On the Danger of Allowing Marital Fault to Re-Emerge in the Guise of Torts

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Mary Ann Glendon is of the vanishing species of social thinkers who combine meticulous scholarship, integrity, brilliance, imagination, and compassion with a considered—and strong—point of view. Glendon has deeply influenced modern thinking on family law worldwide. Her work towers above that of her contemporaries in a debate that has become increasingly politicized and polarized. She has thoughtfully reviewed what is happening and considered what should be happening to marriage and to the family.

The three decades that we have known each other and met and worked together at a great variety of places and occasions all over the world—ranging from the meetings of the Board of Directors and the Board of Editors of the American Journal of Comparative Law, the Panel of Advisers to the American Law Institute’s ongoing family law project, and on numerous international congresses of the greatest geographic and subject matter variety—have meant a great deal to me personally and professionally. Mary Ann is a good friend as well as ideal role model. Her work represents a level of achievement to which one can only aspire—but which remains out of reach.

She has worked in the finest traditions of comparative law to carry forward the work of her teacher, Max Rheinstein, searching out responses to similar social forces in comparable societies—especially those of Western Europe—and seeking to draw out answers that may help in solving our problems. Contributing to the ongoing Transformation of Family Law,1 she has inquired into the social meaning of today’s marriage and unmarried cohabitation, of Abortion and Divorce in Western Law,2 the relative roles of State, Law, and Family,3 and has

* Max L. Rowe Professor of Law, University of Illinois College of Law.
2 Mary Ann Glendon, Abortion and Divorce in Western Law (1987).
sought a just division of marital property between spouses in our modern, redefined marriage.

To name just one of her many insightful contributions, her articulation of the concept of the “new property” pointed to the broad shift in our day from tangible possessions to social entitlements, a shift that had not been appropriately reflected in the division of “property” at the end of marriage, a shift to which our law still seeks to adapt.

Despite her candidly expressed worries about the storms now raging around the family, Mary Ann remains optimistic about the family’s future:

However frail and faltering they may currently seem to be, families remain, for most of us, the only theater in which we can realize our full capacity for good or evil, joy or suffering. By attaching us to beings and feelings that are perishable, families expose us to conflict, pain and loss. They give rise to tension between love and duty, reason and passion, immediate and long-range objectives, egoism and altruism. But relationships between husbands and wives, parents and children, can also provide frameworks for resolving such tensions.4

Far beyond family law, Mary Ann has concerned herself with broader societal developments. In A Nation Under Lawyers5 she scathingly—but with humor, irony, and erudite sophistication—indicts the changed direction (away from legal training) of current standards and methods of legal education, and deplores the resultant oversupply of lawyers who do not enjoy being lawyers and who are ill-equipped to play the part, at the social cost of decreased quality and ethics.

In her always thought provoking and sometimes provocative work, Professor Glendon has not sought unanimous approval. In an academic climate of overwhelming thought conformity, where deviation from the approved fashion of “academic” thinking all too often invites unfriendly attack, she stands out for not hewing to a “politically correct” line. With sincerity and calm argumentation, Mary Ann has sought to stem the tide of intellectual—and often radically gender-oriented—chaos into which much academic writing on family law has sunk, while at the same time not allowing herself to become a partisan in the opposite extreme camp. Instead, she has unerringly worked for good causes, as she sees them, and I cannot think of any critic who has not lauded—or even has questioned—the quality of her scholarship.

4 Id. at 313.
Beyond solitary scholarship and academic discourse, Mary Ann has not hesitated to put her unique talent for diplomacy into world and nation-wide causes. She had the distinction of being selected by the Pope to be the Vatican's delegate at the 1996 Women's Rights Conference in Beijing. She has been a leader in Professor Etzioni's "Communitarian Movement." And, perhaps surprising to those who do not know her, there was a time long ago when she was involved in the activities of the National Lawyers Guild, a time when that organization stood for social progress.

Mary Ann sees the value of working with organized, broader social forces, instead of standing alone as an individual. I enormously admire that willingness to get out in front of ideas and give personal support and involvement to group-sponsored causes that strive for good—when the armchair academic feels compelled to qualify any endorsement of an agenda with reservations, footnotes, or dissents, even at the cost of not being heard or not being influential. It credits her courage to see that "group causes" are more potent forces for social change than an individual can hope to be, and to accept the fact that any group association furnishes a convenient target. Predictably, her work for the Catholic Church, as well as for the Communitarian Movement has come, in the view of some facile critics, at some cost.

But acting on her convictions is her nature—Mary Ann has been a courageous advocate for positive change all her life. Early on, she was in Mississippi working for racial equality and civil rights. Today that sounds like pure credit, but it was not so at the time. At the most personal level, her own family reflects the integrated diversity for which this nation should strive, encompassing a child half-Black, another half-Jewish, another Korean.6

In today's academy, being perceived as a "conservative" on target issues may be as detrimental to a career as, in an earlier age of unreason, it was to be named a "radical." While the president of Catholics for a Free Choice called her "more conservative than the Pope,"7 Mary Ann comments: "I always laugh when I hear myself described as a conservative," and views herself as "politically homeless," saying that she is "more liberal than the right wing of the Republican Party and more conservative than the liberal wing of the Democratic Party."8

Significantly, however, her "homelessness" has not inhibited her career. Some credit must be given to the often biased and conflicted

7 Id.
8 Id.
Harvard faculty for recognizing her as the “Learned Hand”—after a splendid judge—chaired professor. Well beyond that, Glendon has been sought out by the best law schools in this country and the world as teacher, lecturer, and recipient of numerous honorary degrees. This may be the greatest testimonial to her achievement in an age where many law faculties seek to clone themselves in a uniform image. In Mary Ann’s words,

many legal academics still share with their colleagues in other disciplines the scholar’s commitment to pursue knowledge wherever it leads and whatever its unpopularity. But for a growing coterie of professors in the human sciences, including law, that ideal is simply meaningless. In some quarters, notions of knowledge, objectivity, and truth have come under heavy attack. If truth is whatever you want it to be, or the will of the stronger, the distinction between scholarship and advocacy collapses. If the law is radically indeterminate, then all legal scholarship becomes a form of advocacy.10

It is a great honor to be asked to write a tribute to Mary Ann Glendon, whose influence has reached so forcefully into and so far beyond the United States. It also is a daunting, even a frustrating task. Daunting, because what a challenge it is to attempt to review and rethink her vast scholarship in so many areas of concern to the modern world and, for that reason, to her. Frustrating, because what could I say that would do her work and her person justice? I can do neither, but I want to express my profound respect for—even as I stand in awe of—this unique contributor to good and better in our world. She has deeply influenced me and the best tribute I can offer Mary Ann, the scholar, family advocate, internationalist, is a very sincere wish for her continued work and influence.

I will add a few further remarks about a recent family law development that has been of concern to me for some time.11 While my “questions” may be inspired by Mary Ann’s work, the “answers” raised here are sufficiently out of “synch” with mainstream thinking that I do not wish to implicate her further.

One divorce reform debate is over: marital status is no longer seriously at issue. Divorce is available at the will of either the wife or the husband—regardless of fault or merit, or who did what for, or to

9 For a recent example, see Derrick Bell, At Last, Harvard Sees the Light, N.Y. Times, Jan. 27, 1998, at A24.  
10 GLENDON, supra note 5, at 209.  
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whom. Even where fault grounds remain on the books, "no-fault" approaches are available as an alternative.

For a long time, of course, the Western tradition allowed no divorce at all—at least not with the right to remarry. Short of death, annulment was the sole "remedy" and was available only if there was a pre-existing impediment to marriage. Abuse flourished, in terms of unrestrained inventiveness regarding impediments to marriage. Even then, only a fraction of the perceived need was served, and the early divorce reformers of the nineteenth century complained that disaffected parties should be allowed a final divorce for fault, including the right to remarry. They succeeded.

While marital status became dissoluble by divorce, the state continued to reserve for itself the power to grant or deny divorce, relying on a historical (typically religious) definition of marital (moral) fault. In effect, that law prescribed that only an "innocent" spouse could divorce only a "guilty" spouse. Conversely, this meant that an "innocent" spouse could not be divorced against her or his will. Guilt and innocence were defined by the legal grounds for divorce. In short, if one played by the rules, traditional marriage provided economic stability and social security.

The reformers of the mid-twentieth century finally acted on the long-running complaint that the traditional catalogue of marital fault grounds was too narrow and out of touch with the realities of modern marriage. But they still focused on status and on fault. It seemingly escaped their notice that de facto no-fault, like consensual divorce, had been practiced for a long time, and for decades ever more blatantly. Indeed, just before no-fault divorce reform finally swept the secular world in the 1960s and 1970s, upward of 90 percent of all divorces were "consensual." The negotiation over status hid the real issue: economic consequences.

In practical reality then, and in contradiction to the law on the books, status had not been the important issue in divorce for a considerable time. The old law did not mean that divorce was difficult. Rather, it meant that if one party wanted a divorce but had no "licensed" grounds, he or she had to negotiate and pay the other's price for agreeing on a typically fictitious fault ground, thus allowing the divorce to go forward. Divorce went at the price for which the "willing seller" would sell the marriage. That price was equal to what the "willing buyer" would pay for the divorce. Financial and other concessions (e.g., on child custody) brought supply and demand into equilibrium, and "economics" worked. The grounds that ostensibly governed the issue of status thus underhandedly governed the financial consequences of divorce. But where Judge Posner and the newer Chicago
Economics Nobelist, Gary Becker, might praise the free market, others saw a sort of jungle law.

Where the professed aim of no-fault divorce reform had been to bring humane sense to a corrupt process, the significant change it actually brought was divorce at the will of either party. At the margin, the move was from consensual divorce to unilateral divorce. What was hailed as reform reduced the role of contractual fidelity, and depreciated reasonable, economic reliance interests in the most confidential legal relationship. Marriage has become the only contract out of which a breaching party may walk with impunity and, likely as not, profit. Perplexingly, this came to our civilization at the very time when so many other areas of the law moved from caveat emptor to an extraordinary, unprecedented concern for the economic underdog. A great and thorough literature is led in point of time and insight by Max Rheinstein and his student, Mary Ann Glendon, the first and last editor-in-chief, respectively, of the family law volume in the International Encyclopedia of Comparative Law.

When the modern State stopped asking whether the dissonant parties should be granted or denied their divorce, financial arrangements openly took center stage. Today’s contested questions include the allocation of alimony, the distribution of property, and decisions on child support, aside from child custody. But given the complexities of the task, the financial consequences of divorce—especially alimony and property division—have not been resolved as fully or as easily as was the status issue.

Nearly accomplished legal equality of women and men and related social change have accelerated emotion-charged attacks on the alimony front—even while eligibility for alimony has been extended to men. In the United States and elsewhere, “liberated” men proclaim that they should not be forced to support what some judges have called “alimony drones.” They add that women should no longer view marriage as “a bread ticket for life.” Many feminists consider alimony demeaning, as it spells continued financial dependence on a possibly despised ex-spouse. Adding insult to injury, alimony may subject the recipient to nasty conditions involving post-marital sexual behavior. To illustrate, traditional alimony often ended on the

13 See MAX RHEINSTEIN & MARY ANN GLENDON, INTERSPOUAL RELATIONS, in 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PERSONS AND FAMILY ch. 4, at 3 (1980).
ex-wife's remarriage and today, in some places, when she "cohabits"—whatever that may mean.\textsuperscript{16}

To escape the acrimony of alimony and to achieve finality in the divorce, the mid-century reformers’ emphasis, as reflected in the Uniform Marriage and Divorce Act (UMDA), turned to the division of "property." Reform legislation, such as the influential UMDA, proposed to bring an end to the divorced marriage as completely as possible. Alimony, therefore, was to be the rare exception, and instead the new emphasis was on the division of property.

It may be worth noting here that, even in separate property regimes, there had long been full equality between husband and wife in matters of property: each owned until and kept after divorce all property that he or she had earned and saved during the marriage. The problem with that equality was that typically only one of them had earnings: the husband. Commendably, the treatment of property on divorce has now undergone fundamental change, favoring the economically weaker spouse, typically the wife, by splitting "equitably" all property acquired by either spouse during the marriage. So far, so good.

All too often, however, the overarching goal of modern divorce, finality, collides with the reality that there is no significant amount of property in the majority of cases. And for better or for worse, the goal of finality of divorce, if manifested in terms of decreased long-term provisions for a spouse on divorce—where that dependency was created by marriage and, particularly, by marital role division—does increase the risk of marriage. The reform movement sought to compromise between the need for provision and the goal of finality by talking in terms of limited alimony, short-term, under the theme of "rehabilitation." From what? Typically from motherhood—formerly revered as fulfilling the most important social and personal needs. Rehabilitation to what? To self-support, but all too often without adequate concern for the dependent spouse's lack of appropriate and adequate economic opportunity. Adding insult to injury, the very word "rehabilitation" suggests pathology. It implies that the marital role-division that makes full-time parenthood possible now is considered pathological.

This sounds harsh, but it may be the only reasonable adaptation to our short-term-oriented society, where loyalty counts little and self-

fulfillment increasingly is seen narrowly in terms of the literal self rather than through the spectrum of the family. Moreover, the tradition of the mother as full-time parent, as an exclusive track for women and as an all but inescapable consequence of gender, certainly was not a fair societal response to the joint parental responsibility of child rearing. (Indeed, neither was the role of sole financial provider that was—and quite typically still is—thrust upon the man.)

The United States Supreme Court has certified marriage and procreation as fundamental human rights. One may fairly conclude, however, that present legal, economic, and social circumstances have rendered these rights less meaningful by making their exercise too costly. The legal and economic incentive structure may already be so loaded against the role-divided family that an intelligent woman or man no longer has a reasonable choice to forego market participation in favor of family role division.

Back to the financial consequences of divorce: Who should get how much, of what, from whom, and why? The answer remains elusive and the task undone, although many laws have been passed. Again, most divorce reformers have asked us to believe that "marital fault" is irrelevant, both to alimony and to property division. While I do not want to digress too far to belittle the seemingly obvious and important distinction between property and alimony, perceptive observers have long known that that distinction in too many cases is arbitrary or non-existent. When a "property division" may tap an earner's future income stream, and an alimony obligation can be satisfied by way of a lump sum paid out of existing property, what, other than the label, is the distinction? That the label can of course be quite important in terms of evoking quite different legal consequences is still another matter, but also not one that makes much sense, as I have elaborated elsewhere.

Back to fault: the perception that inquiry into marital fault is futile and unpleasant had properly dominated the divorce reform debate, but then the question was what marital fault should govern the status decision, and then the State presumed to reserve to itself the decision whether parties should be allowed to divorce at all. Once it had been resolved that fault should no longer answer the question whether to allow divorce, the reformers carelessly transferred their aversion to fault to the very different question of what the financial consequences of the termination of marriage should be.

18 See HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 460–64 (3d ed. 1995).
However, are not the risks of marriage increased and is marriage not diminished as a legal status, and as an economic good, if “good” or “bad” behavior does not matter? Is it not intuitive—at least to the general public—that “fault” and “merit” are relevant to achieving “fairness”? Fault and merit are relevant in all other areas of the law, so why are they not relevant to the fair distribution of the financial burdens (and benefits) of divorce? Of course they are! The true question is what is fair, and how should (or can) “merit” and “blame” be judged. While the standard, preferred answer “we can’t tell, we don’t want to know, and there’s no such thing as a nice husband or a nice wife anyway” is not satisfactory, it also is not easy to define and apply a workable standard of marital merit and blame. But this does not mean that we should not try—nor indeed that it is not already happening.

This notion is not picked out of the air. In several U.S. states, an extreme return to marital fault through an unexpected side door threatens to create havoc with no-fault divorce. Tort law has become the vehicle, alongside or after a divorce action, to compensate one spouse financially for torts inflicted during the marriage by the other spouse. This became possible only with the recent wholesale abolition of traditional tort immunities prohibiting tort litigation between spouses. And in law, what is possible usually becomes real.

Leaving to one side the legitimacy of litigating physical torts inflicted on one spouse by the other intentionally or negligently, my focus of concern is on “emotional distress.” Following is one of the first such cases.

In 1988, a jury in Houston awarded a divorcing wife $1.4 million for “severe emotional distress” caused by her husband’s marital misconduct. Not the lurid National Enquirer, but the staid Wall Street Journal reported that “on a visit to her husband’s office in 1986, she found him sprawled nude with a former company secretary.”19 While the Texas appellate court reversed this award, similar cases are reaching the appellate level elsewhere—with a considerable burden of expensive litigation and risk of fundamental incursion into post-divorce financial arrangements.20 But litigated appellate cases may fairly be assumed to be only the tip of the iceberg. How many such claims are now settled without litigation, for fear of litigation?

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It is reason for concern—and the dispute is not over defending family lawyers' "turf" and their sources of income—when tort lawyers argue:

Marital tort litigation took off and shows no signs of regressing. Nationwide, marital tort recoveries are high. When considering the more common torts—such as intentional or negligent infliction of emotional distress, assault, defamation, false imprisonment, and interference with child custody—counsel must give careful thought to asserting as an element of damages post-traumatic stress disorder (PTSD). State no-fault statutes often do not do enough to redress wrongs. With no-fault, one spouse may abuse the other without legal consequence—even though the conduct would be deemed tortious if committed by a non-spouse.21

Even today, some of us are still convinced that it is the very essence of marriage that it is not a relationship between strangers. But if the idea of right and wrong is one whose time has never gone, its return to the financial aftermath of marriage through tort law will reintroduce to the end of marriage more and worse acrimony than no-fault divorce ever eliminated.

Many arguments militate conclusively against the mechanical application of the traditional marital fault grounds for divorce, from adultery to desertion, to the financial consequences of divorce. But the discussion need not stop there. Is it really so difficult or impossible or undesirable to factor a new, modernized notion of "fault" into the decision of how to apportion the financial burdens or benefits of divorce?

And, surprise, courts are already doing some of this work. In separate property states courts are creating a new jurisprudence concerning the "dissipation" of marital assets, imposing what amounts to a duty on the owner of separate (but, on a future divorce, marital) property to deal with such property in good faith or even during the ongoing marriage. This doctrine stems from the community property states, and today often is reinforced by statutory provisions in separate property states. Quite obviously there is a close relationship of the concept of dissipation to fault, though not old-line moral "marital fault," but a pragmatic notion of "economic fault." It may be a little puzzling to those who believe in gender equality that the positive mirror image of economic dissipation, "economic merit" (although it is mentioned in the UMDA as "contribution" in direct conjunction with


22 See Beltran v. Beltran, 227 Cal. Rptr. 924 (Cal. 1986); Marriage of Foster, 227 Cal. Rptr. 446 (Cal. 1986).
"dissipation"), has not nearly had the same impact. Illogically, the marital estate typically is defined and divided without or with little regard to whose effort produced it. This issue was the gist of the recent Wendt litigation in Connecticut and is finally coming to popular consciousness.\textsuperscript{23}

Beyond economic misconduct, is there a way to deal responsibly with those cases of misconduct during marriage that overstep the proper bounds of even an "unhappy" marital relationship? Concepts such as blame and merit, unjust enrichment or quantum meruit are starting places. It may be noted that quite a few years ago Germany abandoned a nearly pure no fault approach and reintroduced a modified and limited catalogue of economic and other blame-and-merit considerations to govern the apportionment of financial consequences on divorce, at least in terms of alimony obligations, as follows:

A claim for support must be denied, reduced or limited in duration, if the imposition of the obligation . . . would be grossly inequitable because . . . (2) The recipient is guilty of a crime or of a severe intentional offense against the obligor or against a near relative of the obligor; (3) The recipient has caused his or her own need intentionally or recklessly; (4) The recipient has intentionally or recklessly disregarded significant financial interests of the obligor; (5) For a considerable period of time before the separation, the recipient has grossly violated his or her duty to contribute to the support of the family; (6) The recipient is responsible for obviously serious, clearly unilateral misconduct against the obligor . . . !\textsuperscript{24}

Does this German statute signal a "reactionary" return to a past that would best be forgotten? I do not think so. Can it be improved upon? Probably. For instance, it may not be altogether fair that this provision—as did most of the abolished marital fault law—paves only a one-way street: fault is used only to allow the escape from, or reduction of, a financial obligation—given continuing economic reality, typically the husband's. Arguably, some types of fault should also weigh in by increasing the obligation, typically favoring the wife. That of course is the answer tort law provides, and that aspect of it may not be all wrong—nor is it unprecedented in the sense that old-time alimony was sometimes imposed as a sort of punishment on the husband


\textsuperscript{24} \textit{BÜRGERLICHES GESETZBUCH [Civil Code]} (BGB) § 1579 (F.R.G.).
for his breach of his marital obligations. I want to re-emphasize, however, that I do not offer a solution here regarding how some modern notion of merit or blame (broader than the current exclusive focus on economic misconduct) should be reintroduced to the financial aftermath of divorce—I only raise the question. I am sure, however, that relying on existing tort law to deal with marital misconduct is the worst-case alternative. Whatever may be the appropriate answer, that answer should be developed in the context of divorce law.

This is the setting in which we find ourselves today. The purpose of this short essay is to take issue with the many prominent family law reformers and law reform projects which think that any return whatever of any fault considerations at all to the divorce process is sacrilege, a sinful betrayal of the no-fault divorce reform idea. Regrettably—and worried perhaps by the "foot-in-the-door-argument"—most of the discussion on this topic has not been willing to admit that there is a distinction between considering some appropriately focused notion of fault in the allocation of financial divorce consequences on the one hand, and the status decision, the granting of the divorce, on the other!

In particular, I am simply not persuaded by my friend Ira Ellman's otherwise brilliant and exhaustive argumentation in his Introduction to Proposed Final Draft of the American Law Institute's (ALI) current project on Principles of the Law of Family Dissolution. There the ALI rejects any role for any notion of "fault" with respect to the financial consequences of divorce. In a related and more radical move, alimony is restyled from the traditionally—and that tradition includes the only recently revolutionary Uniform Marriage and Divorce Act—need-based discretionary tool into a right to "Compensatory Spousal Payments" that would monetize economic "loss" from the failed marriage in favor of the party who was inactive, less active, or less successful in the marketplace.


26 As discussed above, I certainly agree that we must reduce the economic risks of marriage for the economically weaker party for whom modern, fault-free, unilateral divorce has made the option of role-divided marriage increasingly unattractive. I also have long argued that traditional fault-based alimony law yielded wholly inappropriate results in numerous situations, and that objective criteria for alimony needed to be developed to reflect the parties' "investments" in their marriage as well as to compensate continuing services rendered to the former marriage (as in post-divorce child custody). See Harry D. Krause, The Theory of Alimony, in CASES AND MATERIALS ON FAMILY LAW 963-69 (1976); see also Krause, supra note 17, at 421-26. I also believe, however, that we must not now overbalance the equation so far that marriage will come to pose unacceptable economic risks for the economically stronger party—lest we shall
More regrettably, the ALI project would abdicate family law jurisdiction over marital misconduct that takes the form of newly de-immunized intra-family torts, and relegate such now "tortious" misconduct to litigation outside of the context of divorce, rather than insist that all issues arising out of a failed marriage be dealt with in one setting.

There certainly was good reason for lifting (or in any event modifying) all (or in any event most) marital tort immunities. But who intended or even contemplated creating a machine that would, in a worst case scenario, make possible (1) signing over on divorce to the non- or less earning home-husband not only one-half of the property accumulated due to the wife’s economic effort, but also (2) an equalizing portion of the wife’s earning capacity for a period of time in the form of a “compensatory spousal payment,” and then still (3) potentially allow the transfer to the husband of the wife’s remaining property (and earning capacity) as a damage judgment based on what used to be viewed as marital misconduct? Please, let’s think about this some more!

see long-term familial relations sink further into the legal and social anarchy of unmarried cohabitation. See id. at 74–87, and Harry D. Krause, Unmarried Couples, 34 Am. J. Comp. L. 533–48 (Supp. 1986).