Mary Ann Glendon*, 6 B.C. Int'l & Comp. L. Rev. 361 (1983), <http://lawdigitalcommons.bc.edu/iclr/vol6/iss1/12>

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

LINDA LEWIN*

THE NEW FAMILY AND THE NEW PROPERTY. BY MARY ANN GLENDON.
Toronto: Butterworths, 1981, 269 pp., \$19.95, paper.

This is a very timely book. Although its author has not intended to address the contemporary swing toward "re-structuring" embodied in "the New Federalism," her scholarly examination nevertheless obliges readers to weigh carefully many of the social and political realities the current administration is determined to change. Just at the moment when the American population's unprecedented dependence on both employment in the public sector and government transfer payments is being severely curtailed, Mary Ann Glendon presents an excellent appraisal of their evolving legal underpinnings in "the new property." She skillfully connects their recent emergence to major historical changes in the relationship of the individual to family and to workplace. In addition, she does a great deal more than that, for this is also a very thoughtful book. Glendon offers us an analysis which, in her words, seeks "to bring comparative law to the threshold of legal sociology."¹ She accomplishes her objective superbly. In order to do so, she picks up a number of themes already developed in one of her previous books, *State, Law and Family*,² and widens considerably her previous scope of inquiry in order to explore many implications of that fascinating comparative study of the formation, consequences, and dissolution of marriage in modern comparative law.

Glendon's building blocks consist of two concepts, each of which will be very familiar either to social historians and sociologists or to specialists in comparative law, namely, "the new family" and "the new property." Few, however, will have considered the relationship between these concepts. Since the 1960's, a new generation of social historians has painstakingly identified and historically traced the first concept, "the new family." They have turned to social anthropology, demography and psychology in order to reexamine the conventional sources of the family in past times, offering us a new perspective on contemporary family organization in the industrial West. Consequently, it is now possible to place the elusively changing profile of this key social institution within a broad chronological framework. As Glendon points out, today's new family is one nurtured on the ideology of individual liberty and the relative independence and equality of its members. It appeared as the economic importance of both marriage and the family unit declined historically. However, as egalitarian and libertarian

* Linda Lewin is Assistant Professor of History at the University of California, Berkeley; A. B., 1963, University of California, Berkeley; M.A., 1968, Ph.D., 1975, Columbia University. Currently, Professor Lewin is researching and writing a book on the social history of family law in Brazil.

1. M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 5 (1981) [hereinafter cited as *Glendon*].

2. M. GLENDON, *STATE, LAW AND FAMILY* (1977). For a review of this book, see Clive, *Book Review*, 3 B. C. INT'L & COMP. L. REV. 495 (1980).

ideologies gained widespread acceptance, they in turn facilitated and legitimated further change in family organization and values. The resulting institution has been our own very familiar — if ephemeral — nuclear family. Founded on the husband-wife relationship, freely contracted and freely dissoluble, the property in this new family is based largely on wages or on government payments, in addition to often substantial pensions and fringe benefits, rather than landed wealth or even stocks and bonds.

“The new property,” Glendon’s second conceptual building block, is especially familiar to comparative law specialists as the notion popularized by Professor Charles Reich almost twenty years ago.³ Reich’s crucial emphasis on the “entitlements” that the new property conferred in salaried wages, welfare transfers, pensions, insurance policies, and access to medical and other “fringe” benefits, contrasted markedly with traditional forms of property guaranteeing the family’s security. In addition, the new property conferred important entitlement to the status that derived from employment and occupation or dependence on government transfer payments, namely what family membership, and especially landed wealth, had formerly conferred. For Glendon, Reich’s emphasis on entitlements, due to what he saw twenty years ago as their essentially precarious position in law and the urgent need to protect them, is inextricably connected to the new family. Stated differently, the relationship between the new family and the new property is confirmed in the transition from what Sir Henry Maine had identified as societies which are “aggregations of families” to what Glendon correctly notes are now societies that have become “collections of individuals.”⁴

Her central argument, consequently, sums up this change and offers a conclusion about the contemporary convergence of private and public law:

The new family law reflects a world where traditional forms of property are often less important than what have come to be known as entitlements, and it manifests new concern with the family property of groups of the population whose principal wealth is apt to be composed of such assets as wages, pension rights, household goods and a lease, or perhaps some equity in a mortgaged home. In public family law, the lack of property, rather than its possession, claims attention.⁵

As law has conceded greater rights to individual privacy in questions of family association, Glendon observes, public law steadily has been supplanting private law. Consequently, the rising frequency of divorce has meant that, for the poorer majority, private law could only dissolve the marriage bond since little property

3. See Reich, *The New Property*, 73 YALE L. J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L. J. 1245 (1965).

4. GLENDON, *supra* note 1, at 143.

5. *Id.* at 117.

existed for it to regulate. Instead, as divorce and remarriage have become more frequent, the consequences for the welfare system have become more apparent. Public law has thus subsumed the rights of dependent children and, very often, of their divorced or single mothers. The breaking up of families has placed a new emphasis on public welfare law that is only beginning to be appreciated.

Considering Glendon's work from the perspective of a social historian, this reviewer recommends *The New Family and the New Property* as an indispensable source that uniquely offers a dimension absent in the comparative legal literature on the family. Regrettably, many historians should and would consult the latter, were it not all too often perceived as excessively abstracted from the social realities of change or inaccessible by virtue of its vocabulary to the layman. Glendon also offers an astonishing and exceedingly welcome familiarity with the "new social history" and the social science literature on which it has depended. She, therefore, bridges some considerable conceptual gaps between history and law as few others can. From the Annales School to Parsonian sociology to the modernization of the family disseminated by William Goode and disciples and to Marx, Engels and Weber — Glendon has read them all and greatly profited from the experience. Since neither the new family nor the new property is any longer a new concept in need of special scholarly identification for historians and comparative law specialists alike, Professor Glendon's special talent lies in the skillful analysis she has woven of the evolution of their mutual relationship over time. As a consequence, historians will take note of the new property in the comparative law literature, just as comparative law specialists will confront directly the profile of the new family that social historians have been sketching for some time.

Impressively drawing on the work of major social historians of the last two decades, Glendon identifies what they have isolated as the key characteristics in changing family organization over the last five centuries and integrates their findings with an older corpus of contract and property law. Analysis is further refined by subjecting conclusions to the scrutiny of legal sociology in order to evaluate the social implications of the new family in law. Her sources are stunning for their range of scholarship, the diversity of their linguistic accessibility, such as French, German, English and Swedish, and their current relevance. In addition to those social historians already mentioned, and to cite only a few, Glendon draws on the works of Philippe Ariès, Fernand Braudel, Benjamin Cardozo, Archibald Cox, Jean-Louis Flandrin, Lawrence Friedman, Morris Janowitz, Lawrence Stone, Christopher Jenks, Jean Carbonnier, Harry Krause, John Merryman, Max Rheinstein — and the United States Census and the *New York Times*. Such versatility is rare and greatly enhances the attraction of the author's arguments, not to mention the pleasure of reading this book.

Glendon begins by relying on Lawrence Stone's model of a permeable, "open lineage" family that depended on the blood ties of the kindred for its cohesion and landed property for its wealth, status and social position. It slowly became

redefined between the sixteenth and eighteenth centuries as a family founded on companionate marriage and a conjugal joining of non-kin.⁶ Glendon then traces the parallel consequences of this historical evolution of family structure for property law in a discussion that begins one of the book's major themes: the alteration of the nature of the legal bonds between the individuals who constitute the family group. She points out, for instance, that the growing preference for the surviving spouse over children or other blood relatives in intestate succession law had, by the nineteenth century, "furnished the most dramatic illustration of the legal movement of the institution of marriage into the foreground relative to other family relationships."⁷ Reform, in other words, narrowed a previously existing gap between legal and sociological norms. Moreover, publicization of formerly private law began to demonstrate remarkable similarities throughout industrialized countries; convergence in both civil and common law countries has continued to characterize the evolution of family law in this century. As family law became less morally prescriptive and more "neutral," it increasingly gave way to individual rights at the expense of the conjugally-bonded group.

While many historians would concur with Glendon that family law has been largely reactive, closing an already existing gap between juridical and social norms, some would still raise the issue of the extent to which law itself has been a transforming force. Glendon does give interesting consideration to how law potentially might be used to strengthen families, acknowledging, however, that its capacity to reshape human relations is very limited. Perhaps the most familiar instance she examines is the recent federal program to locate and compel divorced or separated fathers to maintain their legal obligations of child support. In observing that only one quarter of single, divorced or separated mothers received any support payments for their children in 1975, Glendon concludes that legal redress is severely limited by the lack of sufficient financial resources on the part of either absent or remarried fathers. Yet, the reader still wonders, especially in the case of the middle class, to what extent halfhearted or nonexistent enforcement has hampered efforts. If the federal government can so efficiently withhold income taxes, can it not be expected to invent a similar system that might offset federal assistance to dependent children, to tie rights to responsibilities?

Law might also be appraised as less reactive in situations where it inhibits behavior in relation to the new property. The reluctance of cohabiting individuals to marry or remarry because they wish to avoid a reduction in their welfare benefits or an increase in income taxes is a case in point. Presumably, to the extent that marriage would reinforce the bonds of those cohabiting, the reform of law in order to avoid punitive income deprivation for the partners would permit the family relationship to be strengthened.

6. *Id.* at 12-13.

7. *Id.* at 21.

The interplay of emotional and either property or other economic factors which still define modern marriage in legal and sociological terms is a fascinating theme to which Glendon devotes central attention. The fact that we live in a transitional period in family law nevertheless suggests several points that would have been worthy of further inquiry in her analysis. One of them is to what extent a more neutral family law has impinged on the unequal sociological or economic relationships defined by the husband-wife or father-mother couple. Glendon is very aware of the inferior position of women as wage earners vis-à-vis men. Even more, however, might have been made of the connection between a legal norm positing presumed economic equality, or offering only a weakly defined equity arrangement, following a divorce and the sociological reality that most married women are still supplementary "breadwinners" and most divorced women who head households live near the poverty line. From this perspective, serial marriage acquires a special economic urgency, although often cloaked in the ideology of individual freedom.

On the other hand, serial marriage is economically beneficial to men. All the survey research data on "leisure" time activities continue to confirm that working women and mothers, even those who are full-time professionals like the physicians Glendon describes, perform the lion's share of household labor, economically delivering the domestic services their husbands require as well as a second paycheck. This sociological norm seems still very weakly acknowledged in American family law, compared with certain Continental situations, most notably the German Federal Republic. How do we account historically for the very slow recognition of "women's work" in American family law when, concurrently, the new property otherwise appears to be "catching up" as law recognizes enduring family claims to entitlements like unvested pensions? Since this is an area where law might be more programmatic and less passive, it would have been interesting if Glendon had attempted to answer why more legal innovation has not appeared. Is there an ideology of romantic love that counters claims of individualism on the part of wives when they would appeal to a more neutral family law if their marriage bonds are dissolved? Or is law intrinsically less neutral than one would suppose in giving greater consideration to property than to unpaid labor rendered in marriage? Must not the new property ultimately address such unpaid labor if indeed it is to be "new"?

These issues lead a historian to ask a final and more fundamental question about the process by which public law has supplanted property relationships within the family that formerly fell within the purview of private law. Has not this very gradual displacement created the confusing, if not misleading, sociological apprehension that marriage is merely an emotionally bonded relationship? If new property continues to be redefined with increasing recognition of individual family members' claims to it, then does it not become more difficult to defend the purely emotional nature of the bonds that unite individuals in marriage? The right to dissolve marriage may remain easily available in law but

that fact does not connote a new emotional emphasis consensually free of economic concerns. Law, in other words, shapes appearances. The near absence of real property in modern marriage should not belie the reality that marriage still remains, at least while it lasts, an arrangement with important economic functions relevant for all individuals inscribed in the family unit.

The emphasis on the recent movement toward a new reliance on administrative law to provide or distribute the new property for families whose marriage bonds are either intact or broken emerges as Glendon's most significant conclusion. As "Reaganomics" threatens to deprive the middle class of its federal loan support for the college education of its children, not to mention the cutback of federal aid to dependent children, the public has been made politically aware of the mass dependence on government transfer payments that the new property's entitlements already conveyed by 1980. At this writing, one can only speculate about what the consequences of anticipated cuts in the federal budget will be on family ties. Their impact will certainly reveal the considerable bureaucratization of many of the family's traditional functions, as Glendon has outlined. Her concluding chapter, "Towards a Feudalism of the New Property?," offers a provoking analysis of the analogy often drawn between feudalism and current property or individual relationships to the state, which reflects the expanding role of the state and bureaucracy. In so doing, it addresses the uncertain future.

The difficulty of delineating the public from the private, just as the latter is "disappearing into an amalgam of law that is neither public nor private,"⁸ Glendon notes, is responsible for the appeal of feudal analogies in the writings of Reich, Hayek, Pound, and others. However, comparison of contemporary society with feudalism is erroneous, even if fruitful to a point, because the relationships which bind individuals today are no longer personal in nature. Status is still, in part, achieved through education and occupation, even if it tends to be ascribed and fixed once achieved. While similarly rejecting this analogy, some historians would nevertheless push the connection between the individual's relationship to family as it has been defined in traditional property law (for example, as an individual member whose interest must be subordinated to the group) and the individual's current relationship to bureaucratic structures in administrative law. Both suggest organizational patterns that are not so much feudal as they are corporate, especially given the significant role that Glendon emphasizes has been played by the "helping professions." One may wonder, however, if, as she argues, this trend has led to "atomization" or if corporatism, in part at least, has followed from an overly atomistic individualism. If so, one would hope that, as Glendon wishes, bureaucratic rule "could be transformed from within, humanized, and oriented to a common good."⁹

In returning to the long-term concern of the traditionally open lineage or the

8. *Id.* at 226.

9. *Id.* at 238.

modern companionate marriage, namely the survival of future generations of the family, Glendon identifies a vital thread in the fabric of Western social thought as a basis for future hope. Taking heart from a reasoned consideration of history, one may assess the present as a transitional era and appreciate individual change, even that which has increasingly rendered family ties exceedingly fragile, as a necessary occurrence in a world where bureaucracy is not only inevitable but also probably indestructible and necessary.

The directions in which this historian would wish to push Glendon's illuminating examination of the new family and the new property lie far afield of her own chosen perspective, however irresistibly they might beckon to specialists in disciplines complementary to family law. Glendon has given us a superb analysis that reconsiders many of the connections between legal and sociological change too often taken for granted in both the historical and comparative law literatures. Her text is enviably clear and succinct, knitting together a diverse and intimidating variety of evidence that logically emphasizes the selected themes. *The New Family and the New Property* promises to be a valuable contribution to a wide range of specialists in family studies, policy and law. Its shortcomings are minor and its synthesis a very valuable contribution to an increasingly complex set of issues.