

**The
New Family
and the
New Property**

Mary Ann Glendon

Butterworths

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and
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BUTTERWORTHS
Toronto

The New Family and the New Property

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Mary Ann Glendon

Chestnut Hill, Massachusetts
April 1981

List of Abbreviations

The basic system of citation followed throughout is that of the University of Chicago Press. In cases not covered by those rules, American and English legal citations are in the form of the Uniform System of Citation (published by the Harvard Law Review Association), and legal citations from other countries are in the forms commonly used in those countries.

A. PERIODICALS

<i>A.B.A.J.</i>	<i>American Bar Association Journal</i>
<i>Am. Hist. Rev.</i>	<i>American Historical Review</i>
<i>Am. J. Comp. L.</i>	<i>American Journal of Comparative Law</i>
<i>Am. J. Soc.</i>	<i>American Journal of Sociology</i>
<i>Ann. Rev. Soc.</i>	<i>Annual Review of Sociology</i>
<i>Antioch Rev.</i>	<i>Antioch Review</i>
<i>B.C. Ind. & Comm. L. Rev.</i>	<i>Boston College Industrial and Commercial Law Review</i>
<i>B.C.L. Rev.</i>	<i>Boston College Law Review</i>
<i>B.U.L. Rev.</i>	<i>Boston University Law Review</i>
<i>B.Y.U.L. Rev.</i>	<i>Brigham Young University Law Review</i>
<i>Buffalo L. Rev.</i>	<i>Buffalo Law Review</i>
<i>Calif. L. Rev.</i>	<i>California Law Review</i>
<i>Cambridge L.J.</i>	<i>Cambridge Law Journal</i>
<i>Canadian Bar Rev.</i>	<i>Canadian Bar Review</i>
<i>Colum. L. Rev.</i>	<i>Columbia Law Review</i>
<i>Comm. Prop. J.</i>	<i>Community Property Journal</i>
<i>Cornell L. Rev.</i>	<i>Cornell Law Review</i>
<i>D.</i>	<i>Recueil Dalloz</i>
<i>D.H.</i>	<i>Dalloz. Recueil hebdomadaire.</i>
<i>D.S.</i>	<i>Recueil Dalloz Sirey</i>
<i>Fam. L.</i>	<i>Family Law</i>

<i>Fam. L.Q.</i>	<i>Family Law Quarterly</i>
<i>Fam. L. Rptr.</i>	<i>Family Law Reporter</i>
<i>FamRZ</i>	<i>Zeitschrift für das gesamte Familienrecht</i>
<i>Fordham L. Rev.</i>	<i>Fordham Law Review</i>
<i>Ga. L. Rev.</i>	<i>Georgia Law Review</i>
<i>Gonz. L. Rev.</i>	<i>Gonzaga Law Review</i>
<i>Harv. Civ. Rts. —</i>	<i>Harvard Civil Rights —</i>
<i>Civ. Lib. L. Rev.</i>	<i>Civil Liberties Law Review</i>
<i>Harv. J. Legis.</i>	<i>Harvard Journal on Legislation</i>
<i>Harv. L. Rev.</i>	<i>Harvard Law Review</i>
<i>Hastings Int. &</i>	<i>Hastings International and</i>
<i>Comp. L. Rev.</i>	<i>Comparative Law Review</i>
<i>Hastings L.J.</i>	<i>Hastings Law Journal</i>
<i>Ind. L.J.</i>	<i>Indiana Law Journal</i>
<i>Indus. & Lab.</i>	<i>Industrial and Labor Relations Review</i>
<i>Rel. Rev.</i>	
<i>Indus. Rel. L.J.</i>	<i>Industrial Relations Law Journal</i>
<i>Intl. & Comp. L.Q.</i>	<i>International and Comparative Law</i>
	<i>Quarterly</i>
<i>Intl. Lab. Rev.</i>	<i>International Labour Review</i>
<i>J. Fam. L.</i>	<i>Journal of Family Law</i>
<i>J. Interdisciplinary</i>	<i>Journal of Interdisciplinary History</i>
<i>Hist.</i>	
<i>J. Marr. & Fam.</i>	<i>Journal of Marriage and the Family</i>
<i>J.C.P.</i>	<i>Juris-Classeur Périodique (La Semaine</i>
	<i>Juridique)</i>
<i>Juridical Rev.</i>	<i>Juridical Review</i>
<i>Ky. L.J.</i>	<i>Kentucky Law Journal</i>
<i>L.Q. Rev.</i>	<i>Law Quarterly Review</i>
<i>La. L. Rev.</i>	<i>Louisiana Law Review</i>
<i>Lab. L.J.</i>	<i>Labor Law Journal</i>
<i>Law & Soc. Rev.</i>	<i>Law & Society Review</i>
<i>Mich. L. Rev.</i>	<i>Michigan Law Review</i>
<i>Mod. L. Rev.</i>	<i>Modern Law Review</i>
<i>Monthly Lab. Rev.</i>	<i>Monthly Labor Review</i>
<i>mpr Policy Newsletter</i>	<i>Mathematica Policy Research Policy</i>
	<i>Newsletter</i>

<i>New L.J.</i>	<i>New Law Journal</i>
<i>NJW</i>	<i>Neue Juristische Wochenschrift</i>
<i>Nw. U.L. Rev.</i>	<i>Northwestern University Law Review</i>
<i>Ohio St. L.J.</i>	<i>Ohio State Law Journal</i>
<i>Osgoode Hall L.J.</i>	<i>Osgoode Hall Law Journal</i>
<i>Pac. L.J.</i>	<i>Pacific Law Journal</i>
<i>Pepperdine L. Rev.</i>	<i>Pepperdine Law Review</i>
<i>Proc. Am. Phil. Soc.</i>	<i>Proceedings of the American Philosophical Society</i>
<i>RabelsZ</i>	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
<i>Real Prop., Prob. & Trust L.J.</i>	<i>Real Property, Probate and Trust Law Journal</i>
<i>Rev. Trim. Dr. Civ.</i>	<i>Revue trimestrielle de droit civil</i>
<i>Rutgers L. Rev.</i>	<i>Rutgers Law Review</i>
<i>Sci. Am.</i>	<i>Scientific American</i>
<i>So. Calif. L. Rev.</i>	<i>Southern California Law Review</i>
<i>Southwestern U.L. Rev.</i>	<i>Southwestern University Law Review</i>
<i>Stan. L. Rev.</i>	<i>Stanford Law Review</i>
<i>Tex. L. Rev.</i>	<i>Texas Law Review</i>
<i>The Pub. Interest</i>	<i>The Public Interest</i>
<i>Tulane L. Rev.</i>	<i>Tulane Law Review</i>
<i>U. Calif. — Davis L. Rev.</i>	<i>University of California — Davis Law Review</i>
<i>U. Chi. L. Rev.</i>	<i>University of Chicago Law Review</i>
<i>U. Colo. L. Rev.</i>	<i>University of Colorado Law Review</i>
<i>U. Pa. L. Rev.</i>	<i>University of Pennsylvania Law Review</i>
<i>U. Toronto L.J.</i>	<i>University of Toronto Law Journal</i>
<i>Urb. & Soc. Change Rev.</i>	<i>Urban and Social Change Review</i>
<i>Va. L. Rev.</i>	<i>Virginia Law Review</i>
<i>Wash. L. Rev.</i>	<i>Washington Law Review</i>
<i>Willamette L.J.</i>	<i>Willamette Law Journal</i>
<i>Wisc. L. Rev.</i>	<i>Wisconsin Law Review</i>
<i>Yale L.J.</i>	<i>Yale Law Journal</i>
<i>Z.f.R.V.</i>	<i>Zeitschrift für Rechtsvergleichung</i>

B. CODES, STATUTES AND COLLECTIONS OF JUDICIAL DECISIONS

A.L.R. 2d	American Law Reports, Second Series (Lawyers Cooperative Publishing Co.)
A.L.R. 3d	American Law Reports, Third Series (Lawyers Cooperative Publishing Co.)
A. 2d	Atlantic Reporter, Second Series (West Publishing Co.)
All E.R.	All England Reports
Cal. Civ. Code	California Civil Code (West Publishing Co.)
Cal. Rptr.	California Reporter (West Publishing Co.)
Conn.	Connecticut Reports
ERISA	Employee Retirement Income Security Act
F. Supp.	Federal Supplement (West Publishing Co.)
F.R.D.	Federal Rules Decisions (West Publishing Co.)
F. 2d	Federal Reporter, Second Series (West Publishing Co.)
Fam.	Family Reports (England)
Fam. L. Rptr.	Family Law Reporter (Bureau of National Affairs)
Ill. Stat. Ann.	Illinois Statutes Annotated
J.O.	Journal officiel de la République Française. Lois et Décrets (Statutes and Decrees of the French Republic)
Lab. Arb. & Disp. Settl.	Labor Arbitration and Dispute Settlements (Bureau of National Affairs)
Lab. Rel. Rptr.	Labor Relations Reporter (Bureau of National Affairs)
Mass. Gen. Laws. Ann.	Massachusetts General Laws Annotated (West Publishing Co.)
N.E. 2d	Northeastern Reporter, Second Series (West Publishing Co.)
N.W. 2d	Northwestern Reporter, Second Series (West Publishing Co.)
N.Y.S. 2d	New York Supplement, Second Series (West Publishing Co.)

NLRA	National Labor Relations Act
P. 2d	Pacific Reporter, Second Series (West Publishing Co.)
S. Ct.	Supreme Court Reporter (West Publishing Co.)
S.E. 2d	Southeastern Reporter, Second Series (West Publishing Co.)
S.W.	Southwestern Reporter (West Publishing Co.)
S.W. 2d	Southwestern Reporter, Second Series (West Publishing Co.)
So. 2d	Southern Reporter, Second Series (West Publishing Co.)
Tenn.	Tennessee Reports
U.S.	United States Supreme Court Reports (U.S. Govt. Printing Office)
U.S.L.W.	United States Law Week (Bureau of National Affairs)
UMDA	National Conference of Commissioners on Uniform State Laws, Uniform Marriage and Divorce Act of 1970 (with 1971 and 1973 amendments)
USC	United States Code (Government Printing Office)
USCA	United States Code Annotated (West Publishing Co.)
Wash. Rev. Code Ann.	Washington Revised Code Annotated (Bancroft-Whitney & West Publishing Cos.)
WLR	Weekly Law Reports (England)

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Introduction

In all known societies, family structure has been closely linked to economic structure.¹ The complex nature of the linkage and the actual dynamics of related changes in the family and the economy have been the subject of much speculation and study,² but their legal aspects have been little noted.³ This book examines recent developments in family law, employment law and property law, and finds that they are closely related to each other, as well as to certain modern trends that are transforming private law generally. In a time of transition, both in family behavior and in the nature and forms of wealth, the law is reflecting and interacting with social trends which affect the majority of persons, primarily those who are at neither the highest nor the lowest economic levels. Of particular note are the following: (1) While legal ties among family members are becoming attenuated and the legal structure of the family is being loosened, the web of relationships that bind an individual to his job (and his job to him) is becoming tighter and more highly structured. Changes in the legal regulation of family relationships increasingly reflect the perishability and fluidity, if not the transience, of these relationships, while legal changes in the workplace recognize and reinforce the durability and centrality, if not the permanence, of the work relationship. (2) Developments in labor, property, social welfare, constitutional and family law reflect and promote expectations that an

¹ See generally, König (1974) paras. 36 and 55; Wrigley (1977) 83; Marx (1973) 3; and Kanter (1977).

² *E.g.*, Engels (1972); Lasch (1977a); Goode (1977); Stone (1977). Lasch (1977b, 33) raises the important "possibility that the history of the family provides the missing link between culture and intellectual history on the one hand and politico-economic history on the other; between the study of culture and the study of social structure, production, and power." Stone's early modern English family history, a synthesis based on his own research and on studies made by many other family historians, is remarkable for its attention to economic and legal history of the period.

³ A notable exception is James Coleman (1974) who began his book, *Power and the Structure of Society*, as follows:

[T]here seems nowhere to exist, neither among social scientists nor among others who discuss these matters, the recognition that the society has changed over the past few centuries, in the very structural elements of which it is composed.

A sensitive indicator of this change may be found in law, because law (along with politics) is the practicing profession for which social organization is the central field of operations (13).

individual's economic security against illness and old age or family disruption by death or divorce will no longer, in principle, be provided by the family, and that it will, in principle, be provided through her own work and work-related benefits, with government as a back-up system.

These changes are part of a long historical process that has effected a fundamental alteration in the relative social and economic importance of family, work and government as determinants of wealth, standing, self-esteem and economic security. In the legal order, these changes form part of the intensification of that pervasive process of rationalization and bureaucratization early identified by Max Weber,⁴ through which all law becomes more public and administrative. In the economic order, stress points — elements of instability that seem to augur change whose direction is uncertain — pose problems for the legal system. Ideology frequently distracts from or disguises important tensions. Chapters 1 through 4 examine these legal changes through examples drawn from inheritance law, family law, employment law, property law and social welfare law. Chapter 5 then speculates on their broader implications and considers the signs that some of the legal trends described in earlier chapters may be reaching the limits of their expansive force.

Although continuity of analysis is provided here by following the law of the United States, the study draws on legal developments in England, France, Sweden and West Germany, where appropriate, to support, confirm, refine or qualify the hypotheses advanced here. The study proceeds on the assumption that family law, property and contract are all essentially parts of one field of law, and that developments in each area become more comprehensible when they are placed in the context of trends in private or civil law generally. In this respect, the approach taken here is basically that of a civil lawyer for whom the distinction between private law, that body of norms purporting to govern the relationships of citizens with each other, and public law, those norms governing the relationships of public bodies with citizens or other public bodies, has traditionally been important. But while disparate fields of common law can be thought of as collapsing together into a single field of private law through a process we might call "civilization," the field of private law itself has been deeply invaded in civil- and common-law countries through what may be called a process of "publicization." Thus, the private-public law distinction is increasingly difficult to make and maintain. However, it is convenient to use as a starting point the characterization by the great French legal sociologist, Jean Carbonnier, of property, contract and family as the "three pillars of the civil law,"⁵

⁴ Weber (1946) 198ff, 216ff.

⁵ Carbonnier (1971) 123.