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Are Rights the Right Thing? Individual Rights, Communitarian Purposes and America's Problems (Book Review)

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The so-called rights of man... are simply the rights... of egoistic man, of man separated from other men and from the community. The most radical [liberal] constitution, that of 1793 [identifies] the natural and imprescriptible rights [as]: equality, liberty, security, property.

What constitutes liberty?

Liberty is... the right to do everything which does not harm others... It is a question of the liberty of man regarded as an isolated monad, withdrawn into himself... liberty as a right of man is not founded upon the relations between man and man, but rather upon the separation of man from man. It is the right of such separation...

The practical application of the right of liberty is the right of private property. What constitutes the right of private property?

The right of property is... the right to enjoy one's fortune and dispose of it as one will; without regard for others and independently of society. It is the right of self-interest. This individual liberty, and its application, form the basis of civil society. It leads every man to see in other men, not the realization, but rather the limitation of his own liberty.
The term "equality" has no political significance. It is only the right to liberty as defined above; namely that every man is equally regarded as a self-sufficient monad. . . .

And security? . . . Security is the supreme social concept of civil society; the concept of the police. . . .

The concept of security is not enough to raise civil society above its egoism. Security is, rather, the assurance of its egoism.

None of the supposed rights of man, therefore, go beyond egoistic man, man as he is as a member of civil society; that is an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice. . . . [S]pecies-life itself—society—appears as a system which is external to the individual and as a limitation of his original independence. The only bond between men is natural necessity, need and private interest, the preservation of their property and their egoistic persons.¹

As even Marx conceded, rights are strong things. As we, Americans in particular, know them, rights are meant to stop other people, popular majorities, and especially governments, in their tracks. Rights, or at least rights as conventionally understood and classically articulated in our Bill of Rights, are essentially prepolitical, grounded in the individual and his various forms of property. These rights are meant to guarantee a zone of autonomy for self-fulfillment. The English, American, and, to a lesser extent, French revolutionaries for the most part saw rights as held by individuals and intended to ward off despotism, majority coercion, and transient fashion or sentiment. We all value these liberties as a part of the liberal inheritance which fosters individuality and personality.

But, as practical socialist critics from Babeuf and Marx to DuBois and Allende have repeatedly insisted, "rights" are also very bourgeois. They presume a material basis (productive property) which most people do not have; they posit false universals (as if we were all situated alike and equally interested in the same things); they assume a false equality through their contract orientation (as if freedom of speech, or freedom of labor, or freedom of contract, meant the same thing to a

newspaper as to its employees); they foster absolute and polarizing oppositions which inevitably clash (e.g., the right of the unborn versus the right of a woman to choose). Thus, in their pristine form, and in their American elaboration, rights are the sinews of property-based bourgeois individualism. Since the nineteenth century, rights have underpinned liberal society's economic and social deregulation. What is the market about, if not affording individuals the opportunity to choose? What is having rights about, if not being free to choose?

"The People" may have many rights, but nevertheless remain powerless. Citizens have elaborated their civil liberties, but have only sporadically won social reform. For two centuries now, one response from the left has been simply to redirect the energies of those interested in social change into other channels, away from talk of rights and towards mass politics. Such mass politics has been predicated on notions of class struggle, which include gaining control of state institutions through majoritarian (electoral) politics aimed at abolishing, or at least weakening, private ownership and control of the economy.

The left has also responded by attempting to move from political rights to social rights, i.e., from individual, procedural, boundary-marking, negative liberties to collective, material, participation-based, positive liberties. The hope on the left has been that social democracy would create certain social rights just as bourgeois democracy had created certain political rights. This approach has been somewhat successful, especially in Europe, where social rights have been won by mass movements organized at the workplace, in residential neighborhoods, in the streets, and at the ballot box.

In the United States, courts have often played a greater role than politics in the establishment of social rights, especially in recent decades. These same courts have been crucially responsible for the fact that we have a very free country—in the negative rights sense. Nowhere else have economic and social deregulation triumphed so fully: in America both markets and morality are privatized. In the negative rights sense, we may be the freest of all peoples. Nowhere is the free market treated with more reverence; nowhere are procedural safeguards against public power so strong; nowhere are social norms less binding on individuals who seek to choose their own way. We seem unencumbered by any Burkean partnership of the living with the al-

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ready dead and the yet unborn. Not coincidentally, almost nowhere are mass movements weaker. America is indeed the land of liberty: the land of capitalism and of the ACLU; a magnet to immigrants seeking freedom.

Struggles on behalf of the subaltern have taken place and continue to take place in the United States within this framework of rights. Notable successes have been achieved. Over the last two generations especially; liberals and the left have worked to gain rights in and through the courts on the basis of what lawyers, rights advocates, and judges call "fundamental rights" and "due process." Reasons for this focus on the courts are simple. The left's electoral weakness has produced few successes in the legislative arena and even fewer in the executive-administrative domain. At the same time, for a number of historically contingent reasons, the most recent being the mass movement of African Americans in the '50s and '60s, American courts were unusually sympathetic to certain claims from the left and minorities for nearly a generation. But, with the exception of a few law professors, everyone seems to know by now that the Warren Court period was anomalous and is now over.

Yet America, despite its admired status as a land of rights, is in dire straits. Rights alone do not make a good society. The symptoms of decay and difficulty are legion and clear in every area of life. The decline in our real standard of living continues into its third decade; inequality of wealth is greater than at any time since the 1920s; the number of children living below the poverty line has grown by thirty percent since 1970; basic literacy cannot be expected of our high school graduates; there are more minority men age seventeen to twenty-five in prisons than in colleges; sociopaths outnumber strollers

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on many of our streets; our infant and black male mortality rates both compare unfavorably with those of much of the third world; and the elderly of our nation are more concerned with the costs of illness than with fear of the Beyond. Though our dependable external enemies have disappeared, internal tensions of all sorts have risen to a level that makes nearly every mundane conversation on our sidewalks, in our schools and at our workplaces a diplomatic exercise.

Where is the left, the historic advocate of universal rights, and what is it doing about this state of affairs? Even the most promising of rights realized by litigation activists since the 1950s have come to seem ineffective. With few exceptions, the left has proven unable even to address the immiserization of American life, let alone signal a way out. The splendid and powerful political-cultural “quilt,” foreseen in Jesse Jackson’s speech at the 1984 Democratic convention, has simply failed to materialize.

Instead, the left has helped fashion the would-be peuple of America into competing, if not warring, identitoids, discursive and biological communities who fight with each other over pride of place and respective shares of a shrinking pie. Thus, instead of having to contend with a solidaristic rainbow coalition of working-class Americans and their allies, the free-market devotees, the business elite, and their allies easily run the country, ignoring completely the babel from ivory tower soi-disant radicalism. While we work on our particularity, demand absolute rights, and nurture our separate grievances, the Invisible Hand and those who control it tighten their grip on the country.

In this dreary scene, dissatisfaction with the “rights model” of liberal society has been growing on the left and on the right. For the right, such dissatisfaction has proven a marketable political commodity, trumpeted by conservative Vice Presidents and Attorneys General from

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Issues Call for Change, HOUSTON CHRON., Oct. 31, 1992, at A31 (according to Texas governor speaking to NAACP, four times as many black men are in prison as in college); Paris, Yo! A Rapper’s Domestic Policy Plan, WASH. POST, Jan. 3, 1993, at C2 (editorial stating that there are over 600,000 minority men in prison and 435,000 in college); Camile Peri, Boys to Men, L.A. TIMES, Dec. 20, 1992, (Magazine), at 38 (stating nearly one-quarter of college-age black men are in jail, on probation, or parole).


8. On some problems in everyday sociability see, for example, GERALD GRAFF, THE CULTURE WARS (1992); DAVID Bromwich, POLITICS BY OTHER MEANS (1992); David A. Hollinger, How Wide the Circle of the “We”? American Intellectuals and the Problem of the Ethnos Since World War II, 98 AM. HIST. REV. 317 (1993).
Spiro Agnew and John Mitchell to Dan Quayle and Ed Meese or Richard Thornburgh. Now it seems to be growing in the center as well. On virtually the same day last May that Dan Quayle assailed Murphy Brown’s right to eschew the father and bear a child out of wedlock as a lifestyle choice, a group of self-styled “Communitarians” held a teach-in in New York at which, among other matters, the virtues of responsible, conventional, and conforming two-parent families were lauded.

Mary Ann Glendon, a Professor of Law at Harvard, is a central figure among these Communitarians and an editor of their journal, The Responsive Community, subtitled “Rights and Responsibilities.” And now she has authored a book, Rights Talk, that examines the origins and consequences of a peculiarly American rights malaise.

If nothing else, the title of Glendon’s book is directly on the mark. Trapped in a battle for rights, the dominant strand of social activism in America has failed to transcend regnant American liberalism and the inequalities lying at its heart and in its soul. Does Glendon’s suspiciously Burkean voice have something to tell us about our predicament? It certainly does. A combination of legal-political and intellectual history, Rights Talk demands our attention, for the hour is getting late in America. Glendon’s analysis is on the mark in ways most on the left and right cannot or refuse to see, and her implicit prescriptions must be taken seriously as well.

Under better circumstances, one could simply debate the relative merits of Rawlsian liberalism and Sandelian communitarianism and debate the need to balance self-fulfillment and unencumbered individuals with collective obligation and situated identities. Under better circumstances, Rights Talk would be like one of those criticisms of capitalist society voiced now and then over the past century and a half by the papacy: it condemns what we know to be wrong about market-based, individualistic, liberal, capitalist societies without necessarily


10. John Rawls, A Theory of Justice (1971); Michael Sandel, Liberalism and the Limits of Justice (1982); Michael Walzer, The Communitarian Critique of Liberalism, 18 Pol. Theory 6 (1990). In an assessment that will surely stand for some time, Alan Ryan has written that Rawls’s book “has sparked off more argument among philosophers, and has been more widely cited by sociologists, economists, judges, and politicians than any work of philosophy in the past hundred years.” Alan Ryan, The Return of Grand Theory in the Human Sciences 101 (Quentin Skinner ed., 1986). Rawls’ Kantian-individualist and process-oriented moral philosophy has been the subject of so much work that an annotated bibliography might now run to a thousand pages. For an acid critique, see Fred Siegel, Is Archie Bunker Fit to Rule? Or: How Immanuel Kant Became One of the Founding Fathers, 69 Telos 9 (1986).
convincing us that we would be better off under the less individualist and selfish regime of "ordered liberty" offered up as an alternative by critics of liberalism.

Given the current circumstances of both America and the left, however, Glendon's book is more than just a foil or reminder. There is much to learn here and some indication of what needs to be done. Not only is Glendon accurate in claiming that America's preoccupation with rights has gone too far, but she is on to something crucial when she proposes a return to politics and community and a turn away from rights (and courts) as means to overcome some of what ails America.

Glendon begins with a harsh and unsparing indictment of how rights talk has contributed to the indisputable decrepitude of American politics and public life. The "starkness and simplicity" of American rights talk and the radical liberalism in which it is embedded, "its prodigiality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities"1 have all done their share. With their multiplication, rights and the people claiming them clash more frequently and find compromise more difficult. Our particular interests block out those of others and lead to both a quashing of habits of the heart and a disdain for politics which is, after all, about living with others.

Worse yet, rights campaigns produce negative synergy: every campaign for rights inevitably elicits claims of counter-rights so that potential social solidarity gives way to individual absolutism, group egotism, and the disappearance of social obligation. Thus, the woman whose abortion right is secured because her body is her property must absolutize such a right so that it may triumph over the competing right of a fetus to life.2 Indeed, in-vitro transfer technology will inevitably proceed to the point where an estranged father will sue to remove or retain his share of the fetus off the property of the mother. While some left legal scholars such as Morton Horwitz and Mark Tushnet have made these and similar points about the rights syndrome,3 the bulk of the

11. GLENDON, supra note 9, at x.
12. Glendon rightly reminds us that the privacy right, which currently undergirds abortion rights, emanates from the property right. Id. at 47-56. Without property there can be no privacy. See Charles Fried, Privacy, 77 YALE L.J. 475 (1968); Ruth Gavison, Privacy and the Limits of the Law, 89 Yale L.J. 421 (1980); Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).
American left still stands with individual rights and the elaboration of alternative choices.

For Glendon, the ideological root of our exaggerated rights culture lies in our adoption of an unmitigated version of Locke's natural rights myth, as embroidered by Blackstone. Although she does not furnish the economic and social history that would account for it, Glendon correctly reminds us of the peculiar Anglo-American obeisance toward property—the basis of bourgeois rights. Where, as in France or Germany, feudalism and the classic traditions made greater impressions than they did in the United States, individualism and property did not become as hegemonic.

Neither Rousseau, Savigny, Aquinas, nor Aristotle can underpin the antistate, anticommunitarian vision of solitary individuals in a state of nature such as is featured in the Hobbesian-Lockean myth. In their attack on monarchy, the natural rights liberals also attacked natural and community solidarities while banishing beliefs in care and dependency. Unlike Americans, the continental European left, not so imprisoned by natural rights liberalism, has found it possible in this century to make headway in refeudalizing property and in insisting that property is subject to stewardship, and is a public utility rather than an absolute and inviolable right divorced from any responsibility to one or more communities.

Glendon assumes, I believe correctly, that society is prior to and has legitimate claims over individuals. The relationship between self and society is constitutive, not merely instrumental. Such a view necessarily rejects radical individualism, with its own attendant rejection of duties—an individualism that describes not only ACLU-style liberals but also liberal free-marketeers and the postmodern radicals, themselves in fact hyper-liberals, who dominate what remains of the Ameri-

Glendon's volume that—although she credits Marx with unmasking liberal-bourgeois rights as ignoring human sociality and materiality—she virtually ignores the existence of recent left scholarship on many of the issues she examines. See, e.g., Anthony Chase, The Left on Rights, 62 Tex. L. Rev. 1541 (1984).

It is true, of course, that responsibilities, duties, and obligations, which play so great a role for Glendon and communitarians generally, are often short-shrifted in left scholarship. Hence, in her full and excellent discussion of Blackstone, for example, Glendon makes no reference to the very pertinent work of her own colleagues: Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 205 (1979) and Roberto Unger, Knowledge and Politics (1975). Even more to the point, Glendon ignores left scholarship on "reliance interests," a potentially strong communitarian argument in areas she herself addresses, like factory plant closings. See Joseph Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611 (1988).

14. Glendon, supra note 9, at 43.
can left in the universities.\textsuperscript{16}

Glendon's critique of the "illusion of absoluteness"\textsuperscript{10} underlying our model of rights causes her to miss the grandeur of documents like the Bill of Rights, whose popularity with people the world over cannot be gainsaid. At the same time, one cannot quarrel with her assertion that the American version shows a penchant for absolute, extravagant formulations . . . near-aphasia concerning responsibility . . . excessive homage to individual independence and self-sufficiency . . . habitual concentration on the individual and the state at the expense of the intermediate groups of civil society . . . and unapologetic insularity.\textsuperscript{17}

The absoluteness of our rights awakens infinite and impossible desires, thereby increasing conflicts and lessening the chance for dialogue and community consensus.

Like Marx, Glendon finds that there is much liberté and much égalité in our regime but little fraternité. For the Communitarians, the development of the much-vaunted privacy right is a product of illusory conceptions of human self-sufficiency, which Glendon, like many others, blames on John Stuart Mill. Here Glendon is somewhat unfair. "I have the right to be left alone and to do whatever I want so long as it doesn't hurt anybody else" is a position that Mill himself left behind after recognizing its inadequacy—in part through his contact, via Harriet Taylor, with socialism and feminism.

Still, Glendon is perfectly correct to argue that "privacy rights"—including the rights to contraception and abortion that we have derived from privacy—were by sleight "pulled from the hat of property" and that those who own no castle can never expect to benefit from the many rights ownership conveys.\textsuperscript{18} Unlike human dignity or personality, property is only mythically universal, and the property-based, life-style liberties fostering individuality are indeed often antidemocratic and inegalitarian as well as isolating. Thus, by liberal


\textsuperscript{16.} Glendon, supra note 9, at 43.

\textsuperscript{17.} Id. at 14.

\textsuperscript{18.} Glendon, supra note 9, at 51.
logic a woman's pregnancy or abortion is her prerogative and hers alone; but it is also her problem and hers alone.

Just as Rousseau, Hegel, and Humboldt tempered Hobbes, Locke, and Coke, so Marxist socialism and Christian democracy have tempered liberal individualism in much of continental Europe. But not in the United States, where "don't tread on me" remains a declaration of freedom. Our emphasis on individual autonomy—choice—makes collective action, whether as a family, a neighborhood, or a trade union, much more difficult than in Europe. We fear, disdain, and avoid the dependency that is intertwined with collective action; partially as a result, we have less of it than most European societies.

There is little significant difference between current Republican, free-market individualism and Democratic constituency-individualism. And, as Fox-Genovese showed, even the radicals among us often ignore the social and dependent dimensions of life. Consequently, those located in situations of dependency—such as mothers, children, the old, the sick, and the poor—as well as those who must take care of the dependent are worse off in the United States than in any comparable country. As Glendon rightly points out, European constitutions and the new European Social Charter “domesticate the lone rights bearer by situating him in social context” and thereby force a greater recognition of the weak and dependent.

American law, according to Glendon, emphasizes the absence of obligation to others. It is as if "we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm." As every law student is taught, we have no legal duty to rescue a stranger unless we ourselves caused the peril he faces. (According to the Supreme Court, sometimes even our police and social workers are not so burdened.) The logics of liberal individualism and bourgeois causation enshrined in our Constitution, being what they are, we cannot be made our brother's keeper.

20. Glendon, supra note 9, at 74.
21. Id. at 77.
23. Glendon aptly quotes Judge-scholar Richard Posner in a police failure-to-rescue case: [T]he Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. . . . [T]he difference between harming and failing to help is just the difference . . . between negative liberty—being let alone by the state—and positive liberty—being helped by the state.

Glendon, supra note 9, at 91 (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1203-04 (7th
As in other departments of life, what in much of Europe is considered a "civic duty" is perceived in the United States as a "private right." For Glendon such language is important: the programmatic rights and enabling, positive liberties embraced in many European constitutions are simply absent from our own. Space that might be public is or remains private: duty yields to liberty. Because of our vaunted right not to conform, and our readiness to separate law from morality, our membership in society demands less of us and offers less to us.

Like Communitarians generally, Glendon wants a law more closely linked to morality—but whose? Which community or religious faith should provide the requisite ethical base—and to whom? Even so comprehensive a sociology of religion as Max Weber undertook proved unable to discover a universal ethical core that could infuse positive ethics (as opposed to class prejudices) into formal rules. For Glendon, America errs too much on the side of moral skepticism over natural law. Thus, our rights validate individual, arbitrary preferences rather than teaching us truths or even community values. Glendon would like to have the law carry some of the freight that community, religion, and custom can no longer shoulder: in our society, "law is more pervasive than any other common bond." Yet, as philosophers and judges have repeatedly asserted, without a transcendent ethical base outside itself, the law cannot do this and must remain agnostic.

Rights Talk operates at the margins of recent political-philosophical debates on liberalism and community rather than addressing them head on, even in their more limited jurisprudential context. And, more often than not, Rights Talk seeks to mend our provincial liberal social order, not to challenge it fundamentally. Yet tinkering can change much in life. Other countries—even other capitalist democracies—are different. Juxtaposed to America’s Lockean constitutional conception of individualistic, self-regarding, and unencumbered persons, Germany offers a constitutionalism more deeply implicating community and duty, one rooted in a history that has included significant feudal and socialist impulses. Whereas the centrality and strength of our negative liberties testify to our acute distrust of state power, the

Cir. 1983)). Glendon also observes that in recent decades even hallowed “family rights” have come to be treated as only the rights of individuals in temporary alliance. Id. at 102, 130.

25. GLENDON, supra note 9, at 102.
current German constitution underscores the social connections and commitments of individual citizens. As one German constitutional specialist has put it:

One [the American] vision is partial to the city perceived as a private realm in which the individual is alone, isolated, and in competition with his fellows, while the other [current German] vision is partial to the city perceived as a public realm where individual and community are bound together in some degree of reciprocity. Thus, the authority of the community, as represented by the state, finds a more congenial abode in German than American constitutionalism.27

Crowning this hierarchy of legal values is something the German jurists regularly call “the principle of human dignity.”28 This principle requires rejection of both legal positivism and moral relativism—the very hallmarks of our own system of negative rights. One former President (Chief Justice) of the German Court has gone so far as to eschew the safety of liberal positivism and relativism and say that the guiding values of the German Basic Law are “equality, social justice, the welfare state, the rule of law, and militant democracy.”29

Article 20(1) of the 1949 Basic Law describes the Federal Republic as a federal, democratic, and social state. This social commitment adds to the formal, procedural equality of negative rights law shared with the American constitutional conception: in other words, justice is commanded along with fairness. Equality transcends its purely formal meaning because, unlike in the United States, it is linked to the dual value principles of human dignity and the social welfare state.

Inevitably too, the language of duties—also underdeveloped in the United States—joins the language of negative and positive rights. With that joinder, communitarian relations and pressures join the property-based contractarianism that prevails in our system. A community’s moral convictions must be recognized. Real autonomy, real individual freedom is seen as requiring much more than the ultimate American

28. Id. at 860.
29. Id. at 861 n.69 (citing Wolfgang Zeidler, Grundrechte und Grundentscheidungen der Verfassung im Widerstreit (Festvortrag anlässlich des 53. Deutschen Juristentages in Berlin am Dienstag, 16. Sept. 1980), at 4)). Even German law is double-edged, of course, and so it should be noted that this paramount “principle of human dignity,” particularly in the aftermath of Nazi eugenics, was cited in 1975 to strike down a liberalized abortion statute. 39 BVerfGE 1 (1975).
virtue: choice. To stop with negative liberty, to rest content with resource-based choice by atomistic individuals is, in the German and other social-democratic regimes, to misunderstand and underestimate personhood. The German Supreme Court has explicitly held that

The concept of man in the Basic Law [Constitution] is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person’s dependence on the commitment to the community, without infringing upon a person’s individual value.31

One might ask Glendon just how much difference does the law really make anyway? Of course, the law is hortatory and may educate and, as many social philosophers from Rousseau to Martin Luther King have insisted, it may educate profoundly. In this sense, the first premise of Gerald Rosenberg’s The Hollow Hope: Can Courts Bring About Social Change?32 is mistaken: even if law were mere ideology, ideology is both a terrain and a weapon in social struggle. “How many divisions does the Pope have?” is simply not the right question to ask about a Pope. Though “the word” is not in and of itself power, and ideology does not vanquish the enemy, like flags, no war or insurrection or even reform movement can do without ideological struggle, which in our society intimately involves the courts and the language of rights.

But, with all due respect to Glendon and the Communitarian persuasion as a whole, one must wonder whether law can create community where it never existed or no longer exists. As Marx pointed out long ago, and as social historians have demonstrated over and over, class and community form around the “manifold relations” people sim-

30. Roe v. Wade, 410 U.S. 113 (1973), probably faute de mieux, represents the apotheosis of “choice.” Indeed, defense of the principle enunciated there has become the pro-choice movement. Of course, in material terms there is generally little “free” about the abortion choice. And Roe itself posits autonomous, isolated women, alone and unattached to family or community (except insofar as family and community might impinge on the autonomy and free choice of the woman involved). There are no values that might transcend the woman’s present interests because her interest is presumed to be self-realization. As the U.S. Army recruiting ad puts it, “Be all that you can be.” Glendon herself has written a comparative study of abortion law. MARY ANN GLENDON. ABORTION AND DIVORCE IN WESTERN LAW (1987). See Michael Sandel, Moral Argument and Liberal Toleration: Abortion and Homosexuality, 77 CAL L REV 521 (1989).

31. 4 BVerfGE 7, 15-16 (1954).

32. See GERALD N. ROSENBERG. THE HOLLOW HOPE CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that, contrary to received wisdom, courts’ impact on progressive social change, especially racial justice, has been minimal). See also Jonathan Simon, “The Long Walk Home” to Politics, 26 LAW & SOC’Y REV. 923 (1992).
ilarly situated may (or may not) form with each other. That law has become our most pervasive common bond may be no more than sad testimony to community's demise. Legal, ethnic, religious, geographical, sexual, gender-based, and other categories, no matter how oppressive, cannot provide the solidarity and community that make people act together and for each other. American working-class solidarity, for example, was formed around the social sinews of working-class communities. Individual lives were embedded in "manifold relations"; those relations, once nurtured, maintained and to some degree imposed community values in the face of opposing individual interests. That, however, was before the relative demise of ethnicity (among white workers), working-class neighborhoods and entertainments, intergenerational proximity, trade unions, political party machines, churches, and public spaces, and before the rise of suburbs (home to twenty-three percent of the population in 1950 and forty-six percent in 1990), lone travel by auto, an unprecedentedly homogenous national culture, high geographical mobility, self-help culture, and privatized home entertainment. The kind of willing coercion so difficult for rights advocates to accept was, in fact, at one time both commonplace and embraced as a source of solidarity.

Some types of law, labor law for example, tried to channel community without either destroying such "manifold relations" or elevating them to official status. These laws were not about individual rights but about collective empowerment that might require some subordination of individual autonomy. They fostered solidarity through facilitating institutions that mediated between individual and community: family, class, party, and church were among the collectivities that made today's radical individualism less relevant and less appealing. By so doing, American labor law used to do what the European law still does: foster community and what Habermas might call "participation competency" among union members.

34. See Dianne Crispell, Myths of the 1950s, 13 AM. DEMOGRAPHICS, Aug. 1992, at 38, 41.
Notwithstanding Glendon’s hopes and those of sociologists like Robert Bellah or Amitai Etzioni, upon whose work Glendon greatly relies, there just is not much community left in the United States to build on. The extended dying of our public school system, brought home most recently by the president of Yale University departing for the profit-making sector, and the withering away of our public libraries only represent more nails in the coffin. To the extent that “community” now exists, it probably supports just those property-based, rights-oriented, individualistic values Glendon aptly decries. Our *Gemeinschaft*—our community of values, history, tradition, language, and culture—to the extent that it actually exists, pushes *Gesellschaft*—mere society—as a way of life.

In other words, the source of our values may be just what Glendon says: community. But the content may be the dreaded atomistic individualism. In the interaction between self and community, between self and fellow citizens, it is self-realization, personal autonomy, and individual choice that emerge triumphant. If we want to be engaged in civic, communal, or political life, that is just one more choice. Our rights therefore are again trumps, meant to stop other people. Is it enough, or even possible, in a society that so values individual choice to be true to our collective-communal selves, or to treat rights as public rather than individual endowments?  

The dilemma of anti-solidarity is what makes rights talk appealing. Because rights can claim a certain universality in a liberal society, it has been argued that engaging in rights talk politics “across the spectrum of oppressions” can lead to the forging of a chain and the linking together of various struggles against oppression into a politics that transforms society itself. In addition, public interest groups of various sorts, and minority and feminist civil rights advocates in particular, have argued that rights talk and rights litigation can act as a spur to organization and political engagement. Of course, it can be argued to the contrary that the expert and technocratic framework of rights litigation strategies lessens rather than enhances the involvement of ordinary citizens.

37. See Michael Walzer, Interpretation and Social Criticism 23-30 (1987). As one analyst has expressed the communitarian position, “rights are public and not private property, having their source in the political community and not the individuals who comprise it. They are constitutive of the community’s public morality.” Gardbaum, supra note 26, at 758.

Glendon alternately ignores or rejects the view that America has no significant and tenable shared values such as could make possible getting rid of the rights talk model. She apparently believes in community as both source and content of our values. But what if there is no broadly recognized interpretive community to provide even limited or bounded objectivity to our lives? Or what if there are too many communities and hence no possible standards for behavior? Then lifestyle choices must, by right, fill the decayed worlds of the poor and the deconstructed worlds of the middle classes. Who then may complain about either a Robert Mapplethorpe or a 2 Live Crew? There is nothing shared and no one in whose name coercive power could be legitimately exercised.

In a society where almost everything is, as Glendon shows, both absolutized and contested as a right—instrumental for the sake of individuals—are there even any common meanings of substance to refine and implement on behalf of political community? If we cannot identify values universal in the polity or society, can we expect a functioning political community or even widely authoritative rules? If we do not have many shared values, what can we really expect of our politics? The strange coalitions that formed over the flag-burning issue betray how strongly we fear majoritarian oppression of individual freedom and that, however dysfunctional, even the central symbol of the community and nation must submit to individual freedom.39

What we can expect is, in fact, what Glendon shows us we get: a society in which the “right thing” is “your own thing.” Our ethos does turn out to be that of the John Stuart Mill—minus the elitism of the clergy: “Be all that you can be” while pluralism and tolerance function as the guarantors of fairness. Only the pluralism is fully individualized and out of control, while the tolerance is increasingly corrosive and insincere. Our avowed concern with respecting the values, identities and “lifestyles” of others masks our private right to mock and deride. Rather than arguing over what our collective values ought to be, we simply agree to have none while pretending to respect all.

Because we have almost no enforceable collective values to generate community, rights talk can generate and build subcommunities in a manner its opponents, including Glendon, fail to appreciate fully. Over the past thirty years especially, rights have been advocated by social

movements pursuing causes whose goal is to validate various specific identities or group cultures—race, gender, sexual orientation, age, handicap, family status, and reproductive/fetal status, for example—mostly in the private sphere, rather than common interests or collective solidarities in the political arena. In this sense, rights talk reflects and encourages the liberal tendency to individualize, separate and isolate issues, groups, and their members from each other. From the perspective of core social change, rights talk stymies overarching interconnectedness, while advancing pluralism and even fragmentation. It is difficult to get to the heart of things. Indeed, rights talk encourages the notion that there is no essence to social relations. All oppression, all deprivation of a putative right looks the same, is equally absolute, and is equally unacceptable. Further, as in the law of thermodynamics, every right produces a separate, equal, and opposite right—the most prominent current example being a woman's right to abortion and a fetus's right to life, neither of which existed before or can exist without the other.

Given her severe and persuasive analysis, Glendon's recommendations are somewhat pallid. Like many Communitarians, Glendon is wary of government as a threat to civil society, but at the same time her analysis demands that we, like the Germans or French, have more of it. It seems that Glendon fears excessive mention of the power of big business and big property in the United States—and the plausible use of government to temper it—lest communitarian hopes quickly be dashed by the class strife of real civil society displacing a pre-imagined harmony. Thus, Glendon rejects a "second bill of rights," like that hinted at by FDR in 1944, as a way of constitutionalizing social policy. Instead, she stakes out a position closer to that of the 1992 Clinton


41. She believes, for example, that "improved social welfare services require increased appropriations or more efficient use of resources, and more imaginative recourse to nongovernmental groups, as well as such intangibles as leadership, dedication to public service, good employee morale, and citizen cooperation." GLENDON, supra note 9, at 98. This is all surely true but hardly demands the keen analysis Glendon actually offers. The same may be said for her recommendations that we retreat from a no fault/no responsibility divorce regime, that "children [be put] at the center of our family policy," that local government, religious, and other voluntary associations be accorded more room, that lawyers and judges be more aware of their "radiating pedagogical effects" and not foster irresponsibility, that plant-closing legislation be more community oriented, that we encourage community action over government or market-based alternatives, that political parties show more vigor, etc. Id. at 106, 111-12, 123, 126, 140-41, 175, 179.
campaign and presidency, stressing moderation and compromise—unexceptional and perhaps uninspiring but certainly correct:

Modern liberal polities, in order to live up to their own professed ideals, require not only a citizenry that is prepared to accept some responsibility for the less fortunate, but citizens who are willing, so far as is possible, to take responsibility for themselves and their dependents.42

It may be impossible for the gigantic, ethnically diverse, racially riven, multicultural-yet-insular United States to emulate smaller, more homogenous, and less market-based societies. Our social ecology is too unstable. Likewise, it may be impossible to recreate community as either the WPA artists of the New Deal or Norman Rockwell knew it—let alone as Durkheimian solidarisme or recent East European dissidents (both of which Glendon admires) imagined civil society to be in the West. But there are, of course, some things we can do to foster community, reciprocal reliance, and “manifold relations” in society.

It seems to me that civic duty, personal responsibility, and social equity might well be served through certain specific, albeit controversial proposals: instituting universal compulsory national service such as the draft (as urged by some Communitarians) would be a fine start. A revivified public vocational educational system linked to annual industry norms for accepting and training apprentices along the German model would be another realistic and positive move. Rather than “transcend the state-market framework” as Glendon would like, most necessary reforms are impossible without an active state role as well as “creative uses of the structures of civil society.”43

Ultimately, Glendon’s evocation of community values to define and limit rights and responsibilities must be transcended by a call for more democratic and positive rights and obligations. So long as the rights Americans are always talking about and claiming are negative liberties, Marx’s critique will remain fundamentally valid. Only with the abandonment of the property basis of our rights and the elaboration and fulfillment of the social requisites for effective citizenship will rights talk be more than the self-vindication of individuals or separate groups.

The negative conception of rights based on property was brought into the world by a market-based view of society where, governed by neutral rules, left alone by the state, and not discriminated against for

42. Id. at 105.
43. Id. at 141.
suspect reasons, people would develop their free and autonomous individuality. Nowhere has this been truer than in the United States. From Kant\textsuperscript{44} and Faust to Rawls and Madonna, we have known that autonomous individuality is best achieved by those whose material needs have been secured. Negative freedom cannot secure those needs. Negative liberty, which our legal regime and our rights talk are about, is good if you have cash. Courts can do little to turn the negative into the positive. That is the task of mass politics.

Only if and when we overcome and transcend the grounding of rights in property can moral and political values—separated by liberalism and rights talk—conceivably be brought back together. Only then will a successful integration of Americans into roughly one democratic, moral-political, and interpretive community be possible. And only then—maybe—will the cherished civic republican and communitarian virtues of participation as competent citizens in constructing the common good life be feasible and worthwhile. It was, after all, the realization that the alienation of individuals from the community was the fruit of the exploitation of particular social groups in a sharply divided civil society that took Marx beyond communitarianism and which supported Isaiah Berlin's emphasis on positive liberty to accompany the negative.

Until our politicians and social theorists, including the Communitarians, show themselves able to deal seriously with the realities of class division and incapacitation, we can only expect citizen apathy and incompetence to worsen. An "inert people" cannot take part in "public justification, communication, and deliberation."\textsuperscript{45} In the meantime, we also need to remember what Eric Hobsbawm pointed out a decade ago, namely, that wide-ranging rights claims "are not ends in themselves, but broad aspirations which can be realized only through complex and changing social strategies, on which they throw no specific light."\textsuperscript{46} Those ends too are the task of mass politics.\textsuperscript{47}

\textsuperscript{44}. For Glendon, as for other non-philosopher citizens, goals, values, and priorities are at issue, and their philosophical justifications really do matter. \textit{Cf.} Richard Rorty, \textit{Postmodernist Bourgeois Liberalism}, 80 J. Phil. 583, 583-87 (1983). As Glendon so persuasively shows, the negative rights habits, values, and institutions we have developed may be our problem as well as our salvation, and there is far less reason to applaud than Rorty tends to furnish.

\textsuperscript{45}. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

\textsuperscript{46}. \textsc{Eric Hobsbawm}, \textsc{Workers: Worlds of Labor} 310 (1984).

\textsuperscript{47}. For an insightful and persuasive discussion of a "deliberative view of social rationality" that locates both rights and community in a plausible and realistic portrayal of civil society, see Joshua Cohen, \textit{The Economic Basis of Deliberative Democracy}, 6 Soc Phil & Pol'y, Spring 1989, at 25.