RIGHTS AND IRRESPONSIBILITY

LINDA C. McCLAIN†

INTRODUCTION

There can be little doubt that a marked discontent with rights and “rights talk” is in the air, as are calls for a turn to responsibility and “responsibility talk.”¹ In a broad range of contemporary discourses, rights are juxtaposed against responsibility as if the two were inversely or even perversely related to one another. Indeed, rights are said to license irresponsibility. Academics, politicians, and the popular media claim that Americans increasingly invoke rights talk and shrink from responsibility talk and that as a result America suffers from an explosion of frivolous assertions of rights and a breakdown of responsible conduct. The problem is framed as “too many rights” and “too few responsibilities.”²

This Article examines a cluster of charges about the relationship between rights and responsibility that I call the “irresponsibility critique” of rights. That cluster includes criticisms of the rhetoric of rights, the nature and structure of rights, the societal

† Copyright © 1994, Linda C. McClain.

Associate Professor of Law, Hofstra University School of Law. LL.M., 1991, New York University; J.D., 1985, Georgetown University; A.M., 1981, University of Chicago; A.B., 1980, Oberlin College.

This Article is a revised version of the 1993–1994 *Duke Law Journal* Lecture, which benefitted from comments by students and faculty, particularly Katharine Bartlett and Martin Golding. I presented a draft at the University of Virginia School of Law’s Legal Studies Workshop and received instructive comments from participants. I also benefitted from presenting this project in an early stage at Faculty Workshops at Hofstra Law School and the Hofstra Philosophy Department. For multiple, constructive readings of drafts and responsible criticism, I am indebted to James Fleming. I would like to thank Mary Anne Case, Eric Freedman, John DeWitt Gregory, Tracy Higgins, Jody Kraus, Sandy Levinson, Daniel Ortiz, Wendy Rogovin, and Suzanna Sherry for helpful comments concerning an earlier draft. Thanks go as well to the students in my jurisprudence classes at Hofstra and the University of Virginia and to my research assistants at Hofstra: John Hamberger, Jean Kephart Cipriani, Cathy DiFiglia, and Robert Stone. A Hofstra Law School summer research grant supported this work.

1. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

2. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 161 (1993).

effects of rights and their exercise, and the messages that rights allegedly send to citizens.³ In assessing the irresponsibility critique, I consider how its proponents conceive of rights, what they mean by irresponsibility, and how they propose to shore up responsibility. Furthermore, I explore the extent to which the charges lodged against rights and rights talk are apt, whether the irresponsibility critique is really targeted at or fairly traceable to rights at all or whether it is aimed instead at a perceived social or cultural breakdown, and how the critique should affect the recognition, justification, and content of legal rights.⁴

The primary sources of the irresponsibility critique that this Article examines are Mary Ann Glendon's prominent work, *Rights Talk: The Impoverishment of Political Discourse*, and various publications produced by members of the Responsive Communitarian movement. That movement is associated with Glendon, Amitai Etzioni, and William Galston and publicly endorsed or applauded by an array of academic, political, and other public figures across the political spectrum.⁵ The very title of the movement's journal,

3. The term "rights" as used in this Article is general and unspecified. I focus on rights as they are discussed in the irresponsibility critique. Often, the critique speaks generally about "rights" and "responsibilities." To the extent that it targets particular kinds of legal rights and their features (e.g., constitutional rights), I address those rights specifically. Cf. Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 830 (1993) (arguing for the importance of drawing distinctions among kinds of legal entitlements).

4. This Article does not analyze responsibility in general, for example, in the sense of legal responsibility for wrongs committed in criminal law or responsibility in standards of care and causation in tort law. At the same time, distinctions between the different meanings of responsibility will be helpful. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 211-12 (1968) (distinguishing between role responsibility, causal responsibility, and capacity responsibility). Nor in focusing on responsibility and irresponsibility am I generally taking up the question of free will versus determinism.

5. Glendon is a law professor at Harvard Law School. Often described as the "father" of the new communitarian movement, Etzioni is a professor of sociology at George Washington University. Galston, a political philosopher and formerly a professor at the University of Maryland, is presently a domestic policy advisor to President Clinton. The Responsive Communitarian Platform lists some 70 signatories who endorse the "broad thrust" of the Platform, if not every specific statement. See *The Responsive Communitarian Platform: Rights and Responsibilities*, 2 RESPONSIVE COMMUNITY, Winter 1991-1992, at 18-20 [hereinafter *Platform*]. A sampling from the *Responsive Community* "reading list" includes: ROBERT N. BELLAH ET AL., THE GOOD SOCIETY (1991) [hereinafter BELLAH ET AL., GOOD SOCIETY]; ROBERT N. BELLAH ET AL., HABITS OF THE HEART (1985) [hereinafter BELLAH ET AL., HABITS]; ETZIONI, *supra* note 2; WILLIAM A. GALSTON, LIBERAL PURPOSES (1991); GLENDON, *supra* note 1; and MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). See RESPONSIVE COMMUNITY, READING LIST (undated pamphlet, on file with author). For a discussion of the influence of

The Responsive Community: Rights and Responsibilities, proclaims a need to correct an imbalance between rights and responsibilities.⁶ Because the "new communitarians"⁷ generally assume that liberal legal and political theory are the primary bases for contemporary legal rights and rights talk and that contemporary societal problems stem from the excesses of both liberalism and liberal virtues, I consider the irresponsibility critique in light of liberal justifications of rights and liberal accounts of the relationship between rights and responsibility.⁸

the new communitarianism on President Clinton's administration, see *infra* notes 28–33 and accompanying text.

6. Glendon, James Fishkin, a professor of government at the University of Texas, and Thomas Spragens, Jr., a professor of political science at Duke University, are Co-Editors of *The Responsive Community*. Galston was a Co-Editor, but is currently on White House leave. Etzioni is the Editor.

7. Communitarianism is not a new philosophy or perspective, nor is the communitarian criticism of liberalism new. See, e.g., DEREK L. PHILLIPS, *LOOKING BACKWARD: A CRITICAL APPRAISAL OF COMMUNITARIAN THOUGHT* (1993); SANDEL, *supra* note 5; *LIBERALISM AND ITS CRITICS* (Michael J. Sandel ed., 1984); see also Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 685–89 (1992) (offering a framework for assessing contemporary communitarian positions and their relationship to liberalism). The Responsive Communitarians draw on that criticism of liberalism. See, e.g., GLENDON, *supra* note 1, at 191 n.4 (acknowledging her indebtedness to Sandel's criticism of liberal theory as ignoring the "situated" or "encumbered" self). Nonetheless, both media coverage of the Responsive Communitarian movement and some of the movement's own literature often refer to Etzioni as the "father" or "founder" of communitarianism and to communitarianism as a new social movement (if not a new philosophy). See, e.g., Pat B. Nicklin, *Sounding a Call for Community Spirit*, USA TODAY, May 28, 1993, at 7D; Barbara Vobejda, "Communitarians" *Press Hill on Pro-Family Policies*, WASH. POST, Nov. 4, 1993, at A6; see also THE ONLY COMMUNITARIAN QUARTERLY (describing the new journal, *The Responsive Community*) (undated pamphlet, on file with author). In this Article, I refer to this movement interchangeably as the "Responsive Communitarian movement," the "new communitarianism," and "communitarianism." For the Responsive Communitarian movement's definition of communitarianism, see *infra* text accompanying notes 70–75, 136–38.

8. For one definition of liberalism, see STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 4 (1993) (arguing that the four "core norms or values" of liberalism are personal security, impartiality, individual liberty, and democracy and that the "most novel and radical principle of liberal politics" may have been that "public disagreement is a creative force"). In this Article, I explicate and defend an account of liberalism as a political philosophy and a liberal justification for rights by drawing on a number of sources. See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); STEPHEN MACEDO, *LIBERAL VIRTUES* (1990); JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]; JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *THEORY*]; *LIBERALISM AND THE MORAL LIFE* (Nancy L. Rosenblum ed., 1989); Ronald Dworkin, *Foundations of Liberal Equality*, in XI THE TANNER LECTURES ON HUMAN VALUES 1 (Grethe B. Peterson ed., 1990). The jurisprudential account of rights that I offer draws particularly on the work of Ronald Dworkin.

The communitarian discontent with rights and yearning for responsibility provide an opportunity for exploring a number of arresting questions about rights and their relationships to responsibility and irresponsibility.⁹ What is it about rights that triggers the irresponsibility critique? Do legal rights include a right to be irresponsible, and if so, why defend such rights? Does the structure of legal rights discourage or even preclude individual, community, or societal reflection on right conduct and efforts to foster responsible behavior? Have liberal justifications of legal rights invited discontent by being inattentive to or silent about the relationships between such rights and responsibility? How much of what is at issue in charges of irresponsibility is really about rights, as distinguished from behavior that is already subject to civil (if not criminal) sanction? In sum, does the irresponsibility critique establish its charges against rights and rights talk?

I argue that much of the communitarian discontent with rights stems from a social (rather than a jurisprudential) critique of American society centered around a complex set of social problems, attitudes, and behaviors that have little analytical or causal

See *infra* subsection IV(A)(2) and Section IV(C).

9. The new communitarians are not the only advocates of certain features of the irresponsibility critique. See, e.g., Suzanna Sherry, "Without Virtue There Can Be No Liberty," 78 MINN. L. REV. 61, 75-82 (1993) (arguing for a revival of civic republicanism, responsibility, and independence); Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 47 (1990) (calling for "a reformulation of liberal ideals in American culture that would take seriously not only the individual's demand for rights but also the burdens of his responsibility"). For an exploration of the rights/responsibility dichotomy in the context of the atomism critique of liberalism that is prominent in relational feminist jurisprudence, see Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992). A version of the irresponsibility critique (which I do not fully explore in this Article) is the feminist argument that the immunity or legal unaccountability that certain rights afford to men (e.g., the right of privacy) harms women. See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) (arguing that "[i]n gendered light, the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability"). Finally, another variant of the irresponsibility critique that I leave for elaboration elsewhere would invoke the language of responsibility in justifications for rights to combat not irresponsibility so much as the misperception that exercise of rights reflects irresponsibility and to deepen appreciation of and respect for people exercising rights. See West, *supra*, at 82 (arguing that prevailing justifications of rights "may reinforce the damaging misperception that the demand for abortion reflects the irresponsible worst of us and worst within us") (footnote omitted); cf. Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265, 1283 (1993) (reviewing FEMINIST LEGAL THEORY (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (arguing that "[a] feminist politics built upon narrative can replace the critical distance of 'empty tolerance' with empathetic understanding") (citation omitted)).

connection to legal rights. Although the critique highlights pressing social problems, some of which implicate significant issues concerning the relationship between rights and responsibility in a constitutional democracy, it makes unconvincing and implausible causal assertions about the logic and excesses of liberalism and rights. Indeed, although the new communitarianism may be read as simply calling attention to the gap between actual American society and the ideals of liberalism, it is illuminating to view certain aspects of that movement as a form of what Stephen Holmes has called "soft antiliberalism."¹⁰

To the extent that the irresponsibility critique does offer a jurisprudential critique of rights, I attempt to separate out two interwoven strands of the critique: "immunity" and "wrongness."¹¹ The immunity critique begins with a recognition that a legal right creates a certain immunity, a realm within which one is free from coercion and not legally responsible or accountable to others for social costs or harms resulting from one's actions. The problematic social messages said to be drawn from this feature of immunity are, first, that rights are "trumps"¹² that are more important than any societal interest, and second, that they insulate a right-holder from the moral scrutiny or disapproval of others. The starting point of the wrongness critique is the observation that having a legal right to do something does not mean that it is the right thing to do. Regrettably, it is claimed, because "[t]he language of rights is morally incomplete,"¹³ rights talk sends the erroneous social message that the existence of a right signals the nonexistence of responsibilities constraining its exercise. In turn, that leads to the view that having a legal right to do something is a sufficient reason to do it or, worse yet, that legal rights equal moral rightness.

10. HOLMES, *supra* note 8, at 88, 176. Holmes distinguishes "soft antiliberals" from "hard antiliberals:" soft antiliberals "malign liberalism verbally, but when faced with practical choices, reveal a surprising fondness for liberal protections and freedoms;" hard antiliberals, on the other hand, "damn liberalism from a wholly nonliberal point of view and dare to draw the shocking political consequences." *Id.* at 88. Examples of hard antiliberalism are the political philosophies of Joseph de Maistre and Carl Schmitt. *Id.* at 13-60.

11. See *infra* Sections IV(A)-(B).

12. Evidently, the expression of "rights as trumps" was first coined by Ronald Dworkin 17 years ago. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977). For a treatment of the nature and limits of this notion, see *infra* subsection IV(A)(2)(a).

13. *Platform, supra* note 5, at 14.

I contend that both strands of the irresponsibility critique are overstated and that they understate the extent to which liberal accounts of rights allow for prescriptions like those the communitarians support. I also argue that the irresponsibility critique wavers between attacking the rhetoric or messages of legal rights and attacking the content of rights.¹⁴ To the extent that communitarian discontent with rights extends to rights themselves, we must ask precisely what conception of rights they advance.

This Article argues that the freedom that rights provide makes possible the exercise of responsibility and that leading liberal justifications for rights are not silent about this relationship between rights and responsibility. As a schematic device, I argue that communitarian and liberal talk about responsibility emphasize two different, although related, meanings of responsibility: *responsibility as accountability* versus *responsibility as autonomy*, respectively. As I use the terms, responsibility as accountability connotes being answerable to others for the manner and consequences of the exercise of one's rights, whereas responsibility as autonomy connotes self-governance, that is, entrusting the right-holder to exercise moral responsibility in making decisions guided by conscience. If liberal rights talk seems silent about responsibility, as the communitarians claim, it may be due in part to these very different conceptions of responsibility. An important issue that the irresponsibility critique highlights is the tension between pursuing the goal of responsibility as accountability and protecting the principle of responsibility as autonomy. I illustrate that tension with the example of the right to procreative autonomy.¹⁵

The differing communitarian and liberal emphases on accountability and autonomy as two aspects of the relationship between rights and responsibility are not mutually exclusive: accountability figures in liberal notions of responsibility and autonomy is featured in communitarian notions of responsibility. I argue that liberal accounts of rights provide a better analysis of responsibility than the communitarian accounts of rights have offered to date. They also afford sounder means, short of coercion of the sort that both liberals and communitarians claim to reject, to secure respon-

14. Glendon's analysis of the right to choose abortion is an illustration. See *infra* subsection IV(C)(1).

15. See *infra* Section IV(C).

sible behavior from a citizenry characterized by religious and moral pluralism.

In Part I, I explicate the critiques of rights talk and calls for responsibility talk advanced by Glendon and the Responsive Communitarian movement. I also examine the basic tenets of the new communitarianism and certain proposed correctives to rights talk. The irresponsibility critique holds that freedom requires responsibility as accountability and targets the costs of rights to society and the inattention of right-holders to responsibilities. Two key premises of the irresponsibility critique are that the social costs of rights have become too high and that there is a need for greater accountability, whether achieved through legal sanction or moral suasion.

In Part II, I argue that a significant component of the irresponsibility critique is a social critique, the core theme of which is the decline of a responsible citizenry. According to this critique, a flight from individual responsibility coupled with an increased demand for rights have led to a dearth of civic virtue and a growth of social pathology. The critique laments a lapse in responsibility both as accountability and as autonomy. I challenge the connection that the irresponsibility critique posits between legal rights and those phenomena.

In Part III, I situate the new communitarianism and the irresponsibility critique on the terrain of political theory. I argue that the communitarian agenda echoes core premises of liberalism concerning the importance of the education of citizens, the duties of citizenship, and the institutions of civil society. Yet the new communitarianism also may be understood as a form of "soft antiliberalism," particularly in its tracing of the responsibility deficit to an excess of liberal virtues. Some communitarians argue that liberalism takes diversity and pluralism too seriously,¹⁶ such that citizens manifest liberal virtues by not making any moral judgments about each other's choices. I suggest, however, that the new communitarianism, with its emphasis on listening to the "moral voice of the community" and holding individuals to "values we all

16. I take this formulation from Suzanna Sherry, who calls for a revival of the responsibility and virtue of civic republicanism but is not a member of the Responsive Communitarian movement. See Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship* 15-25 (1993) (unpublished manuscript, on file with author); Letter from Suzanna Sherry to Linda C. McClain 1 (Dec. 9, 1993) (on file with author).

share," does not take diversity and pluralism seriously enough. Moreover, the communitarians' largely uncritical appeal to bygone traditions and moral consensus pays insufficient attention to the unjust and discriminatory aspects of such traditions and understates the reality of moral and religious pluralism. Finally, the new communitarians fail to delineate precisely what "community" is, to specify its relationship to government, and to indicate how and when a community's moral voice should become a legal command.

In Part IV, I put forward a jurisprudential analysis of the new communitarians' irresponsibility critique of rights. I explore both strands of the irresponsibility critique: (1) that legal rights allow for irresponsibility by permitting right-holders to act with legal *immunity*; and (2) that legal rights may promote irresponsibility by allowing people to act without regard to the moral *rightness* of the exercise of rights. I grant that legal rights do not equate with moral rightness, but I challenge the claims that legal rights send a message about moral rightness, moral insulation, or the absence of responsibility. In support of this challenge, I point to contemporary societal debates concerning a number of constitutional rights and the employment of moral suasion and the language of responsibility in those debates.

I also challenge the dichotomous treatment of rights and responsibility by showing that presuppositions about moral capacity, moral rights, and moral responsibility undergird liberal justifications of legal rights, including constitutional rights. Liberals believe that the possibility of irresponsibility is a cost of recognizing and protecting rights, a cost that is generally preferable to shifting the locus of moral responsibility from individuals to the community or the government. At the same time, liberal justifications of rights do not espouse a view that the costs of rights never justify restricting or regulating individual freedom. In this regard, I argue that the irresponsibility critique misunderstands or overstates the notion of "rights as trumps."¹⁷

To illustrate the implications of the different uses of responsibility talk in communitarian and liberal accounts of rights, I exam-

17. Because Ronald Dworkin's notion of rights as trumps especially evokes communitarian discontent, I focus in Part IV particularly on his early conceptualizations of rights and societal constraints on them, see DWORKIN, *supra* note 12, as well as his recent defense of individual freedom, which invokes notions of responsibility not only to justify rights but also to allow room, in some cases, for government to encourage responsible rights exercise, see RONALD DWORKIN, *LIFE'S DOMINION* (1993).

ine the irresponsibility critique in the context of the right to procreative autonomy, a right that has drawn frequent charges of being irresponsibly exercised. Recent legal developments and scholarly commentary signal a turn to the language of responsibility in this area.¹⁸ I contrast the liberal approach of Ronald Dworkin and the communitarian approach of Glendon to explore the interplay of responsibility as autonomy and as accountability, asking what sort of responsibility each approach seeks to foster.¹⁹

Glendon's analysis of abortion illustrates that, at least in certain cases, her concern with the message that rights talk sends goes well beyond the rhetoric of rights to the content of specific rights. Moreover, her rejection of the idea of individual choice in favor of a virtual prohibition of abortion suggests that in some cases the communitarian plan for remedying the imbalance between rights and responsibility would not be left merely to social persuasion and exhortation but would extend to legal prohibition and coercion.

In contrast, Dworkin urges that people live up to the freedom that a right to procreative autonomy protects by exercising their ethical responsibility of reflection in deciding matters of serious moral concern. He concludes that the state may encourage responsibility in making such decisions but may not coerce a particular decision. I argue that, although Dworkin's use of responsibility talk to meld autonomy with some form of accountability raises some significant questions, it offers a better starting point for thinking about rights and responsibility than the evisceration of responsibility as autonomy that Glendon's approach entails.

18. For a discussion of judicial developments, see Danielle K. Morris, Note, *Planned Parenthood v. Casey: From U.S. "Rights Talk" to Western European "Responsibility Talk,"* 16 *FORDHAM INT'L L.J.* 761 (1992-1993). See also *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791 (1992). For examples of liberal responsibility talk, see DWORKIN, *supra* note 17. For explorations of responsibility talk in feminist justifications of abortion rights, see RUTH COLKER, *ABORTION AND DIALOGUE* (1992); West, *supra* note 9. Elsewhere, I have critiqued the reliance on responsibility in West, Colker, and *Casey*. See Linda C. McClain, *The Poverty of Privacy?*, 3 *COLUM. J. GENDER & L.* 119, 122-24 (1992).

19. See DWORKIN, *supra* note 17. Glendon has written extensively about abortion and favorably contrasted the "communitarian" abortion laws of Western European countries with American abortion law. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 33-39, 133-34 (1987); see also GLENDON, *supra* note 1, at 47-75. The Responsive Communitarian movement has not taken a public position on the issue. See *infra* text accompanying note 189.

I. THE NEW COMMUNITARIANISM: IN SEARCH OF "RIGHTS AND RESPONSIBILITIES"

A. *The Calls for Responsibility*

It is becoming a common refrain: Americans focus excessively on rights, to the detriment of responsibilities. During the bicentennial of the ratification of the Bill of Rights, *Harper's* asked a group of scholars and political figures to "carry on the founders' conversation." They pondered whether a "Bill of Duties" should complement the Bill of Rights, taking as their point of departure the claim that although "the vocabulary of rights is nearly exhausted . . . the vocabulary of responsibilities has yet to emerge."²⁰ Although most of the respondents declined to endorse a bill of enforceable duties,²¹ some of them (along with other people) launched a new communitarian movement and drew up *The Responsive Communitarian Platform: Rights and Responsibilities*.²² The Platform "holds" that "a communitarian perspective [balancing rights and responsibilities] must be brought to bear on the great moral, legal, and social issues of our time" and suggests an array of duties and responsibilities to achieve that balance.²³

Proponents of "rights and responsibilities" trace the responsibility deficit not only to the silence of our governing documents about responsibility but also to the structure and rhetoric of American "rights talk"²⁴ and its "morally incomplete" language

20. *Who Owes What To Whom?*, HARPER'S, Feb. 1991, at 43, 44 [hereinafter *Harper's Forum*] (Gerald Marzorati, moderator, including as "modern day founders" scholars Benjamin Barber, Mary Ann Glendon, Christopher Lasch, Christopher D. Stone, and Daniel Kemmis, Mayor of Missoula, Montana). For an earlier discussion of the relationship between the Bill of Rights and citizen responsibilities inspired by the bicentennial of the Constitution, see RIGHTS, CITIZENSHIP AND RESPONSIBILITIES: THE PROCEEDINGS OF FREEDOMS FOUNDATION'S SYMPOSIUM ON CITIZEN RESPONSIBILITIES 43 (Bradford P. Wilson ed., 1985) [hereinafter RIGHTS, CITIZENSHIP AND RESPONSIBILITIES] (offering a Bill of Responsibilities); see also Symposium, *Individual Responsibility and the Law*, 77 CORNELL L. REV. 955 (1992) (exploring the significance of the absence of duties and responsibilities of citizenship in the U.S. Constitution).

21. But see *Harper's Forum*, *supra* note 20, at 47-48 (statement of Christopher Lasch) (advocating a constitutional amendment requiring fathers to marry the mothers of their children and prohibiting divorce for couples with children under the age of 21).

22. See *Platform*, *supra* note 5.

23. *Id.* at 4-5. Three of the five participants in the *Harper's Forum*, Benjamin Barber, Mary Ann Glendon, and Daniel Kemmis, are signatories to the Platform. Glendon and William Galston played central roles in writing the Platform, which was initially drafted by Amitai Etzioni. See ETZIONI, *supra* note 2, at 251.

24. GLENDON, *supra* note 1, at 14.

of rights.²⁵ One alleged consequence of the imbalance between rights and responsibilities is the erosion of personal responsibility and of the institutions of civil society, such as families and associations. These "seedbeds of civic virtue" are necessary to inculcate the traits of character on which the preservation of rights depends but to which rights talk gives insufficient attention.²⁶ The new communitarians seek "[t]o rebuild America's moral foundations [and] to bring our regard for individuals and their rights into a better relationship with our sense of personal and collective responsibility."²⁷

Political leaders, including figures in the current presidential administration, reportedly sympathize with, and perhaps draw guidance from, this new communitarianism and its focus on responsibility.²⁸ As a candidate, Bill Clinton ran on a "new covenant" of greater individual responsibility and government provision of opportunity and on a Democratic Party platform charging the Republican Party with a twelve-year "nightmare" of "irresponsibility and neglect."²⁹ As President, he calls for a "new ethic of personal and family and community responsibility,"³⁰ through which

25. *Platform*, *supra* note 5, at 14.

26. GLENDON, *supra* note 1, at 109-20.

27. *Platform*, *supra* note 5, at 7.

28. Among President Clinton's new advisors is political philosopher and Responsive Communitarian member William Galston, whose account of liberalism sounds themes of individual responsibility wedded to opportunity similar to those President Clinton has expressed. See GALSTON, *supra* note 5; see also *infra* text accompanying notes 29-33. In addition, Platform signatory Henry Cisneros is now the Secretary of Housing and Urban Development. For a discussion of the influence of communitarian ideas on, and the presence of communitarians in, the Clinton administration, see Edward Epstein, *It's Controversial—and Influencing Clinton*, S.F. CHRON., Jan. 5, 1993, at A1 (noting that Etzioni's book, *The Spirit of Community*, has been seen on Clinton's desk and discussing parallels between Etzioni's and Clinton's ideas); Amitai Etzioni, *Joining Together*, RECORDER, Mar. 16, 1993, at 10, 11 (citing examples of Clinton's "communitarian tendencies"); Charles Oliver, *Clinton's Politics of Meaning*, INVESTOR'S BUS. DAILY, Jan. 7, 1994, at 1 (reporting the influence of communitarianism on President Clinton and Vice President Gore). While a Senator, Vice President Al Gore praised the communitarian project at a Responsive Community "teach in," offering the global environmental crisis as an example of the limits of rights talk. See *The First Communitarian Teach-In*, 2 RESPONSIVE COMMUNITY, Winter 1991-1992, at 21, 25-26. Communitarians quote as a "communitarian theme" Gore's assertion that, "[w]hile we give supreme value to the rights of the individual, we expect that freedom to be exercised with respect toward others and with decent restraint." Etzioni, *supra*, at 10 (quoting Vice President Gore).

29. *Excerpts from the Platform: A "New Covenant" With Americans*, N.Y. TIMES, July 15, 1992, at A10.

30. David E. Anderson, *Political World "Too Secular," President Says*, WASH. POST,

Americans will "demand more responsibility from all" and "take more responsibility" for themselves,³¹ and he traces the roots of contemporary social problems to the breakdown of social values, family, and community.³² Both President Clinton and First Lady Hillary Rodham Clinton reportedly espouse support for the "politics of meaning" (if not a "politics of virtue") articulated by Michael Lerner and others in *Tikkun*, which calls for "a new ethos of caring" and links rights with responsibility.³³ Moreover, at various levels of government and in community organizations, there is

Sept. 4, 1993, at D6.

31. "We Force the Spring": *Transcript of Address by President Clinton*, N.Y. TIMES, Jan. 21, 1993, at A15.

32. See *State of the Union: Renewing Values, Revising Welfare, Transcript of President Clinton's Message on the State of the Union*, N.Y. TIMES, Jan. 26, 1994, at A16, A16-17 [hereinafter *State of the Union*] (arguing that problems such as drug use and gang violence cannot be solved by government alone but are rooted in a "loss of values, in the disappearance of work and the breakdown of our families and our communities"). In his recent State of the Union address, President Clinton invoked Abraham Lincoln's appeal to the "better angels of our nature," a favorite communitarian reference. *Id.* at A17; see GLENDON, *supra* note 1, at 177; Platform, *supra* note 5, at 5. Moreover, echoing frequent communitarian references to the "social fabric," see *infra* text accompanying notes 51-57, Clinton urged that we "weave" the "sturdy threads" of the institutions of civil society into a "new American community." *State of the Union, supra*, at A17.

33. See Michael Kelly, *Hillary Rodham Clinton and the Politics of Virtue*, N.Y. TIMES, May 23, 1993, § 6 (Magazine), at 22; Thomas Fields-Meyer, *This Year's Prophet*, N.Y. TIMES, June 27, 1993, § 6 (Magazine), at 28 (reporting on the influence of Lerner's "politics of meaning" on the Clintons); see also *It's Not Just the Economy, Stupid*, TIKKUN, May-June 1993, at 7, 7-8 (reprinting Hillary Rodham Clinton's address at the University of Texas, Austin, which called for a "new politics of meaning" and "new ethos of individual responsibility and caring," and offering editorial viewpoints about how to implement a "politics of meaning").

The "politics of meaning" resembles the new communitarianism in linking the language of rights to the neglect both of responsibilities and of the importance of community, and in advocating concern for family, work, national service, and the like. See Michael Lerner, *Work: A Politics of Meaning Approach to Policy*, TIKKUN, May-June 1993, at 23, 23-25. But see Charles Derber, *Coming Glued: Communitarianism to the Rescue*, TIKKUN, July-Aug. 1993, at 27, 28, 95-96 (characterizing Etzioni's *The Spirit of Community* as advocating a "professional middle class" communitarianism, inattentive to the needs of all Americans and to economic realities, rather than a "bold communitarian agenda on capitalism and the market system"). One distinction may be that the politics of meaning articulates as a primary goal for public policies the reconstruction of society, and its economic and political institutions, to provide meaning and purpose and to foster care. See Leruer, *supra*, at 26 (advocating a national work policy premised on the goal that every workplace should "serve the common good" and "provide meaningful work"); Michael Lerner, *Reflections on Israel and Jewish Continuity, Violence and Crime, How Clinton is Doing, and The Politics of Meaning*, TIKKUN, Jan.-Feb. 1994, at 7, 10-11 (advocating making "a politics of meaning the dominant framework for economic and political life").

considerable interest in bolstering personal, family, and community responsibility as a cure for a range of social problems and pathologies, some of which are said to be linked to rights.³⁴ Meanwhile, political figures, cultural critics, and the popular media routinely sound the alarm of an explosion of frivolous rights assertion accompanied by an abdication of personal responsibility and the assumption of the mantle of victim.³⁵

The refrain "too many rights, too few responsibilities" and the appeal to attend to "rights *and* responsibilities" in themselves do not explain how rights and rights talk directly undermine responsibility and permit, or even encourage, irresponsibility. To assess the irresponsibility critique, we must get a clearer picture of what sorts of responsibilities the communitarians believe are in need of restoration (e.g., moral, social, communal, or legal responsibilities) and to whom or what such responsibilities are owed (e.g., to self, family, community, or country).

B. *From "Rights Talk" to "Table Talk:" Glendon's Call for a Refined Rhetoric of Rights*

In *Rights Talk*, Glendon argues that rights talk impoverishes political discourse and civic life because it drives out or obscures the language of responsibility.³⁶ She characterizes her critique as aimed at the rhetoric of rights (rights talk) rather than at specific rights or the idea of rights in general.³⁷ Diagnosing a lack of fit between, on the one hand, a rights talk that is silent about a right-bearer's correlative responsibilities and duties and, on the other, a deep American belief that persons should be personally responsible for their actions, Glendon argues that the law's silence about responsibility may even appear to send a message that the law condones irresponsibility.³⁸ Glendon urges a refined rhetoric

34. See *infra* note 108.

35. See, e.g., CHARLES J. SYKES, *A NATION OF VICTIMS* (1992); *infra* text accompanying notes 128-29.

36. See GLENDON, *supra* note 1. For some reviews of Glendon's book, see Thomas D. Barton, *Reclaiming Law Talk*, 81 CAL. L. REV. 803 (1993); Richard A. Epstein, *Rights and "Rights Talk"*, 105 HARV. L. REV. 1106 (1992); Suzanna Sherry, *Rights Talk: Must We Mean What We Say?*, 17 LAW & SOC. INQUIRY 491 (1992); James B. White, *Looking at Our Language: Glendon on Rights*, 90 MICH. L. REV. 1267 (1992); Cass R. Sunstein, *Righttalk*, NEW REPUBLIC, Sept. 2, 1991, at 33.

37. See GLENDON, *supra* note 1, at 15.

38. See *id.* at 104-05 (citing a 1989 poll on family values conducted by Mark

of rights, drawn from "our own indigenous resources"—prominently household "table talk" and discourses from other settings in which notions of relationship, responsibility, connection, and compromise figure.³⁹

What is wrong with rights talk? Glendon submits,

Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. In its relentless individualism, it fosters a climate that is inhospitable to society's losers, and that systematically disadvantages caretakers and dependents, young and old. In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue. In its insularity, it shuts out potentially important aids to the process of self-correcting learning. All of these traits promote mere assertion over reasoning.⁴⁰

Glendon illustrates these lamentable features of American rights talk with examples from constitutional, family, and tort law.⁴¹

Mellman). Glendon's specific examples of instances in which law may encourage or appear to condone irresponsibility include: the "no duty to rescue" rule in tort law; the constitutional embrace of that rule in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), which speaks of the Constitution as a charter of negative liberties and appears to sanction parental irresponsibility; and, finally, the law and policies surrounding child support. See GLENDON, *supra* note 1, at 105, 135. In the first two instances, Glendon criticizes judicial opinions for failing to explain the moral infrastructure of American society, notwithstanding the absence of legal obligations. *Id.* at 95-98, 102-05.

39. See GLENDON, *supra* note 1, at 15, 174-75; cf. Martin P. Golding, *The Significance of Rights Language*, 18 PHIL. TOPICS 53, 53, 62-64 (1990) (noting the tendency "to slip into rights talk, even when its appropriateness is questionable" and arguing that "rights have their home in the arms-length, impersonal sort of relationship . . . [between] members of the community of strangers," but are not appropriate within "certain types of moral-communal relations," such as friendship).

40. GLENDON, *supra* note 1, at 14.

41. The format of Glendon's book is to devote one chapter to each feature of rights talk. See, e.g., *id.* at 18-46 (using property law and theories of property to illustrate "the illusion of absoluteness"); *id.* at 47-75 (critiquing "the lone rights-bearer" assumed by the right of privacy); *id.* at 76-108 (examining "the missing language of responsibility" in the context of the no duty to rescue rule in tort law and its constitutional application in *DeShaney*); *id.* at 109-44 (observing "the missing dimension of sociality" in family law and policy and in the inability of legal language to express the needs and interests of communities); *id.* at 145-70 (arguing that a "rights insularity" by American jurists pre-

Gauging the scope of Glendon's critique is difficult. At its narrowest, it is a meditation on the silence in American governing documents, such as the Bill of Rights, concerning responsibilities. This silence is in striking contrast with European constitutions and rights proclamations such as the French Declaration of Rights and Duties.⁴² At its broadest, it is a social critique of American society and of American attitudes about freedom that are not tempered by a sense of personal responsibility and civic duties. Glendon's leading example of such attitudes is a survey of teenagers reporting their perception that what makes America special is that they are free to do whatever they want, without limit.⁴³ As a jurisprudential critique aimed at features of rights talk itself, her critique attacks the characterization of rights as trumps and absolutist formulations of rights that are silent about duty and responsibility and that appear to preclude any deliberation over social needs or the common good.⁴⁴ Glendon argues that both our public documents and our rights talk encourage a careless and exaggerated way of speaking and thinking about rights, as if liberty meant license. Yet she points out that the interpretation of rights by judges, lawyers, contracting parties, and others reveals that rights are not without limits, e.g., the limits imposed by judicial interpreters of our governing documents and those imposed by the reciprocal nature of rights and duties in contractual and other relationships.⁴⁵

vents them from looking to other legal systems for instructive approaches to legal rights).

42. For example, Glendon notes that the Bill of Rights has nothing comparable to § 29 of the United Nations Declaration of Human Rights, which states that "[e]veryone has duties to the community" and that everyone's rights and freedoms are subject to limitations "for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." *Id.* at 13 (quoting *Universal Declaration of Human Rights*, U.N. GAOR, 3d Sess., at 7, U.N. Doc. A/810 (1949)). *But see* ETZIONI, *supra* note 2, at 10 (suggesting that citizens' obligations to the community might be inferred from references in the Constitution to "the quest 'to form a more perfect Union' and . . . the need to 'promote the general welfare' for that purpose") (quoting U.S. CONST. pmb.).

43. *See* GLENDON, *supra* note 1, at 9 (citing a survey by People for the American Way). This example also is featured prominently in Responsive Communitarian literature. *See, e.g.*, ETZIONI, *supra* note 2, at 3-4.

44. *See* GLENDON, *supra* note 1, at 18-46 (contrasting continental European and American understandings of rights and tracing the latter to the influence of Blackstone and Locke). For a discussion of rights as trumps, see *infra* subsection IV(A)(2).

45. *See* GLENDON, *supra* note 1, at 9-10, 13. This concession by Glendon about the actual practice of rights seems to throw into question her basic premise of the absence of

Why is our rights talk silent about responsibilities and does the silence matter? On the one hand, Glendon explains the undeniable differences between the American Bill of Rights and the French Declaration of Rights and Duties on the basis of the different intellectual pedigrees of the American and French Revolutions (Lockean individual rights and self-interest versus classical and Rousseauian civic virtue and duty).⁴⁶ On the other hand, in contrast with scholars who might link the absence of responsibility talk to a triumph of liberalism over republicanism and a resulting move from civic virtue to self-interest,⁴⁷ Glendon downplays the American and European textual differences by arguing that the Founders did not need to adopt a bill of legal duties because they relied on the institutions of civil society, the "seedbeds of civic virtue," to restrain and temper individual self-interest and the exercise of rights. Invoking speeches by the Founders, Glendon and other proponents of an unwritten "constitution of responsibility" stress the role of morality and religion as the ultimate supports for maintaining a republican form of government, for respecting people's rights and liberties, and for making "our experiment in ordered liberty" possible.⁴⁸ Relying particularly on Alexis de Tocqueville's nineteenth-century observations of Americans,

responsibility talk in law. Responsibility is a basic term in the legal vocabulary, and the formulation "rights and responsibilities" is a common and pervasive formulation appearing in numerous contexts. Consider such formulations as the "rights and responsibilities" of parties in litigation; customer "rights and responsibilities" in business and consumer transactions; the "rights and responsibilities" of citizenship; and the Section on Individual Rights and Responsibilities of the American Bar Association. It is not the project of this Article to explore all such usages.

46. See *id.* at 10–11, 13, 32–37. For a discussion linking the silence in the U.S. Constitution about citizens' duties to the break by theorists like Hobbes and Locke, who focused on natural rights, from the natural law tradition that focused on obligations and duties, see Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 753 & n.245 (1980).

47. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

48. GLENDON, *supra* note 1, at 115–17. For Glendon's appeal to "ordered liberty," see *id.* at 10 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *id.* at 127–28. For particular historical texts, see THE FEDERALIST NO. 55 (James Madison); George Washington, *Farewell Address*, reprinted in GEORGE WASHINGTON: A COLLECTION 521 (William B. Allen ed., 1988). See also Steven Calabresi & Gary Lawson, *Foreword: The Constitution of Responsibility*, 77 CORNELL L. REV. 955 (1992) (arguing that the Founders presupposed citizen responsibility as a vital support of government and took for granted the vitality of civil society, morality, and religion); Orrin G. Hatch, "A Dependence on the People," 77 CORNELL L. REV. 959 (1992) (same).

Glendon argues that the "seedbeds of civic virtue," such as families, myriad associations, and the constraints of morality and religion, once played a vital role in educating Americans about rights and duties.⁴⁹

In Glendon's view, the silence of our governing documents concerning responsibility would not matter so much if the institutions that have traditionally anchored people in community and provided a sense of duty, obligation, and responsibility were germinating virtuous citizens with the requisite character traits for "ordered liberty."⁵⁰ That traditional, richly textured social fabric is wearing thin, however, in part because of the infiltration of rights talk and in part due to the weakening of social norms. Thus, Glendon asserts, Americans increasingly view law as the primary, if not only, source of teaching about morality.⁵¹ She traces the rise of rights talk to what she claims was a significant shift in constitutional law in the 1950s and 1960s to a focus on individual rights and an eschewal of ordinary politics in favor of judicial vindication of rights.⁵² This "rights revolution," she argues, brought with it an equally significant social phenomenon—a change in "habits of thought and speech."⁵³ The result is a rights-laden discourse that makes public dialogue and deliberation about responsibilities and the common good difficult and fosters attitudes that the Founders would have disapproved of as "liberty as license."

49. See GLENDON, *supra* note 1, at 117–20 (citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 63, 70, 93–94 (J.P. Mayer ed. & George Lawrence trans., 1969); ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION xiii (Stuart Gilbert trans., 1955)). For another example of communitarian reliance on Tocqueville, see BELLAH ET AL., HABITS, *supra* note 5, *passim*. For a discussion of the problems with uncritical and heavy reliance on Tocqueville by communitarians, see PHILLIPS, *supra* note 7, at 61–80.

50. See GLENDON, *supra* note 1, at 115–17.

51. See *id.* at 87, 136–38.

52. *Id.* at 4–7. Although a critique of Glendon's constitutional history is not the project of this Article, it is likely that Glendon's account of the history of constitutional law is problematic. For example, Glendon herself notes Tocqueville's observation of how legal discourse and a legalistic spirit "infiltrate[d]" American society and "the manners and morals" of Americans. *Id.* at 1–2. In the *Lochner* era, the U.S. Supreme Court upheld property rights and liberty of contract at the expense of social and economic legislation. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8–2 to –7 (2d ed. 1988). It may be the type of right being asserted in recent years, i.e., rights of privacy and equality, that the irresponsibility critique finds problematic. See *infra* Section II(B).

53. See GLENDON, *supra* note 1, at 7.

Yet Glendon maintains that the social fabric is not threadbare, and she charges that rights talk obscures a still-intact civil society, with its "communities of memory and mutual aid."⁵⁴ She marshals "evidence" that America has indigenous cultural resources⁵⁵—"indigenous languages of relationship and responsibility"⁵⁶—available to refine rights talk, which she sees as a "simplistic" language making it difficult for Americans, who would otherwise "speak[] from the heart," to express themselves.⁵⁷

As with her critique of rights talk, the scope of Glendon's proposed corrective is difficult to gauge. She claims that her goal is a refined rhetoric of rights, one that would keep "competing rights and responsibilities in view."⁵⁸ She suggests that we address such matters as

whether a particular issue is best conceptualized as involving a right; the relation a given right should have to other rights and interests; the responsibilities, if any, that should be correlative with a given right; the social costs of rights; and what effects a given right can be expected to have on the setting of conditions for the durable protection of freedom and human dignity.⁵⁹

Matters such as how to link rights with responsibilities and how to factor in social costs, however, would appear also to raise questions about the content of and limitations on rights. Glendon appears to consider, as falling within the scope of refining rights rhetoric, not only greater judicial attention to the publicity effects of judicial opinions⁶⁰ but also greater judicial willing-

54. *Id.* at xii; cf. BELLAH ET AL., *HABITS*, *supra* note 5, at 333 (defining a "community of memory" as a group of socially interdependent people "defined in part by its past and its memory of its past").

55. See GLENDON, *supra* note 1, at 174-75.

56. *Id.* at xii.

57. *Id.* at 8. There are striking parallels between Glendon's analysis of the gap between rights talk and how Americans actually think and feel and the diagnosis offered in *Habits of the Heart*. Similarities include reliance on Tocqueville's analysis and the use of such notions as first and second languages, communities of mutual aid and memory, ecological analogies for America's social problems and resources, and the emphasis on people as products of institutions, traditions, and the like. See BELLAH ET AL., *HABITS*, *supra* note 5, at 20, 35-41, 152-55, 283-86, 333-36. In turn, Bellah and his associates relied on Glendon's analysis in their subsequent book. See BELLAH ET AL., *GOOD SOCIETY*, *supra* note 5, at 47-48, 129-30, 302.

58. GLENDON, *supra* note 1, at 15.

59. *Id.* at 177.

60. See *id.* at 95-96, 104-05 (faulting courts in "no duty to rescue" cases for failing to explain the existence of a moral duty to rescue and criticizing the Court's decision in

ness—regardless of whether a fundamental right is involved—to consider and weigh “moral fabric” arguments and take into account citizen interest in using the criminal law (e.g., sodomy laws) to express and maintain a “widely shared moral view.”⁶¹ Moreover, although Glendon rejects the idea of importing European rights declarations codifying express limitations on rights and correlative duties to communities, she frequently invokes them as instructive⁶² and proposes that the former West Germany’s restrictive abortion law would better serve American women than the right of privacy has.⁶³ As elaborated below, all this suggests a substantive critique of the content of rights, as well as a tension between, on the one hand, her wish to use law to signal hortatory, educational messages about duty, responsibility, and the values that the community “holds dear” and, on the other, her proposals to use law to establish enforceable obligations.⁶⁴

Glendon’s appeal to the cultural resources that she believes can offer correctives to an extreme rights talk and can help restore the balance between responsibilities and rights similarly raises questions about whether her goal is different rhetoric or different

DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189 (1989), for failing to explain adequately that the absence of constitutional duties does not signal the absence of statutory and state constitutional duties to provide for the welfare of citizens); *id.* at 153–54 (faulting the tone of the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), for its apparent indifference to “feelings of an unpopular minority”).

61. See *id.* at 151–58 (criticizing the opinions of Justices White and Blackmun in *Bowers* for assuming that the existence of a fundamental right overcomes any interest of citizens in “officially maintaining certain traditional norms of sexual morality” and favorably contrasting a European decision that considered the impact of decriminalization on the moral fabric). In Glendon’s consideration of possible moral fabric arguments undergirding the Georgia sodomy law at issue in *Bowers* and in her contrast of a European law she describes as criminalizing “certain homosexual acts,” she appears, like Justice White’s opinion in *Bowers*, to ignore that the law focused not on homosexual sodomy but on all sodomy. *Id.* at 148–52. Compare *Bowers*, 478 U.S. at 196 (concluding that “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” is a rational basis for the statute) with *id.* at 216 (Stevens, J., dissenting) (“[T]he Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it . . .”).

62. See *supra* note 42 and accompanying text.

63. See GLENDON, *supra* note 1, at 60–66. For a discussion of the abortion example, see *infra* Section IV(C).

64. See *Harper’s Forum*, *supra* note 20, at 48 (statement of Mary Ann Glendon) (The “educational and symbolic [function of law is] to state prominently a society’s central commitments.”); *id.* at 51 (statement of Mary Ann Glendon) (“I prefer [a] ‘declaration’ [of responsibilities] over ‘bill’ because I prefer the hortatory mode over the coercive.”).

rights. She envisions a refined rights talk informed by our more carefully nuanced table talk, with its "potentially transform[ative]" insights about attention to the "relationships, obligations, and long-term consequences of present acts and decisions" and to cooperation and compromise.⁶⁵ Similarly, she favorably invokes Stephen Macedo's defense of liberalism, which argues that the "'moral core' of our public order is a commitment to public justification"⁶⁶ and reason giving and that the liberal virtue of moderation counsels us in some cases "to moderate our claims in the face of the reasonable claims of others . . . and split at least some of our differences."⁶⁷ Below, I argue that Glendon's invocation of table talk and of models of public justification to refine rights rhetoric invites consideration of what sort of rights she supports.⁶⁸

C. *The Responsive Communitarian Appeal to "Rights and Responsibilities"*

In the conclusion of her critique of rights talk, Glendon observes that refining the rhetoric of rights is but one element of the transformative politics needed to repair the fabric of American society.⁶⁹ Attempting to begin the process, the Responsive Communitarian movement describes itself as a "communitarian social movement"⁷⁰ committed to a "communitarian perspective" that mandates attention to, *inter alia*, "the social side of human nature" and "the responsibilities that must be borne by citizens, individually and collectively, in a regime of rights."⁷¹ Seeking "balances between individuals and groups, rights and responsibilities," the Responsive Communitarian Platform's goal is to reinvigorate a neglected moral realm—"which is neither one of random individual choice nor of government control"—in which "moral voices" that originate in "America's diverse communities of memory and mutual aid . . . achieve their effect mainly through education and persuasion."⁷²

65. GLENDON, *supra* note 1, at 174–75.

66. *Id.* at 176–77 (quoting MACEDO, *supra* note 8, at 34, 41).

67. *Id.* at 177 (quoting MACEDO, *supra* note 8, at 46).

68. See *infra* notes 250–52 and accompanying text.

69. See GLENDON, *supra* note 1, at 183.

70. Platform, *supra* note 5, at 5.

71. *Id.* at 4–5. For consideration of the new communitarianism as a political theory, see *infra* Part III.

72. Platform, *supra* note 5, at 5; see also GALSTON, *supra* note 5, at 281 (arguing for

Rejecting the labels "conservative" or "liberal" and advocating a middle path between "Radical Individualists" (prominently associated with the ACLU) and "Authoritarians,"⁷³ the new communitarians hold that a "moral revival" is possible "without allowing puritanism or oppression."⁷⁴ In effect, they aim to reinforce the thick social fabric that Glendon diagnoses as both fraying and yet surviving (although masked by rights talk). Sympathizers with the communitarian outlook applaud its focus on moral revival, suggesting that it gives "philosophical voice to the yearnings of ordinary folk who wish to preserve their liberties while reclaiming their vision of a decent community, one in which the moral senses will become as evident in public as they now are in private life."⁷⁵

On the one hand, the new communitarian literature invokes a model of community in which government is rarely necessary because the community's moral voice exhorts individuals to do what they ought to do. Indeed, Etzioni concludes that unaided individual conscience is not enough.⁷⁶ "Much of what Communitarians favor," Etzioni elaborates, "has little to do with laws and regulations, which ultimately draw on the coercive powers of the state, but with being active members of a community."⁷⁷ On the other hand, the Platform echoes Glendon in stating that "the law does play a significant role not only in regulating society but also in indicating which values it holds dear," hinting at the perhaps ineluctable movement toward embodying the moral voice of the community in law.⁷⁸ Thus, although the Platform states that a communitarian approach "does not dictate particular policies,"⁷⁹

the "legitimate role" of "moral argumentation and (in some cases) forms of public persuasion" within the regime of rights); *infra* text accompanying note 92. The voice metaphor is striking in light of another prominent discourse calling for a better integration of responsibility into law, the strand of feminist legal theory inspired by Carol Gilligan's influential book, *In a Different Voice*. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); see also McClain, *supra* note 9.

73. ETZIONI, *supra* note 2, at 15.

74. *Id.* at 1. The journal *The Responsive Community* routinely has a news section entitled "Authoritarians, Libertarians, and Communitarians" and divides stories up within their appropriate category. On the search for a middle ground, see Fred Strasser, *Searching for a Middle Ground*, NATL. L.J., Feb. 3, 1992, at 1, 28-29.

75. JAMES Q. WILSON, *THE MORAL SENSE* 248 (1993).

76. See, e.g., ETZIONI, *supra* note 2, at 30-31.

77. *Id.* at 39.

78. *Platform*, *supra* note 5, at 17; see *supra* text accompanying note 64.

79. *Platform*, *supra* note 5, at 5.

responsive communitarians take a keen interest in public policy (as their "position papers" on various issues indicate) and seek to advance the implementation of their idea that "strong rights presume strong responsibilities" and their commitment to "shoring up our moral, social and political environment."⁸⁰

According to the Platform, "[a] responsive community is one whose moral standards reflect the basic human needs of all its members" or the "full range of legitimate needs and values."⁸¹ The Platform describes a process by which a community develops shared moral values subject to certain criteria.⁸² Once the community agrees on these shared values, members should hold each other to them. The Platform asserts some of "those values Americans share," which schools should teach

that the dignity of all persons ought to be respected, that tolerance is a virtue and discrimination abhorrent, that peaceful resolution of conflicts is superior to violence, that generally truth-telling is morally superior to lying, that democratic government is morally superior to totalitarianism and authoritarianism, that one ought to give a day's work for a day's pay, that saving for one's own and one's country's future is better than squandering one's income and relying on others to attend to one's future needs. . . . [T]he whole school should be considered as a set of experiences generating situations in which young people either learn the values of civility, sharing, and responsibility to the common good or of cheating, cut-throat competition, and total self-absorption.⁸³

From this passage, we get a clue about what irresponsibility means by considering the antonyms offered to civility and responsibility: "cheating, cut-throat competition, and total self-absorption." In

80. The quoted language comes from the preface to the "Position Papers" published by The Communitarian Network and *The Responsive Community*. Topics of position papers to date include the family, rights and responsibilities of organ donors, domestic disarmament, and "core values" in health care reform.

81. *Platform*, *supra* note 5, at 6, 7; cf. McClain, *supra* note 9, at 1193 (analyzing Carol Gilligan's argument that responsibility, from a care perspective, is a "response" to the needs of others).

82. In referring to the criteria for the development of moral values, e.g., that they be nondiscriminatory, generalizable, and "justified in terms that are accessible and understandable," *Platform*, *supra* note 5, at 7, the Platform bears some resemblance to liberal accounts both of hypothetical agreement on the principles of justice and social cooperation and of the requirements of public justification and public reason. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 22-28, 223-27.

83. *Platform*, *supra* note 5, at 9-10.

contrast, the strong themes of self-reliance and of attention to the common good point responsibility as autonomy in the direction of accountability.⁸⁴

A responsive community would use social suasion to encourage members to live up to their duties, many of which the Platform specifies. For example:

[W]e should not hesitate to speak up and express our moral concerns to others when it comes to issues we care about deeply and share with one another. It might be debatable whether or not we should encourage our neighbors to keep their lawns green (which may well be environmentally unsound), but there should be little doubt that we should expect one another to attend to our children, and vulnerable community members. Those who neglect these duties should be explicitly considered poor members of the community.⁸⁵

The consequences of being considered poor members of the community are not indicated.⁸⁶

The Platform gives another illustration of the link between irresponsibility and social costs: parents who, consumed by "making it," "consumerism," or "personal advancement," take "short-cuts," thereby producing "woefully deficient" children and inflicting social costs.⁸⁷ The communitarians believe that many problems of contemporary society stem from parents' failures to discharge their responsibilities to their children. They call for a "culture of familialism,"⁸⁸ one premised on "equal rights and responsibilities" of mothers and fathers.⁸⁹

84. For the association of irresponsibility with a decline in both senses of responsibility, see *infra* Section II(A).

85. *Platform*, *supra* note 5, at 11.

86. Etzioni, however, supports public shaming in the case of certain nonviolent criminal offenses. See ETZIONI, *supra* note 2, at 140-41.

87. *Platform*, *supra* note 5, at 7-8; see *infra* note 209 and accompanying text.

88. See JEAN ELSHTAIN ET AL., A COMMUNITARIAN POSITION PAPER ON THE FAMILY, at 1-2, 19 (undated paper, on file with author). The preparers of this position paper were Jean Elshtain, Enola Aird, Amitai Etzioni, William Galston, Mary Ann Glendon, Martha Minow, and Alice Rossi.

89. *Id.* at 15. The references in communitarian literature to parenting responsibilities as "not for women only" may account for some feminist support of the communitarian agenda on the family. For example, feminist legal theorist Minow, a co-author of the position paper, is a member of the Editorial Board of *The Responsive Community*. Co-authors Elshtain (also on the Editorial Board) and Rossi are Platform signatories, as is Betty Friedan.

Echoing Glendon's critique of rights talk, the new communitarians hold that "*strong rights presume strong responsibilities*" on the part of the right-holder.⁹⁰ The Responsive Communitarian agenda for redressing the imbalance between rights and responsibilities proposes a mixture of social and legal limitations on rights and rights assertion, at times relying on social suasion and moral voice, at times resorting to political power and legal coercion, but also calling for a "moratorium" on the "minting" of new rights.⁹¹

Furthermore, the new communitarians seek to bring the moral voice of the responsive community to bear in closing the gap between rights and rightness. The Responsive Communitarian Platform states,

The language of rights is morally incomplete. To say that "I have a right to do X" is not to conclude that "X is the right thing for me to do." One may, for example, have a First Amendment right to address others in a morally inappropriate manner. . . . Rights give reasons to others not to coercively interfere with the speaker in the performance of protected acts; however, they do not in themselves give a person a sufficient reason to perform these acts. There is a gap between rights and rightness that cannot be closed without a richer moral vocabulary—one that invokes principles of decency, duty, responsibility, and the common good, among others.⁹²

This tenet of the Platform indicates that a primary communitarian method for linking rights and responsibilities is moral suasion concerning how to exercise one's rights, instead of immediate resort to legal coercion. The above statement illustrates both the wrongness and immunity prongs of the irresponsibility critique. Below I examine the notion of a morally incomplete vocabulary of rights.⁹³

90. ETZIONI, *supra* note 2, at 1.

91. Etzioni argues for a "four-point agenda: a moratorium on the minting of most, if not all, new rights; reestablishing the link between rights and responsibilities; recognizing that some responsibilities do not entail rights; and, most carefully, adjusting some rights to the changed circumstances." *Id.* at 4.

92. *Platform*, *supra* note 5, at 14 (giving specific examples of hateful, racist opinions directed toward "a Jew" or "a black") (echoing language from William A. Galston, *Rights Do Not Equal Rightness*, 1 RESPONSIVE COMMUNITY, Fall 1991, at 7, 8). For elaboration on this point, see ETZIONI, *supra* note 2, at 201-02; GALSTON, *supra* note 5, at 281.

93. See *infra* Sections 1V(A)-(B).

Whatever one's philosophical or practical disagreements with the agenda, one might well applaud the communitarians for grappling with a number of difficult social problems and proposing solutions for them. Still, one should ask: What do rights and rights talk have to do with these problems, and how do rights interfere with their solution?

II. ASSESSING THE IRRESPONSIBILITY CRITIQUE AS A SOCIAL CRITIQUE

Can America survive as a democratic society if everyone has rights and no one has responsibilities? We say NO!⁹⁴

Situating the new communitarians' irresponsibility critique in the context of a number of contemporary critiques of American society suggests that, to a significant extent, certain components of the irresponsibility critique are a social critique aimed less at legal rights and their justifications than at American society and "rights culture." Those components include the following claims: (1) Americans want rights and entitlements without the responsibilities of citizenship, a symptom of a deeper moral crisis; (2) the legacy of the 1960s includes not only the civil rights movement but also a challenge to authority that led to the crumbling of moral authority and tradition and an explosion of self-indulgent and socially harmful behaviors; and (3) Americans today debase the moral and social value of genuine legal rights by making ever-increasing and frivolous claims to rights and entitlements while fleeing personal responsibility and shifting blame to others.

The communitarians tie all these social phenomena together with the thread of a decline or demise of responsibility. I will grant that such an explanation may have some validity, although I do not attempt to assess fully the communitarian account of the problems of American society. Rather, the primary focus of this Article is the alleged link between irresponsibility and legal rights, and in this Part I challenge whether legal rights, liberalism, and an "excess" of liberal virtues are plausibly characterized as causes of these social phenomena.

94. Statement appearing on a pamphlet advertising the journal *The Responsive Community* (undated pamphlet, on file with author).

A. *The Quest for a Responsible Citizenry*

As a social critique of rights, the irresponsibility critique explores the indispensable relationship between freedom and responsibility. The American experiment, the communitarians argue, depends on such traits of character as self-control, self-restraint, and respect for the rights of others, as well as a willingness to assume responsibility for oneself, for one's family, and for the health of America's institutions.⁹⁵ Freedom, in other words, depends on both responsibility as autonomy and responsibility as accountability.

The communitarians argue that, to a disturbing degree, Americans manifest "a strong sense of entitlement—that is, a demand that the community provide more services and strongly uphold rights—coupled with a rather weak sense of obligation to the local and national community."⁹⁶ To the extent that the irresponsibility critique targets such public attitudes, it does not directly implicate rights as much as lapses in civic responsibility. Indeed, the prominent example offered as a symbol of contemporary attitudes of taking without giving is young people's reported expectation of being tried by a jury coupled with a reluctance to serve on juries.⁹⁷ Not only is there no legal right to evade jury service but (as the communitarians insist) jury service is a civic duty, nonperformance of which the state may legally sanction.⁹⁸

In a sense, this component of the irresponsibility critique is a helpful civics lesson about the role that citizens must play in sustaining a constitutional democracy and the inseparability of freedom and responsibility. In the communitarian view, however, civic education and national or community service, although important,

95. See GLENDON, *supra* note 1, *passim*; *supra* text accompanying notes 46–53. For an elaboration of these themes, see RIGHTS, CITIZENSHIP, AND RESPONSIBILITIES, *supra* note 20.

96. ETZIONI, *supra* note 2, at 3.

97. *Id.*; Platform, *supra* note 5, at 12; see also Etzioni, *supra* note 28, at 10 (stating that this "symbolic" social science finding triggered the dialogue that launched the communitarian movement).

98. *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 999 (3d Cir.) (stating that "governments may require individuals to perform certain well-established 'civic duties,' such as military service and jury duty, and impose legal sanctions for the failure to perform"), *cert. denied*, 114 S. Ct. 85 (1993); Platform, *supra* note 5, at 12 (arguing that "serving on juries" is a "fully obligatory" duty to the polity); see also N.Y. JUD. LAW § 527 (McKinney 1992) (imposing a civil penalty for failing to respond to jury summons or to attend jury service).

cannot fully redress the decline of a responsible citizenry⁹⁹ because the roots of the American malaise go deeper into the personal and familial lives of the citizenry. Indeed, the moral or social fabric, the "ecosystems" of society, result significantly from the effects of the choices and conduct of millions of individuals.¹⁰⁰ Echoing Glendon, the Platform warns that perhaps the most basic institution of civil society—the family—which should be a moral educator schooling the next generation of citizens in the interplay of rights and responsibilities, is in peril and that "the second line of defense"—schools—cannot alone prevent the decline of a responsible citizenry.¹⁰¹ Moreover, communitarians charge that, although schools are reluctant to engage in moral education and character formation, they must do so to combat the "moral deficit" among young people.¹⁰²

Communitarian inventories of the "moral state of the union" indicate that the responsibility deficit in America includes not only some conduct protected by legal rights but extends well beyond to include conduct that is not even arguably protected by rights.¹⁰³

99. Communitarians are not alone in their support for such measures. For example, President Clinton delivered an important speech on national service at Rutgers University, the home institution of Responsive Communitarian Benjamin Barber, a prominent advocate of volunteerism. See *The Call to National Service*, N.Y. TIMES, Mar. 3, 1993, at A24; see also Evelyn Nieves, *With Clinton Visit Due, Program at Rutgers is Spotlighted*, N.Y. TIMES, Feb. 27, 1993, at 21 (reporting on the Rutgers University Civic Education and Community Service Program, an extensive undergraduate community service program). Consider also the National Community Service Act, 42 U.S.C.A. § 12501 (West Supp. 1993), which expresses the purpose of "renew[ing] the ethic of civic responsibility in the United States" through encouraging citizens (particularly young Americans) to engage in community service. *Id.* § 12501(2); see also *Steirer*, 987 F.2d at 997, 1000 (upholding a compulsory community service requirement in high school that was supported by both the American Alliance of Rights and Responsibilities and by People for the American Way).

100. Cf. Karl Zinsmeister, *Parental Responsibility and the Future of the American Family*, 77 CORNELL L. REV. 1005, 1011 (1992) (stating that civil society is the product of many millions of individual choices and claiming that parents hold the fate of America in their hands).

101. *Platform*, *supra* note 5, at 7–10; see *supra* text accompanying notes 87–89.

102. ETZIONI, *supra* note 2, at 89–97 (urging the inculcation of values, self-control, and self-discipline); see also Albert Shanker, *School Rules*, N.Y. TIMES, Jan. 9, 1994, § 4, at 7 (arguing that "school is one of the chief places where youngsters learn about rules and responsibility" and that "[w]hen students see rules enforced, they are learning the habits and sense of responsibility that people need to live together civilly and safely"). Shanker, President of the American Federation of Teachers, is a Platform signatory.

103. See ETZIONI, *supra* note 2, at 23–30 (reviewing the "state of the union's morality" and including as evidence of "moral erosion" not only rates of divorce and social attitudes towards sex and marriage but also high rates of "chronic malingering at work," the use of physical force against others (in many instances, without regret), insider trad-

Irresponsibility includes lawless behavior that is unprotected by rights and often violative of the rights of others.¹⁰⁴ The current example of such conduct of foremost concern to Americans, and of considerable concern to communitarians, is violent crime.¹⁰⁵ What the irresponsibility critique seems to overlook is that although constitutional rights attend persons accused of crimes and limit methods to prevent crime—and communitarians challenge “absolutist” interpretations of such rights—the criminal activity itself is not protected by rights.¹⁰⁶ Moreover, contrary to the communitarian charge that libertarian interpretations of rights prevent government from addressing the problem of violent crime, liberal political theory treats providing for the physical security of citizens as one of the most basic obligations of government.¹⁰⁷

ing in financial markets, political scandals, and the marketing of unsafe products by manufacturers).

A recent issue of *The Responsive Community* entitled *The Moral State of the Union* similarly links together as causes for communitarian concern an admixture of attitudes and behaviors. See, e.g., James Patterson & Peter Kim, *The Decline and Fall: An Alarmed Perspective*, 4 RESPONSIVE COMMUNITY, Winter 1993–1994, at 47, 47–51 (listing many of the same phenomena as Etzioni and also “systematic rule-breaking,” “abusing alcohol or drugs in the workplace,” and high rates of crime and reporting that “93 percent of Americans report that they alone determine what is moral in their lives”). But see Everett C. Ladd, *The Myth of Moral Decline*, 4 RESPONSIVE COMMUNITY, Winter 1993–1994, at 52, 52–64 (arguing that a perceived decline in “[t]he moral state of the United States” is a recurring theme throughout American history but that such views are unduly pessimistic because many social norms are firmly entrenched).

104. Glendon uses as one example of irresponsibility the violent abuse committed by Randy DeShaney, on his son, Joshua. See GLENDON, *supra* note 1, at 135 (discussing *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189 (1989)); see also *infra* note 110 and accompanying text.

105. See Richard L. Berke, *Fears of Crime Rival Concern Over Economy*, N.Y. TIMES, Jan. 23, 1994, at A1.

106. The communitarians attack interpretations of the Second and Fourth Amendments that are invoked to oppose preventive measures in the name of neighborhood self-protection and support civil disarmament. See *infra* note 302 and accompanying text. A further argument linking violence to rights would be that certain family structures (specifically, female-headed households) more frequently produce people who engage in crime. Moral deregulation in the area of family law is said to lessen societal sanctions against such family forms. See *infra* text accompanying notes 121–24.

107. HOLMES, *supra* note 8, at 3–4; DWORKIN, *supra* note 17, at 14; see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991). But see *DeShaney*, 489 U.S. at 196, 202 (concluding that, because the Due Process Clauses “confer no affirmative right to governmental aid,” the state of Wisconsin “had no constitutional duty to protect [a child] against his father’s violence” and that failure to do so did not violate the Due Process Clause). I do not address in this Article the common feminist critique that, notwithstanding the existence of criminal laws against rape and assault, the law has afforded immunity to male violence

Similarly, communitarians are not alone in focusing on an absence of a sense of personal and social responsibility (as well as self-esteem) as an explanation for a range of behaviors that are described as self-destructive and socially costly, nor are they the only ones urging a shoring up of a sense of responsibility as a corrective.¹⁰⁸ An absence of responsibility, in the senses of both autonomy and accountability, may well be a significant cause of such behavior. The question, however, is the relationship between these social problems and legal rights and their exercise. Certainly, a successful regime of rights depends on right-holders respecting the rights of others.¹⁰⁹ Moreover, law places certain restraints on freedom and holds people accountable for failing to obey the law. It would appear that the underlying culprit for a substantial amount of the irresponsibility communitarians target is not so much rights as the erosion of qualities such as self-control, restraint, and respect for others and for the law, qualities esteemed—not discouraged—by liberalism.¹¹⁰ Yet the new communitarians believe that rights have contributed to that erosion, stressing as pivotal the civil rights movement and the broad challenges to authority and tradition during the 1960s.

against women within the institution of marriage. See, e.g., Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 45-46 (1990).

108. Note the considerable interest in recent years by many local and state governments in fostering self-esteem (defined as a sense of personal and social responsibility) as a "social vaccine" against a wide range of "dysfunctional" and socially costly behaviors (such as substance abuse, child abuse, and teenage pregnancy). See, e.g., TOWARD A STATE OF ESTEEM: THE FINAL REPORT OF THE CALIFORNIA TASK FORCE TO PROMOTE SELF-ESTEEM AND PERSONAL AND SOCIAL RESPONSIBILITY 4 (1990).

109. One might call this the moral, if not logical, correlation between recognition and protection of one's own rights and those of others. See JOEL FEINBERG, *SOCIAL PHILOSOPHY* 61-62 (1973).

110. See ETZIONI, *supra* note 2, at 30 (stating that "illegal and immoral behaviors have broken through [the] important line of voluntary self-restraint"). For an argument tracing many of the traditional causes of crime to low self-control, see MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* 85-120 (1990). On the centrality of self-control and self-restraint in liberalism, see HOLMES, *supra* note 8, at 235-37 (invoking Nietzsche's criticisms of liberalism for its core insistence on self-restraint to refute the antiliberal charge, from the opposite direction, that liberalism involves the "total collapse of self-restraint"). But see JAMES Q. WILSON, *THINKING ABOUT CRIME* 237-38, 247-49 (2d rev. ed. 1983) (arguing that one factor accounting for crime increases in the 1960s and 1970s was "the continued spread of the ethic of self-expression," an ethic emphasizing self-gratification and rights rather than self-restraint and duties).

B. *The Legacy of the 1960s and the Civil Rights Movement: Progress or Pandora's Box?*

Out of the literature of communitarianism emerges a tale of the legacy of the 1960s explaining both the explosion of rights talk and the erosion of morality and civic virtue. I shall attempt a composite, if oversimplified, account.¹¹¹ In the 1950s, the moral authority of leaders and community norms were respected; it was possible to talk about what was right and what was wrong. Families were stronger, violent crime rarer, and habits of self-reliance and self-restraint more abundant. This society had some notable failings: racial inequality and segregation, gender inequality (including a male-governed family structure and the exclusion of women from the commercial work world), and the marginal status of certain ethnic and religious groups (like Jews and Catholics). Moreover, the values themselves were somewhat authoritarian. Nonetheless, there was a cultural consensus in America, a traditional morality, that was dominant and effective.

The civil rights movement, the communitarians grant, appropriately criticized injustice and exclusion and rightly sought to realize the ideal of equality for all citizens.¹¹² Yet, for the communitarians, the 1960s were a Pandora's Box because that decade unleashed a dangerous explosion of claims of entitlement, an ideology of personal fulfillment and liberation, and a pervasive challenge to traditional morality and all forms of traditional authority.¹¹³ Such a challenge undermined the solidarity, security, and strong family values that held sway in the 1950s and repudiated a traditional morality that emphasized self-control, self-restraint, and self-discipline.¹¹⁴ In its place, the challenge of the 1960s left us with eroding moral foundations and institutions, moral relativism, an ideology of liberty as license to practice unbridled individual-

111. Unless otherwise indicated, I have drawn on the work of Etzioni and Galston for the composite account in this Section. See ETZIONI, *supra* note 2, at 12-13, 23-24; GALSTON, *supra* note 5, at 267-70. It should be noted, however, that Etzioni expresses a more critical view of tradition, and more readily concedes the appropriateness of challenges to it, than does Galston.

112. See, e.g., GLENDON, *supra* note 1, at 6, 15-16.

113. But see ETZIONI, *supra* note 2, at 11-12, 23-25 (arguing that it was not the challenge to authority that was the problem, but the absence of new social forms and consensus). Moreover, Glendon argues, the 1960s led to an eschewal of ordinary politics in favor of the judicial protection of rights. See GLENDON, *supra* note 1, at 4-7.

114. GALSTON, *supra* note 5, at 268-70.

ism, and a profound absence of moral consensus on new shared values and new forms of social institutions.¹¹⁵ Indeed, Galston considers it a debatable question "whether the cultural revolution of the past generation has left the United States better or worse off," noting that "[a]lthough the civil rights movement is widely acknowledged to have righted ancient wrongs, epidemics of crime, drugs, and teenage pregnancy have exacted a fearful toll."¹¹⁶

The communitarian account is overstated. The assertion of civil rights has no obvious or plausible link to the rise of irresponsible and often unlawful behavior because civil rights do not include "rights" to commit violent crimes or drug offenses.¹¹⁷ Moreover, many civil rights (such as voting, housing, and education) secure the capacity for responsible citizenship, for participation as well as autonomy.¹¹⁸ Communitarians respond that this

115. ETZIONI, *supra* note 2, at 23-24; cf. Anna Quindlen, *America's Sleeping Sickness*, N.Y. TIMES, Oct. 17, 1993, § 4, at 17 (arguing that Etzioni's "driving impulse—that we have done away with old forms, connections, rules, traditions, but have put nothing much in their place—cannot be denied" and urging that we "build to replace the old outmoded forms").

116. GALSTON, *supra* note 5, at 273. Galston does not elaborate on his juxtaposition of the civil rights movement and these "epidemics." But cf. *infra* note 123. He seems to argue, however, that the metaphor of civil rights for African-Americans inspired a broad range of challenges, in the name of freedom, to other hierarchies that formed part of "traditional morality" (e.g., the subordination of women to men and of "heterodox sexuality" to "traditional families") and the demand for legitimizing social differences. GALSTON, *supra* note 5, at 268-69.

117. In President Clinton's recent speech about Martin Luther King, Jr., he contrasted the gains of the civil rights movement with such contemporary problems as violence committed by African-Americans against African-Americans, teen pregnancy, and family breakdown, and he stressed that Dr. King had fought for rights for blacks but not for the freedom for them to kill each other. See Douglas Jehl, *Clinton Delivers Emotional Appeal on Stopping Crime*, N.Y. TIMES, Nov. 14, 1993, at A1 (calling for community and government responsibility). One possible interpretation of such a linkage is the argument that before civil rights made greater social mobility by African-Americans possible, African-American communities had a stronger system of social sanction of criminal and other unacceptable behavior. See *The MacNeil-Lehrer NewsHour: Tarnished Dream* (PBS television broadcast, Nov. 15, 1993) (remarks by Stanley Crouch), available in LEXIS, NEWS library, SCRIPT file. In any event, the Reverend Jesse Jackson has characterized the recent "crusade" to stop the violence committed by some young African-American men and boys against other African-Americans as a "new frontier of the civil rights movement." Don Terry, *A Graver Jackson's Cry: Overcome the Violence!*, N.Y. TIMES, Nov. 13, 1993, at A1. But see *id.* (reporting the concern that Jackson's campaign may come close to "blame-the-victim oratory" and arguing that the solution must include getting "society to live up to its responsibilities to justice and equality"). For an argument that the "racial construction of crime" in American society and in criminal law disproportionately identifies black people with criminality, see Dorothy Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1945-61 (1993).

118. See Sunstein, *supra* note 36, at 35 (characterizing voting rights and

very expansion of opportunities, benign in itself, inadvertently brought about harmful social changes.¹¹⁹ In contrast, Cass Sunstein argues that the posited link between rights talk and a responsibility deficit is exactly backward: rights talk arose because of a deficit of responsibility on the part of society and government.¹²⁰

Nonetheless, as Galston's reference to the "epidemic" of teen pregnancy suggests, the attempt to link the civil rights movement to a growing social "pathology" and shrinking moral consensus is part of a larger, often vituperative, debate over American values that centers on whether society is "defining deviancy down" or "up"¹²¹ and becoming too tolerant of behaviors and choices once condemned socially, if not legally.¹²² An examination of some of

antidiscrimination laws as "social," rather than selfish, rights). Consider traditional justifications for private property as a means to secure independence and make civic participation possible. *See id.*; *see also* JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 54-55 (1990); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 178-81, 234 (1992).

119. An example communitarians offer is women's entry into the workforce, which, together with less restrictive divorce laws, it is argued, have had a dramatic impact on patterns of childcare in the home, creating "latchkey" children and resulting in insufficient attention to the nurture and education of children. *See* GLENDON, *supra* note 1, at 127-28.

120. Sunstein, *supra* note 36, at 34.

121. *See* Daniel P. Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17 (1993) (arguing that Americans have reacted to increased rates of violent crime and births outside of marriage by redefining as normal what was once considered deviant); Charles Krauthammer, *Defining Deviancy Up*, NEW REPUBLIC, Nov. 22, 1993, at 20 (agreeing with Moynihan but arguing that there is a "complementary social phenomenon" of finding "normal" middle class family life and "ordinary" heterosexual relationships to be "deviant").

122. *See* Moynihan, *supra* note 121. The centerpiece of this debate appears to be the rise in single-parent, female-headed households and its causal relationship to a number of social problems. Concern and rhetoric appear to escalate when one introduces the additional variables of public assistance and teen pregnancy and motherhood. *See* Mickey Kaus, *Bastards*, NEW REPUBLIC, Feb. 21, 1994, at 16 (reporting an emerging conservative consensus that "[i]llegitimacy . . . is the single most important social problem of our time," at the root of many of America's social problems) (quoting Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14); *see also* Gwen Ifill, *Clinton Warns Youths of the Perils of Pregnancy*, N.Y. TIMES, Feb. 4, 1993, at A18 (linking the restoration of family values to personal responsibility and addressing the problem of pregnancy among teenagers). Clinton has praised former Vice President Dan Quayle for championing two-parent families and criticizing the television program *Murphy Brown* for allegedly glamorizing single motherhood. *See* Paul Bedard, *Clinton: Quayle Was Right on Families*, WASH. TIMES, Dec. 4, 1993, at A1. *But see, e.g.*, Alan Wolfe, *Only Connect*, NEW REPUBLIC, Oct. 4, 1993, at 33, 36-37 (reviewing WILSON, *supra* note 75) (suggesting that although James Wilson, as a social scientist, warns of the harmful effects of one-

those choices and behaviors traced to the legacy of the 1960s—changes in mores concerning sexuality, greater diversity in family forms, the increases in divorce, the greater acceptance of pregnancy and parenting outside of marriage, and the availability of abortion—suggests that the real targets of the irresponsibility critique are such social changes. Developments in the area of family law and recognition by the Warren and Burger Courts of fundamental rights to make marital and reproductive (and some would argue sexual) decisions also are implicated.¹²³ In assessing the irresponsibility critique, the critical questions are what messages are to be drawn from these legal developments and whether certain legally protected choices are proxies for irresponsibility.¹²⁴

C. *The Rights Explosion and the Flight from Responsibility*

Glendon and the new communitarians lament the increasing tendency of Americans to express needs and wants in terms of rights and to invoke rights talk, a tendency summed up by social critics and popular media as “rights inflation” or a “rights explosion.”¹²⁵ This component of the irresponsibility critique seems to be directed at a supposed culture of rights, manifested in the frivolous or irresponsible assertion of rights. For example, people are said to call for new rights without regard to the duties and obliga-

parent families, his attempt to root moral sentiments in nature would suggest that “[i]f men are by nature irresponsible and women are by nature caring, then surely one-parent families ought to be preferred over traditional ones”); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274 (criticizing the characterization in poverty and divorce discourses of the single mother as pathological and challenging the premise that a “natural” family has two parents). An analysis of the assumptions about gender roles in the debate over family forms, however, is beyond the scope of this Article.

123. See, e.g., GALSTON, *supra* note 5, at 269 (arguing that key U.S. Supreme Court decisions on issues such as “school prayer, pornography, criminal justice, and abortion” spurred the assault on traditional morality, “widened individual freedom,” and called for neutrality in areas “previously seen as the legitimate arena for collective moral judgment”). Another alleged legacy of the 1960s—as well as of the “greed decade” of the 1980s—is a range of business practices and unapologetic, irresponsible (and at times illegal) capitalistic pursuits that imposed social costs, such as plant closings, corporate takeovers and raids, insider trading, and the savings and loan scandal.

124. See *infra* subsection IV(B)(2).

125. See ETZIONI, *supra* note 2, at 6 (arguing that “[o]nce, rights were very solemn moral/legal claims, ensconced in the Constitution and treated with much reverence,” but that today, people attempt to elevate every personal desire and special interest to the status of a legal right and confuse privileges with rights). See *infra* note 128.

tions that a right creates (e.g., asserting affirmative rights to health care without considering the implications for the public fisc).¹²⁶ Rather than creating more rights talk, which supposedly not only shuts down debate and makes compromise difficult but also devalues rights, communitarians argue for a "return to a language of social virtues, interests, and, above all, social responsibilities [that] will reduce contentiousness and enhance social cooperation."¹²⁷

The rights explosion frequently is said to be accompanied by a corresponding plunge in Americans' sense of personal responsibility, manifest in the tendency to shift blame away from, or look for causes outside of, oneself and to assume the mantle of the victim.¹²⁸ To be sure, those who elaborate the victimhood critique offer some startling and absurd (even laughable) examples, as well as more disturbing and problematic illustrations, of rights assertion coupled with the denial of personal responsibility.¹²⁹ It is unclear, however, how this refusal to accept responsibility in the sense of either autonomy or accountability is a legacy of the 1960s or is in any way due to the recognition and enforcement of legal rights.¹³⁰

126. See *id.* at 5-6.

127. *Id.* at 6-7.

128. See John Taylor, *Don't Blame Me! The New Culture of Victimization*, NEW YORK MAG., June 3, 1991, at 27, 29 (diagnosing the "inextricably linked concepts" of "victimization," whereby the principle of individual responsibility for one's actions is almost a relic, and the growth of a "rights industry"); see also Jesse Birnbaum, *Crybabies: Eternal Victims, Hypersensitivity and Special Pleading Are Making a Travesty of the Virtues that used to be Known as Individual Responsibility and Common Sense*, TIME, Aug. 12, 1991, at 16, 17 (reporting Taylor's thesis).

129. For examples in the absurd, or at least questionable, category, see Taylor, *supra* note 128, at 32 (describing a lawsuit brought against a refrigerator manufacturer by people injured from running races carrying refrigerators on their backs); Brent Staples, *The Rhetoric of Victimhood*, N.Y. TIMES, Feb. 13, 1994, § 4, at 14 (describing a lawsuit based on strict liability brought by someone who lost a toe to a lawn mower "while cutting the lawn recklessly uphill, in defiance of common sense and the owner's manual"). For an example in the disturbing category, see *id.* at 14 (arguing that the defense of sexual abuse and fear of harm offered by Lyle and Erik Menendez to the murder of their parents is "emblematic of the troubling American preference for taking on the role of the victim," affording victims a "license" to kill).

130. The argument may simply be a further elaboration on the supposed significance of having a Bill of Rights, but not a Bill of Duties, and of becoming unmoored from the moral and legal constraints the Founders thought would ensure virtue and communitarians argue existed until the 1960s. See Sherry, *supra* note 16, at 15-25 (interpreting the phenomena of blame shifting and claiming victim status as evidence that the "peculiarly American" exaggerated focus on individual rights leads to "the loss of any notion of responsibility," in contrast with republican notions of citizen virtue); *supra* text accompanying notes 46-53, 95-102, 111-15.

More germane to the communitarian critique of the rights explosion and the flight from responsibility is the contested legacy of the War on Poverty and charges about the undermining effects of liberal social welfare policies and entitlements on individual responsibility. In contrast to liberal policies thought to vitiate such basic values as personal responsibility, family cohesion, and the work ethic, and thus to license irresponsibility,¹³¹ communitarians advocate welfare policies that combine compassion and a sense of obligation to those in need with an insistence on individual and community (rather than, at least initially, government) responsibility.¹³² The issue is not legal rights, conventionally understood, so much as it is entitlement programs. This debate hinges critically on one's assumptions about personal, institutional, and causal responsibility for poverty and its eradication.¹³³ Moreover, it is likely that behind the charges of the rights explosion and flight from responsibility lie philosophical and political divisions over the appropriate role of government in alleviating human suffering and providing security against contingency,¹³⁴ as well as disagreements

131. See GALSTON, *supra* note 5, at 159–62, 184–86; *State of the Union*, *supra* note 32 (statement of President Clinton faulting welfare policies that conflict with values of work, family, and responsibility); cf. Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299, 314 (1992) (arguing that the attack on political liberalism is due to a “perception that many of the programs and policies advocated by liberals rest on a reduced conception of individual responsibility”). But see Stephen Holmes, *The Gatekeeper*, NEW REPUBLIC, Oct. 11, 1993, at 39, 42 (reviewing RAWLS, *POLITICAL LIBERALISM*, *supra* note 8) (suggesting a tension between Rawls’s commitment to redistribution and social determinism and his apparent attempts to “make the poor responsible for their own behavior”).

132. GLENDON, *supra* note 1, at 105 (arguing that liberal polities need “not only a citizenry that is prepared to accept some responsibility for the less fortunate, but citizens who are willing, so far as it is possible, to take responsibility for themselves and their dependents”); see also ETZIONI, *supra* note 2, at 143–47. Glendon’s favorable accounts of European social welfare laws might suggest support for considerable government assumption of responsibility. See GLENDON, *supra* note 1, at 98–108; see also *infra* note 135.

133. Compare CHARLES MURRAY, *LOSING GROUND* (1984) (arguing that the welfare programs of the Great Society led to increased poverty and encouraged and rewarded a range of irresponsible personal behaviors) with WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* 16–18, 77–95 (1987) (rejecting Murray’s analysis and attributing poverty in the inner cities largely to systemic unemployment and other economic conditions, which in turn affect personal behaviors).

134. See, e.g., Paul Magnusson & Owen Ullmann, *The Second Year: Clinton Weaves a Security Blanket for America*, BUS. WEEK, Jan. 24, 1994, at 68, 70 (describing Clinton’s economic plan as designed to provide a security blanket and reporting criticism by conservative William Kristol that “[t]his is emblematic of paternalistic liberalism, which does not treat citizens as self-governing but as befuddled victims”); see also Taylor, *supra* note

over whether such government assumption of responsibility leads to or licenses individual irresponsibility.¹³⁵

In sum, all three of the above components of the irresponsibility critique, understood as a social critique, provide an opportunity for reflecting on the current state of American society, but they are unpersuasive as critiques of legal rights.

III. ASSESSING THE NEW COMMUNITARIANISM AS A POLITICAL THEORY

A. *The New Communitarianism: Liberalism Cured of Its Excesses or "Soft Antiliberalism?"*

Communitarianism, of course, is not a new political theory and, in the past, it has served as a vantage point for a range of critiques of liberalism. The new communitarianism eschews such labels as liberal and conservative, or left and right, and offers itself as a middle way between libertarianism and authoritarianism.¹³⁶ Communitarianism, we are told, rejects both an authoritarian imposition of one's moral positions on others and a libertarian belief that "all will be well" if "individuals are left on their own to pursue their choices, rights, and self-interests."¹³⁷ The distinctiveness

128, at 29 (arguing that the twin phenomena of rights assertion and rejection of personal responsibility reflect assumptions that individuals are not in control of their lives and that personal misfortune or suffering must have an identifiable cause outside oneself that could be controlled through social change).

135. As I understand the debate, it appears to touch on the intersection of responsibility as autonomy and as accountability. The argument seems to be that individuals, in exercising their autonomy, fail to take responsibility for themselves yet are not held accountable for the consequences of their own choices because entitlement programs mitigate or ameliorate such irresponsibility. See Sherry, *supra* note 16, at 19-25; cf. GLENDON, *supra* note 19, at 57, 136-37 (contrasting Western European social welfare law, which takes for granted that "governments are responsible for public welfare," with the reluctance in the United States to assume "public responsibility" for needy children and public concern over whether social welfare and social assistance help the "truly needy" or merely reward the irresponsible and undeserving).

136. ETZIONI, *supra* note 2, at 14-18. Etzioni's usage connotes "liberal" and "conservative" in the sense of American political parties and positions. He calls for a "new social, philosophical, and political map," using the terms "Authoritarian," "Communitarian," and "Libertarian." *Id.* at 15-16.

137. *Id.* at 15. The Platform states that communitarians are "not majoritarian but strongly democratic" due to their view that the experiment in ordered liberty depends "not on fiat or force, but on building shared values, habits and practices" and on accepting policies because they are "recognized to be legitimate, rather than imposed." *Platform*, *supra* note 5, at 6. By favoring "strong democracy," they "seek to make government more representative, more participatory, and more responsive to all members of the

of communitarianism, then, is its emphasis on attending to responsibility and on the role of community in shaping the moral behavior of free individuals.¹³⁸

In many ways, the new communitarianism simply calls attention to the failures of American society to realize liberal principles and presuppositions about the requirements for a stable political order. Most significantly, liberalism conceives of people as capable of respecting and exercising not merely the rights but also the duties of citizenship.¹³⁹ Indeed, in the ideal of citizenship that Rawls posits, citizens are "normal and fully cooperating members of society" who "want to be, and to be recognized as, such members."¹⁴⁰ Responsibility figures centrally in liberalism; both the duties and rights of citizens assume forms of responsibility.¹⁴¹ Although rights talk supposedly impoverishes political life by encouraging the mere assertion of rights over reason giving, in fact, reason giving in political deliberation is the heart of the duty of civility and of the standards for a common public life.¹⁴²

Moreover, liberalism assumes that families and schools play vital roles in providing children with moral education and in incul-

community" through, *inter alia*, curbing special interests, private money, and corruption in government. *Id.* See generally BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 261 (1984) (espousing a model of strong democracy that requires "unmediated self-government by an engaged citizenry" and calling for institutions that would involve individuals at neighborhood and national levels in "common talk, common decision-making and political judgment, and common action").

138. ETZIONI, *supra* note 2, at 15; *Platform*, *supra* note 5, at 5.

139. See HOLMES *supra* note 8, at 228 ("Liberal rights are *not* opposed to duties or obligations."); RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 18 (espousing a conception of the person as "someone who can . . . exercise and respect [social life's] various rights and duties").

140. RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 84.

141. This topic merits fuller treatment elsewhere. For an excellent discussion of responsibility in liberalism, see MACEDO, *supra* note 8. For some examples of responsibility within Rawls's account of liberalism, see RAWLS, *THEORY*, *supra* note 8, at 241 (describing the "principle of responsibility" with respect to knowing and obeying the law as following from the "principle of liberty"); *id.* at 389 ("To act autonomously and responsibly a citizen must look to the political principles that underlie and guide the interpretation of the [C]onstitution" in determining whether circumstances justify civil disobedience.); RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 33 (describing citizens as free because they can "tak[e] responsibility for their ends").

142. See GLENDON, *supra* note 1, at 176-77 (citing MACEDO, *supra* note 8, at 34, 41); RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 212-20 (analyzing the idea of public reason, the duty of civility, and the ideal of democratic citizenship); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 20-27, 133-35 (1993) (discussing the commitment to political deliberation and a republic of reasons).

cating the capacities necessary to exercise the rights and fulfill the duties of citizenship.¹⁴³ It recognizes that citizens are part of many communities and associations and that the institutions of civil society both play a vital role in the nurturing of citizens and serve as an important "fund" for public values such as justice and cooperation.¹⁴⁴

Finally, liberalism is not hostile to the propositions that legal rights do not exhaust the range of relationships among citizens and that a society will not flourish if citizens do nothing more than obey the law and act within their rights.¹⁴⁵ It is worth noting, however, that the irresponsibility critique takes as a point of departure a claim that two core features of liberalism—an assumption that citizens obey the law (subject to a moral right and duty of civil disobedience) and respect the rights of others—are endangered in American society.¹⁴⁶

Nonetheless, the new communitarianism shows ambivalence toward liberalism and seems to diagnose the extremes of rights talk and the responsibility deficit as consequences of taking liberal rights, principles, and virtues too far. Communitarian correctives range from offering a new account of liberalism to apparently repudiating liberalism.¹⁴⁷ Although not aimed specifically at

143. RAWLS, THEORY, *supra* note 8, at 516 ("[M]oral education is education for autonomy."); *see also* RAWLS, POLITICAL LIBERALISM, *supra* note 8, at 199–200 (recommending "that children's education include such things as knowledge of their constitutional and civic rights . . . [and] also prepare them to be fully cooperating members of society and enable them to be self-supporting"). Although critical of Rawls's assumption that families are just, Susan Okin notes that Rawls "treats the family seriously as the earliest school of moral development." SUSAN M. OKIN, JUSTICE, GENDER, AND THE FAMILY 17–23, 97–101 (1989) (citing RAWLS, THEORY, *supra* note 8, at 465). For a discussion of the proper role of schools in teaching the rights and responsibilities of citizenship and inculcating capacities for critical thought and deliberation, *see* Amy Gutmann, *Undemocratic Education*, in LIBERALISM AND THE MORAL LIFE, *supra* note 8, at 71, 73–88.

144. RAWLS, POLITICAL LIBERALISM, *supra* note 8, at 14.

145. *See, e.g.*, Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 499–504 (1989) (articulating a model of "liberal community" in which citizens feel "integrated" with their political community and link their own fate to the realization of justice in that community).

146. *See supra* Section II(A).

147. For the former, *see* GALSTON, *supra* note 5, at 3–21 (offering an account of a "purposive liberalism" and rejecting the "neutrality thesis" said to underlie prevailing accounts of liberalism). For the latter, *see* BELLAH ET AL., GOOD SOCIETY, *supra* note 5, at 6 (noting the characterization of the debate over the best approach to contemporary problems as being between "philosophical liberals" and "communitarians" and rejecting philosophical liberalism if it reflects a belief that "all our problems can be solved by

Glendon or the Responsive Communitarians, Stephen Holmes's critique of American communitarianism as the most pervasive contemporary form of "soft antiliberalism," with characteristic historical and theoretical fallacies, is helpful in assessing certain features of the new communitarianism.¹⁴⁸

For example, Holmes suggests that critics of liberalism often contrast rights unfavorably with duties (or responsibilities), engaging in an ahistorical "antonym substitution" and ignoring that the "original opposites of rights . . . were tyranny, slavery, and cruelty."¹⁴⁹ Communitarians acknowledge that rights, in such an historical context, were a good thing, avoiding the above fallacy.¹⁵⁰ They argue, however, that there can be too much of a good thing and that current American perceptions of freedom as unlimited necessitates the corrective of reestablishing the link between rights and responsibilities.¹⁵¹ Similarly, the new communitarians voice

autonomous individuals, a market economy, and a procedural state"); see also PHILLIPS, *supra* note 7, at 24–27 (noting support by communitarians such as Bellah and his associate William Sullivan (both Platform signatories) for classical republicanism).

148. See HOLMES, *supra* note 8, at 176. Holmes counts among American communitarians Michael Sandel and Platform signatory Robert Bellah. Holmes's book includes a chapter on Christopher Lasch. See *id.* at 122–40. Lasch's work is cited by Glendon and in other communitarian literature. See, e.g., BELLAH ET AL., *GOOD SOCIETY*, *supra* note 5, at 6 n.8; GLENDON, *supra* note 1, at 173–74. The following features of antiliberalism resemble themes of the new communitarianism: "the discourse of 'crisis' and moral impoverishment," HOLMES, *supra* note 8, at 7; the insistence that human beings need roots and togetherness but that liberal society pulls them apart into atomized, mobile, selfish, and rootless individuals; and the concern that there have been important spiritual truths known to earlier times that have been obscured by philosophical error, *id.* at 7–8. But see Alan Wolfe, *Pressure Points*, *NEW REPUBLIC*, Dec. 13, 1993, at 44, 45, 46 (reviewing HOLMES, *supra* note 8) (arguing that Holmes fails to establish that there is "such a thing as antiliberalism" and that what he "dismisses as antiliberalism can also be understood as an effort to adopt liberal principles to the specific dilemmas of late twentieth-century America").

149. HOLMES, *supra* note 8, at 253–55; see also Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE*, *supra* note 8, at 21, 23 (arguing that "liberalism's deepest grounding" from the earliest defenses of toleration has been in the conviction, "born in horror, that cruelty is an absolute evil").

150. See, e.g., GALSTON, *supra* note 5, at 12.

151. ETZIONI, *supra* note 2, at 3–10 (emphasis added); GLENDON, *supra* note 1, at 8–9. Holmes argues that antiliberals misleadingly juxtapose the purportedly liberal maxim, "I can do whatever I want," with, "I shall do whatever morality requires," thus suggesting "nihilistic self-indulgence," rather than contrasting it with constraints on freedom imposed by rank or arbitrary authority. See HOLMES, *supra* note 8, at 254. In any event, notwithstanding Glendon's report that some teenagers regard freedom as unlimited, see *supra* text accompanying note 43, it is more likely that Americans would add a gloss, i.e., "consistent with respecting the rights of others." Indeed, Glendon herself reports that

support for pluralism and toleration, but their call for raising the moral voice of the community assumes that liberalism takes diversity and pluralism too seriously, resulting in the inability or unwillingness to make any moral distinctions or judgments about the worth of different visions of the good life.¹⁵² Thus, liberalism is said to impoverish, and perhaps preclude, moral discourse.

Glendon's critique of American rights talk and call for a re-fined rhetoric of rights illustrates two of what Holmes calls the "basic fallacies or theoretical failings characteristic of [communitarian antiliberalism]:" the "shifting target" of criticism and "theory as therapy."¹⁵³ First, Glendon "oscillate[s] between a criticism of liberal theory and a criticism of liberal society."¹⁵⁴ On the one hand, she claims that our liberal rights talk and theory deficiently describe, indeed mask, most Americans' actual experiences of connection with others and their vocabularies of rights *and* responsibilities. On the other hand, she asserts that liberal rights talk and rhetoric all too accurately reflect, and in fact have contributed to, the perilous decline in a sense of personal responsibility in American society. As Holmes suggests, however, conflating contemporary society with liberal theory or portraying it as the inevitable outcome of a liberal regime of rights threatens to obscure the serious criticisms that some liberals would make of contemporary society precisely for its failure to realize liberal ideals.¹⁵⁵ As noted above, some liberals argue that any contemporary responsibility deficit is due in significant part to the failure of government to realize the promise of legal and civil rights and to the failure of society to embody ideals of equality, mutual respect, and justice.¹⁵⁶

Second, Glendon offers "theory as therapy:" by adjusting the message that our rights talk sends, she will put us in touch with our traditions. Thus, Holmes notes, the communitarian theorist is the therapist, not mere diagnostician but midwife as well.

adult Americans ranked "[b]eing free of obligations so I can do whatever I want to do" at the bottom of the list of important personal values. GLENDON, *supra* note 1, at 105.

152. See *infra* text accompanying note 280. Calling for a return to republican virtue, Suzanna Sherry reaches a similar conclusion. See Sherry, *supra* note 16, at 7-11, 13-15.

153. HOLMES, *supra* note 8, at 176, 181-83.

154. *Id.* at 181 (characterizing communitarian criticism in general).

155. *Id.* at 184.

156. See *supra* text accompanying note 120.

Cognitive mistakes can have important behavioral consequences, of course, and many of them are likely to be bad. . . . When liberals impugn "the social," it seems, they not only misdescribe human action but also allow the best part of life to wither on the vine. By providing us with a new language, by redescribing human existence accurately (as thoroughly dependent on a nourishing social milieu), communitarians can make it worthwhile once again, or perhaps for the first time They will unearth the hidden treasure, make explicit the implicit, and release the warm human potential half-frozen beneath the ice of liberal ideology [The communitarian theorist] will rearticulate the shared understanding that the rest of us have half-forgotten, thereby abolishing loneliness and rendering our lives, again or at last, joyfully communal.¹⁵⁷

Holmes's description of the communitarian as therapist seems to fit quite well Glendon's twin focus on the phenomenon of Americans' rights rhetoric belying and shutting them off from their actual beliefs, experiences, and traditions, as well as on the potentially transformative nature of those traditions as hidden indigenous resources for refining the rhetoric of rights. Like Holmes, we might question whether correcting theoretical errors will solve social problems and express doubts whether supposed theoretical errors of liberalism appreciably account for "the inner sickness of American society."¹⁵⁸

B. *Looking Backward to a Responsive Community?*¹⁵⁹

1. *The Appeal to Tradition.* In the new communitarian appeal to tradition, communities of "mutual aid and memory," and the Founders, there is a problematic inattention to the less attractive, unjust features of tradition. At the time of the Founding, the class of Americans eligible for the rights, duties, and responsibilities of citizenship excluded many people: women, African men and women in slavery, and unpropertied white men. Furthermore, Glendon looks to women's traditional roles and special experiences

157. HOLMES, *supra* note 8, at 182-83.

158. *Id.* at 184. Granted, Glendon and her compatriots in the Responsive Community movement do want to go beyond theory as therapy and to effect social change through new social policies and, when appropriate, new laws.

159. The allusion is to Derek Phillips's book, *Looking Backward*, see PHILLIPS, *supra* note 7, which takes its title from the famous utopian novel by Edward Bellamy.

as moral educators and caretakers as a corrective to rights talk,¹⁶⁰ yet makes no mention of the role of tradition and law in enforcing those special responsibilities (or "natural" duties) or of the law's invocation of them to justify excluding women from the rights, duties, and responsibilities of citizenship.¹⁶¹ Similarly, the communitarian contrast of the moral consensus of the 1950s with the alleged contemporary absence of consensus fails to consider seriously whether such a consensus was severable from such features of the 1950s as suppression of dissent (McCarthyism), intolerance, bigotry, racism, sexism, and the like. To be fair, some communitarians do appear to recognize the need for careful evaluation of what was good and bad about tradition and the possibility of severing certain features of it from others.¹⁶² At the same time, acknowledging the discriminatory components of tradition does not prevent other communitarians from lamenting its passing and contrasting it favorably with the present cultural drift.¹⁶³

Inevitably, appeals to a more moral American past must confront questions about the relationship between, on the one hand, the desired characteristics of virtue, values, and an assumed moral

160. See GLENDON, *supra* note 1, at 174.

161. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 59-65 (1961) (holding it permissible for a state to relieve women from jury duty because of their "special responsibilities" as the "center[s] of home and family life"); *Fay v. New York*, 332 U.S. 261, 289-90 (1947) (noting the "universal practice" of permitting only men to sit on juries and finding that the idea that women should serve on juries is based not on the Constitution but on a "changing view of the rights and responsibilities of women in our public life"); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140-42 (1872) (Bradley, J., concurring) (concluding that, "in view of the peculiar characteristics, destiny, and mission of woman," it is not unconstitutional for the legislature to conclude that only men, and not women, may be attorneys). Similarly, Glendon invokes the values of relational feminism but does not ponder what Carol Gilligan has called the problematic expectation of a self-sacrificing female form of care. See GLENDON, *supra* note 1, at 174; see also GILLIGAN, *supra* note 72, at 74-75, 149, 166; McClain, *supra* note 9, at 1194-98. But see GLENDON, *supra* note 1, at 127 ("[F]ew would care to call in question . . . improvements in the educational and economic position of women.").

162. See *supra* text accompanying note 112 and note 115; see also Amitai Etzioni, *The Limits of Reconstruction*, NAT'L REV., Mar. 15, 1993, at 56, 57 (reviewing *THE LOSS OF VIRTUE: MORAL CONFUSION AND SOCIAL DISORDER IN BRITAIN AND AMERICA* (Digby Anderson ed., 1992)) (describing communitarian attention to severability and cautioning about glorifying the past in this way).

163. See GALSTON, *supra* note 5, at 273; *supra* text accompanying note 116. Galston advocates a "functional traditionalism" to ameliorate "the cultural cleavages of the past generation," whereby public policy would endorse and sustain aspects of tradition (such as "the intact two-parent family" or a moment of silence in public schools) if there are "reasonable public arguments"—rather than an appeal solely to religious convictions—for such traditions. GALSTON, *supra* note 5, at 280-88.

consensus and, on the other, the glaring problems of injustice, inequality, and exclusion.¹⁶⁴ It seems fair to ask whether the communitarians draw the correct conclusions as to “*what* is to be learned by looking backward.”¹⁶⁵ Challenging communitarian portraits of American history, Derek Phillips argues both that communitarian portraits of bygone consensus and solidarity are a “myth of fundamentalism” unsupported by history and that the constant features of a politics of the common good have been aristocracy, inequalities of wealth and political rights, and the exclusion, subordination, and exploitation of the many for the benefit of the few.¹⁶⁶ If the communitarians are wrong on their history, little is left of their appeal to return to bygone traditions.

2. *The Appeal to Community.* The new communitarians also give insufficient attention to the meaning of community, its relationship to the state, and the role of authority and coercion in a communitarian society. A central feature of communitarian discontent with liberalism is its alleged lack of an adequate vision of community. Although “communitarians invest this word with redemptive significance,” what we need to know is: “[W]hat is community? What does it look like? What are *its* problems?”¹⁶⁷

The image of community that emerges from communitarian literature is in the first instance a geographical community, wherein members agree on values, hold each other to such values, and exhort each other to fulfill duties and responsibilities.¹⁶⁸ Etzioni analogizes such communities to traditional small towns and villages but suggests that such a model also is achievable in suburban and,

164. The literature on the revival of civic republicanism explores this issue. See, e.g., Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 821 & n.55 (1993) (noting the exclusion of women and the poor from full membership in society and arguing that “all their talk of virtue did not make the classical republicans virtuous”).

165. PHILLIPS, *supra* note 7, at 195 (concluding that, “[i]f those were the good times, Lord protect us against the bad”).

166. See *id.* at 149–74. Phillips also argues that heavy reliance on Tocqueville, rather than contemporary social history, leads to these problems. See *id.* at 61–80.

167. HOLMES, *supra* note 8, at 177. Holmes argues, “When we hear [the word community], all our critical faculties are meant to fall asleep.” *Id.*

168. See PHILLIPS, *supra* note 7, at 14 (defining community, as it appears in the communitarian writing of Robert Bellah and his associates, Michael Sandel, Alasdair MacIntyre, and Charles Taylor as “a group of people who live in a common territory, have a common history and shared values, participate together in various activities, and have a high degree of solidarity”).

to a lesser extent, urban areas.¹⁶⁹ Yet contemporary communities, he argues, while maintaining social bonds, should differ from traditional communities in permitting greater heterogeneity and diversity.¹⁷⁰

The new communitarians conceive of the units of society as ever-larger communities, culminating in the United States as a community of communities.¹⁷¹ As liberals such as Isaiah Berlin and John Rawls remind us, however, government involves coercive power.¹⁷² Although the communitarians insist that much of their program does not involve government or law, they propose to use law and public policy to help repair the social fabric, to make some "social" responsibilities legally enforceable, and to signal values that they hold dear.¹⁷³

It is appropriate to wonder whether the communitarian agenda inevitably will result in government encouragement, if not enforcement, of communitarian shared values and responsibilities.¹⁷⁴ Moreover, although communitarians say that they prefer the law's exhortative force to coercion, I argue below that communitarians do not wholly eschew curtailing rights and enforcing responsibilities coercively when the perceived costs of not doing so are sufficiently high.

Finally, it is not entirely clear how a communitarian society would blend community suasion and government persuasion concerning responsibilities with a commitment to protecting legal rights. Communitarians themselves appear to acknowledge that

169. See ETZIONI, *supra* note 2, at 116-21; *id.* at 127-30 (offering proposals for "pro-community" architecture and planning).

170. See *id.* at 116-22 (distinguishing "*Gemeinschaft*" (what Etzioni calls "community") and "*Gesellschaft*" (what he calls "society") and suggesting the need for a "new *gemeinschaft*" that is neither hierarchical nor oppressive). Etzioni acknowledges that there can be nongeographical communities that, although perhaps less stable and deep-rooted, may fulfill some of the social and moral functions of traditional communities. See *id.* at 121-22.

171. See *id.* at 147-60; *Platform*, *supra* note 5, at 4.

172. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121-22 (1969); RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 136, 216-17; see also GALSTON, *supra* note 5, at 296 (suggesting that liberal theory is "preoccupied with the threat of moral coercion").

173. See *supra* text accompanying notes 77-80.

174. Cf. Gey, *supra* note 164, at 820-21 (arguing that, in civic republican theory, the community is "not simply a benign force that merely advises its members on their thoughts and behavior" but also has "enforcement mechanisms that include the ultimate resort to force").

community suasion may become coercion or a threat to individuals.¹⁷⁵ Moreover, communitarians have not given satisfactory accounts of the relationship between individuals and the various institutions of civil society at the heart of the Responsive Communitarian agenda. In political liberalism, individuals do not shed their rights as citizens through membership in the institutions of civil society, such as the family and religious organizations.¹⁷⁶ How would responsive communities protect individuals in the face of expressed community or institutional needs or interests?¹⁷⁷ We need to hear fuller answers from the new communitarians to such questions about community.¹⁷⁸

3. *Communitarian Virtues and Liberal Virtues: The Withering Away of the State?* Communitarians propose that we require a set of shared "social virtues"—basic settled values—for a community to endorse and affirm in order to indicate what conduct is "viewed as beyond the pale."¹⁷⁹ What is the relationship between those virtues and liberal virtues (such as self-control, self-criticism, reason giving, and toleration)?¹⁸⁰ Are the shared social virtues that the communitarians emphasize also political values, or would adherence to social virtues render a polity itself increasingly unnecessary? Although the Platform imagines an initial process of agreement on values, it does not emphasize a clear role for ongoing deliberation about the common good or for the liberal virtues of reason giving and critical reflection.¹⁸¹

175. *Beyond the Pale?*, 3 RESPONSIVE COMMUNITY, Fall 1993, at 66, 66 (reproducing both an example of Operation Rescue's "NOT WANTED In Our Community" posters, which feature the pictures and addresses of physicians who perform abortions, and an example of a flyer with a picture of opponents of legal abortion used by pro-choice organizations and asking: "When does a community's expression of moral disapproval become an unacceptable threat to individuals? Are such tactics head-hunting or an expression of community outrage?"); see also ETZIONI, *supra* note 2, at 25 (anticipating that "we will . . . rebel if we feel we are pushed too far, by moral claims or a choir of our peers").

176. RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 221 n.8.

177. See Barton, *supra* note 36, at 812 (expressing fear that Glendon's weaker version of rights might not suffice in light of the "ineluctable tension between the preservation of authority" in such institutions and the "fair treatment of individuals").

178. One possible source is an anticipated book. See COMMUNITARIAN THINKING: NEW ESSAYS (working title) (Amitai Etzioni ed., forthcoming 1994-1995).

179. See, e.g., ETZIONI, *supra* note 2, at 24-25.

180. See MACEDO, *supra* note 8, at 265-77.

181. ETZIONI, *supra* note 2, at 19-20; see also *supra* text accompanying note 142. Granted, the communitarians do imagine ongoing deliberation over more contested values.

The communitarian program is somewhat ambivalent with respect to the value it attaches to government and the role that government should play in a communitarian social order. It is not clear to what extent the life of a citizen in a responsive community is a political life, or whether and how the good citizen is different from the good neighbor. A responsible citizen, the Platform asserts, is involved in community but need not be active in the polity.¹⁸² Notwithstanding communitarian calls for a richer political life and for national policies, at times it seems that the primary goal is less civic virtue and the robust political life lived in the public square, extolled by the classical republicans (to the detriment of the hearth), than a renewed "thick" civil society in which small-town, neighborly virtues and a "culture of familialism" flourish. Thus, it is not clear whether the more appropriate communitarian image is sharing table talk at grandmother's house or deliberating about political issues at a town meeting.¹⁸³

Moreover, the communitarians believe that nongovernment associations could solve many current social problems. In this context, self-government would appear to mean a reduction in government: the greater the sense of personal responsibility and the stronger the bonds of civil society, the less the need for government (especially national government) to assume responsibility.¹⁸⁴ An implication of this approach is that the attainment of responsive communities would result in the withering away of the state.

See ETZIONI, *supra* note 2, at 25.

182. Platform, *supra* note 5, at 12.

183. I use the gender reference because Glendon emphasizes the role of women as purveyors of table talk and moral traditions. See GLENDON, *supra* note 1, at 174-75. For communitarian praise of the town meeting, see BELLAH ET AL., HABITS, *supra* note 5, at 168-85, 200-06.

184. This seemed to be a clear message of the 1992 Republican National Convention and the rhetoric of family values. See Hatch, *supra* note 48, at 960 ("If citizens can behave themselves and make do for themselves, they need little government; if they cannot, they need a great deal of government.") (quoting FORREST McDONALD & ELLEN McDONALD, REQUIEM 10 (1988)). Milder versions of this causal argument may be found in communitarian literature; for example, that it is the failure of families to provide moral education that requires the government to assume responsibility. See ETZIONI, *supra* note 2, at 92; see also *id.* at 134-47 (tracing the rise in government involvement to the decline in services provided by families and other associations and advocating ways that communities can engage in self-help without involving the government).

4. *Assessing Responsibility and Problems of Moral Conflict and Pluralism.* The Responsive Communitarians give inadequate attention to issues of moral conflict, moral complexity, and pluralism. Communitarians claim to accept pluralism and diversity, but they understate the significance, for example, of "reasonable pluralism" as a fact of contemporary life that reflects people's free exercise of their moral powers.¹⁸⁵ A key assumption of the new communitarianism is the ability to identify, out of divergent moral positions, a set of values that we all share and to use "the moral voice of the community" to move people to rightness, signaling disapproval when individuals fall short of meeting their responsibilities to the community.¹⁸⁶

To be sure, the communitarians are probably correct that deliberation would yield some shared personal and political values. Indeed, an assumption that it is possible to reach agreement on many fundamental political matters and basic questions of justice notwithstanding pluralism undergirds prominent accounts of liberalism.¹⁸⁷ Although the communitarians say that modern communities will be diverse rather than homogenous, a crucial question remains about the extent to which communitarian social virtues depend on uniformity in "lifestyle choices."

There is sharp disagreement over both the desirability and the meaning of certain values that communitarians assert we share—for example, pluralism, tolerance, and abhorrence of discrimination—and whether and how public institutions, such as schools, should inculcate them.¹⁸⁸ Communitarians want to reinvigorate moral discourse about moral values or conceptions of the

185. RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 37, 144.

186. *Platform*, *supra* note 5, at 6.

187. RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 3–11; *see* SUNSTEIN, *supra* note 142, at 137.

188. *See supra* text accompanying note 83; Gutmann, *supra* note 143; Nomi M. Stolzenberg, "He Drew a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls*, 105 ETHICS (forthcoming 1995). For example, Galston argues that parents may need "bulwarks against the corrosive influence of modernist skepticism" in public education to protect the right to live an unexamined life. *See* GALSTON, *supra* note 5, at 254–55. Sherry counters that Galston exalts rights "at the expense of virtue" and argues that "[i]f we leave our own lives unexamined, we cannot presume to take part in the governance of others." Sherry, *supra* note 9, at 81.

good life without raising fears of authoritarianism and intolerance but offer no evidence that a deep or broad consensus is possible. Indeed, communitarians acknowledge that there will be controversial areas and the communitarian silence to date concerning an approach to two of the most divisive contemporary social and political issues—abortion and civil rights for gays and lesbians—suggests the difficulty of reaching agreement on such issues.¹⁸⁹

Similar concerns attend the communitarian appeal to use the moral voice of the community to exhort people to meet their responsibilities. Responsibility, it is claimed, originates in community. There is an implicit certitude about what the responsible choice is and a striking lack of attention to the problems of conflicting responsibilities and values, particularly for people who are members of many communities and who find themselves pulled by conflicting obligations.¹⁹⁰ Moreover, the particularity with which some communitarians are willing to spell out what responsibility requires and what fosters community seems to replace the role of personal autonomy, of taking responsibility for one's own conception of the good life, with accountability to the prescriptions of the community. They move from uncontroversial general values to

189. See Keith Henderson, *Advocate for a Community Ethos*, CHRISTIAN SCI. MONITOR, Apr. 19, 1993, at 13 (quoting Etzioni as saying that he sees little chance of resolving the abortion controversy and that "it's not an issue I spend a lot of time with"). But see *infra* subsection IV(C)(1) (discussing Glendon's stance on abortion). Further, several of the initial signatories of the Platform signed "with exception to" certain of its sections. See Platform, *supra* note 5, at 18–19. Although not expressly identified as a communitarian stance on toleration and homosexuality, *The Responsive Community* has published material related to the issue of homosexuality that suggests a somewhat ambivalent stance. See John Gray, *The Failings of Neutrality*, 3 RESPONSIVE COMMUNITY, Spring 1993, at 21, 24–25 (arguing for a policy of "a peaceful *modus vivendi*" form of toleration, "in which homosexuals have the same personal and civil liberties as heterosexuals and in which neither bears burdens the other does not," but which "would not mandate . . . wholesale reconstruction of institutional arrangements" (e.g., family and marriage) under a principle of "radical equality").

190. For example, Thomas Nagel identifies the "fragmentation of value" as an inescapable part of contemporary ethical decisionmaking. See THOMAS NAGEL, *The Fragmentation of Value*, in MORTAL QUESTIONS 128 (1979). Human beings, he argues, are subject to many different claims. Some arise out of obligations to other people or institutions based on one's relationships to others. Others arise from the constraints imposed by the general rights of other persons. Still other sources of value that Nagel identifies include utility (that is, the effects of what one does on everyone's welfare), perfectionist ends or values, and the value of commitment to one's own projects or undertakings. See *id.* at 128–31. There can be, he argues, no simple metric, no index, no general rules as to which moral and motivational claims take precedence. What we turn to, after the process of practical justification, is judgment and practical wisdom. *Id.* at 131–35.

highly contested specific values. Their prescriptions are at times perfectly sensible, at times somewhat trite, and at times (at least for some people) intrusive and inappropriate.¹⁹¹

Finally, the repeated appeals to a settlement on values that we all share and to the community's voice suggest a static model of community and individual identity. In contrast, a more fluid and dynamic model imagines a self capable of assessing and revising particular attachments and convictions by making ongoing judgments about their value.¹⁹² Such a liberal view of the self recognizes the value of community but also recognizes that people may wish or need not only to enter but also to exit communities, relationships, and associations, particularly if they come to view them as undesirable, dangerous, or unhealthy.¹⁹³

In sum, the new communitarianism could be seen as a form of soft antiliberalism, as an attempt to save liberalism from its supposed excesses, or as an indictment of contemporary society for its divergence from liberal ideals. On any reading, however, the alternative political theory that the new communitarianism proffers is neither internally consistent nor wholly satisfying on such issues as the relationship between community and polity, the possibility of consensus on values and responsibility, the role of law in achieving a communitarian moral revival, and the role of rights in responsive communities. I explore such issues further in the next Part by as-

191. To be sure, Etzioni's book is written in the manner of a manifesto and is somewhat colloquial or casual in its tone. With all due respect, some of the examples he offers of what does and does not foster moral voices and community are trite. For example, he tells us that "a onetime evening of folk dancing at the local church is not nearly as socially constructive as a folk dance group that meets every week" and that dating services or singles parties are less "socially constructive" than groups serving "a Communitarian purpose," like running crime watches or soup kitchens. ETZIONI, *supra* note 2, at 125. For a less innocuous prescription raising questions as to communitarian acceptance of diversity, consider Etzioni's chapter on "The Communitarian Family," in which he gives high praise to marriage as personally and socially beneficial and makes no mention of same-sex relationships or families. *See id.* at 54-88. He concludes, "We [the moral voice of the community] do not mean to ostracize those who remain single as 'aging bachelors' and 'spinsters' But we poorly serve the community, and the many persons involved, if we fail to communicate that together is better for most people, most of the time." *Id.* at 88.

192. KYMLICKA, *supra* note 8, at 48-52, 61.

193. *Id.* at 57-61; *see also* Nancy Rosenblum, *Pluralism and Self-Defense*, in *LIBERALISM AND THE MORAL LIFE*, *supra* note 8, at 207, 220-23 (interpreting liberal pluralism as offering notions of personal movement and shifting involvements as defenses (particularly for women) against absorption in a single role or sphere); *cf.* McClain, *supra* note 9, at 1187-88 (discussing feminist cautions against the uncritical embrace of community).

sessing the irresponsibility critique as a jurisprudential critique of rights.

IV. ASSESSING THE IRRESPONSIBILITY CRITIQUE AS A JURISPRUDENTIAL CRITIQUE

The new communitarian discontent with rights targets not only a supposed rights culture, in which general notions of entitlement exist without acceptance of responsibility, but also a rights talk inattentive to the responsibilities that should attach to particular rights. On one reading, the irresponsibility critique merely points out and seeks to correct some erroneous inferences drawn from certain features of legal rights, which I call immunity and wrongness. So read, the critique says little about rights themselves. On another reading, the new communitarians' discontent with the costs of rights—linked to immunity and wrongness—and their impulse to link rights to responsibilities seem to reach deeper, to attack rights themselves. We therefore must consider how the new communitarians understand rights and their purposes and what sorts of rights they would defend.

A crucial issue in this regard is the different ways in which rights implicate responsibility and irresponsibility and the interplay of notions of responsibility as accountability and as autonomy. A prominent liberal justification for rights, which I defend, is that responsibility, understood as the opportunity to exercise one's moral and intellectual capacities, requires individual freedom. On this account, loss of the opportunity to develop and exercise moral responsibility, to take responsibility for and act on one's life plan, is a casualty, or cost, of not protecting individual freedom. In this context, responsibility is understood as autonomy. Although protecting responsibility as autonomy may entail some irresponsible decisions, this conception considers it a more serious cost to move the locus of such responsibility from the individual to the community or state.

In this Part, I argue that the jurisprudential underpinnings of the irresponsibility critique of rights and the communitarian agenda of linking rights and responsibilities are flawed. The irresponsibility critique mischaracterizes liberal conceptions of rights. I also argue that such liberal conceptions are not devoid of notions of accountability and that an important issue that the irresponsibility critique highlights is the tension between pursuing the goal of responsibility as accountability and protecting responsibility as autonomy.

A. *The Immunity Critique*

The immunity strand of the irresponsibility critique of rights addresses both certain features of legal rights and their assumed social messages. The new communitarians understand legal rights to provide protection against legal coercion, preserving a zone of noninterference or immunity: "Rights give reasons to others not to coercively interfere with the [right-holder] in the performance of protected acts."¹⁹⁴ A consequence is that legal rights may include the freedom to engage in "morally inappropriate," irresponsible, or even socially harmful conduct without legal accountability.¹⁹⁵ The social message that people are said to infer from immunity is that they have a right to be insulated from the moral claims or moral scrutiny of others.¹⁹⁶ Although immunity creates social costs, the irresponsibility critique appears to accept immunity as a feature of legal rights. At the same time, communitarians express discontent with rights talk for its alleged inattention to the social costs of rights and for its message that rights are absolutes, to be enforced no matter what their consequences.

1. *Rights, Immunity, and Harm.* The irresponsibility critique posits that legal rights permit individual irresponsibility and impose costs on society. I have shown that notions of social cost and harm feature centrally in the new communitarians' condemnation of irresponsibility but that much of what communitarians include within their condemnation has little if any connection to actual rights.¹⁹⁷ To the extent that the critique addresses legal rights, it does not categorically reject rights because of the legal immunity

194. *Platform*, *supra* note 5, at 14.

195. *Id.* In elaborating the Platform tenet, "Rights vs. Rightness," Etzioni explains:

Scalia argues . . . that we must realize that a willingness to fight for the complete freedom of speech does not condone hateful speech, but rather that "we are willing to fight and die *for your freedom to be irresponsible and even socially harmful* because the alternative would sweep away too much good speech along with the bad."

ETZIONI, *supra* note 2, at 201 (quoting Antonin Scalia, *Law, Liberty and Civic Responsibility*, in *RIGHTS, CITIZENSHIP AND RESPONSIBILITIES*, *supra* note 20, at 3, 4). Compare Justice Scalia's stance on the message sent by First Amendment protection with that he claims is sent by abortion decriminalization. See *infra* notes 306-08 and accompanying text.

196. I address the social message of "noninsulation" when I discuss the wrongness strand of the irresponsibility critique. See *infra* Section IV(B).

197. See *supra* Sections II(A)-(B).

they afford. Yet in calling for a rhetoric of rights that is attentive to their social costs, it does suggest some ambivalence about such immunity. In any event, the critique vigorously rejects any leap from legal immunity to social unaccountability. In assessing the immunity critique, we should ask whether legal rights in fact immunize right-holders from liability for imposing social costs or harms on others.

Wesley Hohfeld's classic account of rights provides a helpful point of departure. Hohfeld argued that legal rights are usefully understood in terms of several possible pairs of jural relationships or correlatives.¹⁹⁸ Of particular interest with respect to the immunity critique are the first two pairs: *right/duty* and *privilege/no right*. In the first pair (for Hohfeld, the only technically proper usage of the term "right"), my right or claim to X or to do X correlates with your duty either to provide me with X or not to interfere with my doing X.¹⁹⁹ Although not all legal rights entail legal duties on the part of others, and vice versa, the "logical correlation" of legal rights and legal duties, at least with respect to rights having the structure of "claim-rights," seems "logically unsailable."²⁰⁰ In Hohfeld's second pair of jural relationships, *privilege/no right*, my privilege or liberty to do X correlates with your having no right to require that I do otherwise nor any legal claim against me regarding my privileged action (or inaction).²⁰¹

Individual rights against government interference or the constitutional rights often used as examples in the irresponsibility critique might be understood as taking the form of Hohfeld's first pair: an individual right to do or not do X and a government duty not to interfere with that right. Arguably, one could also regard constitutional rights as captured by Hohfeld's second pair: an individual liberty to do or not do X and no right or authority for government to interfere.²⁰² In either account, there is a realm of activity or inactivity that is immune from legal interference or

198. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-30 (1913). For a recent article discussing the influence of Hohfeld's approach and proposing an alternative, see Morris, *supra* note 3.

199. Hohfeld, *supra* note 198, at 30-32.

200. See FEINBERG, *supra* note 109, at 62.

201. See Hohfeld, *supra* note 198, at 32-44.

202. Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 n.4 (1993) (arguing that individual rights against the government could equally be expressed by either of these pairs).

sanction, or at least from any claim of right that one perform or refrain from activity.²⁰³

Some scholars argue that in Hohfeld's account a legal right is a right to do nonremediable harm to others. J.M. Balkin writes, "Hohfeld's basic idea [is] that a legal right is a privilege to inflict harm that is either not legally cognizable or is otherwise without legal remedy."²⁰⁴ Similarly, Joseph Singer contends that the significance of Hohfeld's analysis was that it demonstrated the limits of the then-prevailing justification for legal rights: John Stuart Mill's harm principle and the distinction between self-regarding and other-regarding acts.²⁰⁵ In other words, Hohfeld's analysis brought to the fore the notion that legal rights and liberties protect not merely self-regarding acts but also conduct that is harmful to others. Although one could counter that some notion of harm nonetheless does serve as a limiting principle in a regime of rights and that not all rights impose harms, the point these scholars illuminate is that a consequence of the immunity that legal rights afford may be the imposition of noncompensable harms or costs on others.²⁰⁶

The new communitarians do not propose to expand the definition of harm to justify interfering coercively with all activities that impose costs, yet harm does serve as a justification for constraining

203. With respect to the communitarian project of laying moral claims on right-holders, there may be many activities that I have a right to do, or may be at liberty to do because they are not prohibited by law, and other citizens may have either a duty not to interfere with my doing them or no legal right that I not do them.

204. J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1129 (1990).

205. See Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1056-67. Mill's "principle" is as follows:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.

JOHN STUART MILL, ON LIBERTY 10-11 (David Spitz ed., 1975) (footnotes omitted).

206. The most familiar limitation in laypersons' understandings of rights is probably the competing rights of others. For a discussion of this and other limits on rights as trumps, see *infra* subsection IV(A)(2)(a). There is an extensive literature on the allocation and enforcement of legal rights or, more broadly, entitlements, that addresses such issues as the extent to which people may violate the rights of others and various remedies for such violations. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986).

certain rights. As the Platform suggests, freedom of speech is the paradigm example of a right that, although it imposes social costs and individual harm, nevertheless warrants legal protection.²⁰⁷ In contrast, in areas of public health and safety, including measures to prevent disease and crime, communitarians reject "absolutist" assertions of rights and feature notions of harm and costs centrally.²⁰⁸ With its imagery of social environments and ecosystems, the irresponsibility critique assumes that a wide range of individual choices have social costs, both for the public fisc and for the social fabric. Thus, for example, the communitarians stress the social costs of divorce, single-parent families, and deficient parenting, and advocate a family policy that uses a range of facilitative, persuasive, and coercive measures to encourage or impose parental, institutional, and governmental responsibility.²⁰⁹

Thus, although the communitarians accept legal immunity as a feature of some legal rights, they urge a general principle of social accountability for the exercise of rights and argue that legal immunity should not insulate right-holders from public persuasion.²¹⁰ It is unethical, socially irresponsible, and intolerable, communitarians

207. See *Platform*, *supra* note 5, at 13-14 (stating that "[s]uggestions that [the First Amendment] should be curbed to bar verbal expressions of racism, sexism, and other slurs seem to us to endanger the essence of the First Amendment, which is most needed when what some people say is disconcerting to some others"). Communitarians favor nonlegal remedies to educate and promote tolerance. See ETZIONI, *supra* note 2, at 192-206; *Platform*, *supra* note 5, at 13-14.

208. See ETZIONI, *supra* note 2, at 11, 163-91 (advocating making adjustments to, or "notching," rights in light of "new responsibilities"); *Platform*, *supra* note 5, at 15-16 (indicating support for sobriety checkpoints, antiloitering laws, drug testing, and civil disarmament and invoking the "American moral and legal tradition" of balancing individual (in this case, Fourth Amendment) rights with public protection).

209. See ELSHTAIN ET AL., *supra* note 88, at 14-15 (detailing proposals that, for example, call for attention to "cultural values" of "excessive careerism or acquisitiveness" that detract from child care and advocating a "children first" principle for divorce law to "slow the rush to divorce"). Mill recognized a relevant limiting principle: otherwise self-regarding behavior became other-regarding if it ultimately implicated the public fisc or placed demands on society when individuals failed at moral duties and obligations, particularly duties to children. See MILL, *supra* note 205, at 73-76, 90-91.

210. See GALSTON, *supra* note 5, at 281; cf. R. Bruce Douglass & Gerald M. Mara, *The Search for a Defensible Good*, in *LIBERALISM AND THE GOOD* 253, 276 (R. Bruce Douglass et al. eds., 1990) (advocating some balance between accountability and toleration because, "[w]hen people get into the habit of conceiving of the more consequential decisions they make about the conduct of their lives as nothing but personal, it is all too easy . . . to lose sight . . . of the inescapable difference that it makes, to everyone affected . . . how well such decisions are made").

hold, not to take moral and social responsibilities into account in exercising one's rights.

A comparison with Mill's delineation of the respective spheres of individual freedom and legitimate government interference is instructive on this point.²¹¹ Mill argued that an individual is not accountable to society for actions concerning only himself (when there was no harm to others), but "for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society [deems] that the one or the other is requisite for its protection."²¹² Yet within the realm of unaccountability, Mill granted that society could use a range of measures, such as "[a]dvice, instruction, persuasion, and avoidance," to signal disapproval of individual action or to attempt to influence such action.²¹³

In this regard, the communitarians seem to reject Mill's nomenclature of a realm of unaccountability because of the social message of insulation that it might foster. In any event, they argue for a narrower understanding of such a realm because the interdependency of contemporary society increases the instances in which the exercise of freedom imposes costs or harms on others.²¹⁴ Nevertheless, they might find in Mill (and, indeed, in other liberal defenders of individual freedom) support for their argument that a right bestowing legal immunity does not immunize persons from the moral scrutiny or moral claims of others. At the same time, the communitarian quest to link rights and responsibilities poses

211. See MILL, *supra* note 205, at 10–11, 87. The irresponsibility critique often focuses on constitutional rights and individual liberties, areas similar to the trilogy of freedoms—of thought, of action, and of association—that Mill addressed. *Id.* at 13–14.

212. *Id.* at 87.

213. *Id.* at 11, 70–74, 87.

214. See ETZIONI, *supra* note 2, at 7–8 (rejecting libertarian challenges to seatbelt and motorcycle helmet laws and noting that "reckless individuals . . . do not absorb many of the consequences of their acts"). For a discussion of the social costs rendering untenable assertions of Mill's distinction in challenges to seatbelt and motorcycle helmet laws, see *Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir.) (rejecting the invocation of the right to privacy and of Mill's harm principle in upholding a helmet law and observing that such a law prevents the imposition of costs on others), *cert. denied*, 493 U.S. 920 (1989); *People v. Kohrig*, 498 N.E.2d 1158, 1164–66 (Ill. 1986) (upholding a seatbelt law because the legislature could have rationally determined that the law would protect people other than belt wearers and that it would reduce public costs that result from accidents); *cf.* DWORKIN, *supra* note 12, at 261 (discussing the scope of Mill's principle and mentioning the motorcycle helmet example as one of the "rare occasions when a government is asked to prohibit some act on the sole ground that the act is dangerous to the actor").

important questions concerning when persuasive measures rise to the level of social tyranny, coercion, or social punishment of the sort that Mill feared and criticized as a threat to individual liberty.²¹⁵

2. *Rights as Trumps.* In the context of constitutional rights, Ronald Dworkin has advanced a conception of rights as trumps that grows out of the liberal tradition of which Mill's *On Liberty* is an exemplar. Dworkin's conception, or at any rate his metaphor, of rights as trumps has provoked the ire of the new communitarians because it supposedly illustrates how rights are out of balance with responsibility. Communitarians charge that thinking of rights as trumps leads to disregard of any responsibilities to society and the social costs of conduct, to a shutting down of debate and of any attention to questions of society's interests, and even to an attitude of excessive self-indulgence.²¹⁶

The new communitarians' critique of the notion of rights as trumps as contributing to the problem of irresponsibility goes beyond the rhetoric of rights talk to the underlying conception of what a right is. The communitarians' alternative conception of rights is unclear. At bottom, the objection to rights as trumps seems to be that this notion has spread from an account of certain fundamental constitutional rights to an ubiquitous conception of legal rights and thus to a proliferation of rights talk, and that rights talk has ended all debate or thwarted all moderation of claims by exalting individual desires over any social ends.²¹⁷ As the following discussion illustrates, the communitarian attack on the idea of rights as trumps ignores important limitations on that notion already developed in liberal theory. The attack reflects a deep discontent with immunity, yet does not offer a clear picture of how social costs should affect the protection of rights.

215. See MILL, *supra* note 205, at 5-6, 14-15, 62-63; see also *supra* text accompanying note 175.

216. See, e.g., ETZIONI, *supra* note 2, at 7-8; GLENDON, *supra* note 1, at 8, 40; cf. WILSON, *supra* note 75, at 250 ("Believing that individuals are everything, rights are trumps, and morality is relative to time and place, [Enlightenment] thinkers have been led to design laws, practices, and institutions that leave nothing between the state and the individual save choices, contracts, and entitlements.").

217. See, e.g., GLENDON, *supra* note 1, at x-xi (criticizing the proliferation of rights talk as promoting "unrealistic expectations" and ignoring "both social costs and the rights of others").

a. *The limits of Dworkin's theory of rights as trumps.*

Many years before Glendon wrote *Rights Talk*, Dworkin observed that "[t]he language of rights now dominates political debate in the United States."²¹⁸ In *Taking Rights Seriously*, he presented what he called a "liberal theory of law," defending a "strong sense" of the "old idea of individual human rights."²¹⁹ He championed this theory over legal positivism, a philosophy rooted in utilitarianism. In his famous characterization of rights as trumps, Dworkin argued that "[i]ndividual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."²²⁰ Rejecting a utilitarian political theory within which explicit consideration of the general welfare directly bore on what rights people had and the extent to which those rights were protected, Dworkin argued that fundamental rights trumped the utilitarian calculus of the greatest happiness of the greatest number.

Similarly, Dworkin contended, "A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."²²¹ To conclude otherwise, by asserting that society has the right to do whatever advances the general welfare or "the right to preserve whatever sort of environment the majority wishes to live in," would "annihilate[]" individual rights against the government.²²² It would reduce them to mere interests, to be balanced away at the majority's discretion.

Dworkin called his strong sense of rights an "anti-utilitarian concept of a right" and argued that it was this sense that marked the "distinctive concept of an individual right against the State which is the heart, for example, of constitutional theory in the United States."²²³ Whereas the irresponsibility critique asserts that the moral vocabulary of rights talk impoverishes political

218. DWORKIN, *supra* note 12, at 184.

219. *Id.* at vii.

220. *Id.* at xi.

221. *Id.* at 194.

222. *Id.*

223. *Id.* at 269.

discourse, Dworkin argued for reinvigorating the moral rights of individuals against the state.

Glendon offers Dworkin's notion of "taking rights seriously," even at the expense of the general interest, as an illustration of the "illusion of absoluteness" of American rights talk and of the "spell" of William Blackstone's absolutist notion of property rights.²²⁴ She states that "it is difficult to imagine any serious contemporary European legal philosopher" asserting, as Dworkin did, that, "if someone has a right to something, then it is wrong for government to deny it to him even though it would be in the general interest to do so."²²⁵ Dworkin's account of what taking rights seriously requires apparently conflicts with what Glendon thinks taking the social costs of rights seriously requires.

An examination of the limits of Dworkin's conception of rights suggests that the illusion of absoluteness may be Glendon's. The first important limit on the notion of rights as trumps is that the strong rights that Dworkin defended were fundamental constitutional rights, not every constitutional right, much less every right, and certainly not every imaginable "liberty interest."²²⁶ Second, he granted that, with respect to the vast bulk of laws not implicating those strong rights, promotion of the general welfare was a sufficient justification for restricting liberty.²²⁷ Third, even when a strong right against the government was in play, Dworkin cautioned that it would overstate the point to say that "the State is *never* justified in overriding that right."²²⁸ For example, Dworkin acknowledged that the government would be justified in overriding a right of free speech to "protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit."²²⁹ Thus, Dworkin did not claim that societal welfare

224. See GLENDON, *supra* note 1, at 40. But see Epstein, *supra* note 36, at 1109-17 (challenging Glendon's portrayals both of Blackstone's conception of property rights and of contemporary conceptions in American law).

225. GLENDON, *supra* note 1, at 40 (quoting DWORKIN, *supra* note 12, at 269).

226. DWORKIN, *supra* note 12, at 190-91. Additionally, Dworkin emphasized that the idea of liberty as license (freedom from social or legal constraint) did not capture Mill's (or Dworkin's) interpretation of rights. He defended Mill's conception of liberty as "moral independence." *Id.* at 259-65.

227. See *id.* at 191.

228. *Id.*

229. *Id.* Nonetheless, Dworkin states that if one acknowledges the final circumstance as a justification, one would be "treating the right in question as not among the most important or fundamental." *Id.*

never restrains rights or overrides them, merely that fundamental rights are not simply an "interest" to be balanced against other interests.

Fourth, an important ground for limiting rights that Dworkin recognized is the competing or conflicting rights of others, especially conflicts between citizens' rights to the state's protection and their rights to be free from the state's interference.²³⁰ In such situations, the more important right must prevail at the expense of the less important, a matter requiring judgment. Fifth, in considering whether a particular right should be recognized or extended, Dworkin acknowledged that government could limit the definition of a right on certain grounds. For example, it might do so if the values protected by the original right were not really at stake in a particular case or if the costs to society went far beyond "the cost paid to grant the original right."²³¹ Finally, Dworkin's account of the constraints that strong legal rights put on the government did not presume to answer all questions as to how the moral and social responsibilities of citizens should guide their lives and the exercise of their rights or how citizens and government might attempt in noncoercive ways to shape other citizens' exercise of their rights.²³²

Dworkin recognized that a government taking rights seriously would incur costs: "[T]he majority cannot travel as fast or as far as it would like if it recognizes the rights of individuals to do what, in the majority's terms, is the wrong thing to do."²³³ Why take rights seriously if doing so makes it more difficult and expensive for a polity to secure the general benefit? Dworkin argued that, although the "bulk of the law . . . must state, in its greatest part, the majority's view of the common good," the institution of rights is the promise of the majority to the minority "that [its] dignity and equality will be respected."²³⁴ Indeed, ideas of human dignity

230. *Id.* at 193-94.

231. *Id.* at 200.

232. Dworkin has addressed such questions in his subsequent works. See DWORKIN, *supra* note 17, at 148-54, 166-68, 237-41; Dworkin, *supra* note 8, at 113-18; Dworkin, *supra* note 145, at 491-504; *infra* subsection IV(C)(2). Communitarian critiques of Dworkin's liberal conception of rights generally do not take these works into account. See GALSTON, *supra* note 5, at 90-91 (discussing, *inter alia*, *Taking Rights Seriously*); GLENDON, *supra* note 1, at 40 (discussing *Taking Rights Seriously*).

233. DWORKIN, *supra* note 12, at 204.

234. *Id.* at 205.

(particularly, the supposition of what it means to treat individuals as full members of the human community) or equality (particularly, the requirement that government treat individuals with equal concern and respect) are typical grounds for protecting strong rights.²³⁵ Furthermore, both dignity and equality implicate responsibility as autonomy.

In sum, two points are critical. First, the communitarians (as well as other critics of liberal rights talk) seem to overlook that Dworkin acknowledged many limits on the idea of rights as trumps.²³⁶ Second, if the communitarians reject Dworkin's underlying conception of what a right is, it is not clear whether they accept legal immunity as a feature of legal rights. If that is the case, we need to know what alternative conception of rights the communitarians would embrace and how they would wed legal, as well as social, accountability to rights.

b. What is wrong with rights as trumps? The account of rights in the irresponsibility critique appears to grant that: (1) a legal right held by one person generally involves a correlative duty on the part of another; (2) the Constitution provides a reason for government not to interfere coercively with the exercise of rights guaranteed therein; and (3) the exercise of legal rights may result in irresponsible or socially harmful conduct.²³⁷ If the communitarians accept these features of legal rights (and even state that moral claims may undergird some constitutional rights²³⁸), it is not

235. *Id.* at 198-99; cf. Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765, 791 (1992) (stating that liberal rights must ultimately be grounded in an intuition that "in the long run the benefits of having a right . . . outweigh any costs incurred by its possession").

236. A good example of other criticism is found in the work of Robin West. She charges,

Mainstream liberal constitutional discourse is presently characterized by an almost obsessive refusal to acknowledge or examine the nature of the costs of constitutional rights and liberties because of the logic and structure of rights themselves: the right exists to preclude precisely such cost-benefit analyses. Because there is no social cost that a right does not theoretically "trump," from a liberal perspective there is simply no reason to assess the costs of rights, and plenty of reason not to: assessment only threatens societal respect for the right in question.

West, *supra* note 235, at 791.

237. See *supra* text accompanying notes 92, 126, 194-95.

238. See, e.g., ETZIONI, *supra* note 2, at 6 (describing constitutional rights as "solemn moral/legal claims"); *id.* at 51-52 (arguing that public opposition to the obscenity prosecution of the Mapplethorpe photographic exhibition, notwithstanding the fact that many people found the art deeply offensive, reflected "moral support for free speech").

clear why they object to the key component of rights as trumps, namely, that government may not act coercively to prevent rights exercise, even if such inaction might limit society's ability to pursue its conception of the general welfare.

Glendon objects to the claim that it would be wrong for government to prevent people from exercising rights when their doing so is against the general interest of society. Is it therefore right for government to prevent people from exercising rights in such situations? Although the communitarians ask that we talk about rights in a different way, they offer no coherent alternative to the strong sense of constitutional rights that Dworkin advances.

Perhaps the new communitarians object to the blunt and peremptory image of a trump, which may send social messages that a right automatically trumps any consideration of the impact of rights on the common good, rather than to Dworkin's particular conceptions of what a right is and of what is required if government is to take rights seriously. Thus, communitarians may fear that talking about rights as trumps sends the (mistaken) message that the assertion of rights cuts off debate. Similarly, Cass Sunstein suggests that too often rights "masquerad[e] as reasons" and are not conducive to deliberation. In contrast, a more deliberative approach, even if it led to the same protection of a right, would at least acknowledge that there are other issues to consider.²³⁹ Of course, the image of rights as trumps itself suggests that other cards are on the table.

c. *Are rights really trumps in an age of balancing?* Regardless of whether rights should be characterized as trumps, there is reason to doubt that they in fact are treated as trumps in contemporary constitutional law. It is ironic that the notion features so centrally in the new communitarians' irresponsibility critique as emblematic of the failings of contemporary rights talk, given developments in constitutional law in the years since the publication of Dworkin's appeal to take rights seriously. The conservative Burger and Rehnquist Courts often have been criticized for not taking rights seriously. Indeed, James Boyd White suggests that Glendon's critique of rights tells only part of the story since the "characteristic vice" of the Supreme Court cases of the last few decades is not

239. *Id.* at 7 (citing Sunstein, *supra* note 36, at 34).

the assertion of absolute rights of the sort that Glendon decries but "the claim to judge every case by a process of 'balancing' one cluster of interests off against another."²⁴⁰

Likewise, other observers of current constitutional jurisprudence have suggested that it is the metaphor of balancing that best describes the identification, valuation, and comparison of competing interests now pervasive in adjudication of individual constitutional rights.²⁴¹ The metaphor of balancing is quite at odds with that of trumps and raises significant questions concerning the impact of treating rights as interests to be balanced with other interests.²⁴² Whatever the best answers to these questions may be, Glendon's protests against the "absolutist" rhetoric of the idea of rights as trumps ring oddly in an age of balancing. The characteristic vice of such an age is more likely to be balancing rights away, rather than taking them seriously, though the heavens fall.²⁴³

3. *Weighing the Social Costs of Rights.* It is not clear to what extent the greater individual accountability that communitarians seek with respect to rights is compatible with a strong conception of rights. For example, Glendon urges a refined rights rhetoric that is attentive to the social costs of rights and to the question of "the responsibilities, if any, that should be correlative with a given right."²⁴⁴ The irresponsibility critique sounds an ominous warning that strong defenses of individual rights undermine both communities and the support on which rights themselves ultimately depend.²⁴⁵ The argument is that strong defenses of rights underes-

240. White, *supra* note 36, at 1273.

241. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963-72 (1987); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. (forthcoming June 1994); Fallon, *supra* note 202, at 346-47, 360-64.

242. Cf. Fallon, *supra* note 202, at 372 (arguing that both individual rights and government powers must be defined by reference to often conflicting interests that must be balanced but suggesting that his approach is not inconsistent with Dworkin's).

243. A recent conference at Hastings College of Law, San Francisco, sponsored by the *Hastings Law Journal*, convened to consider the implications of the "madness" of the Supreme Court's attempts to balance public values and individual liberties. See *When is a Line as Long as a Rock is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication*, Conference at Hastings College of Law (Feb. 26, 1994) (informational brochure, on file with author).

244. GLENDON, *supra* note 1, at 177.

245. *Id.* at 138.

timate the costs of rights to communities, and ultimately, to a polity. Within the new communitarians' expansive interpretations of the social costs of rights, including the impact of millions of daily decisions on the social fabric and on communities, we might ponder what freedoms the new communitarians would recognize as inviolate.

Consider two approaches to linking rights with responsibilities. In one, the moral voice of the community exhorts an individual that her action (although legally within her rights) either is not the responsible thing to do or is not consistent with her responsibilities to the community. In the other, the moral voice of the community (reflected in law) tells an individual that she has no right to act or that her right to act may be overridden by her responsibilities to the community. To the extent that Glendon's critique offers guidance concerning a communitarian stance, it raises questions as to whether communitarians generally favor suasive, nonlegal measures to legal measures, whether they favor suasive or coercive legal measures, and under what circumstances communitarians would choose one approach over another.

Glendon unfavorably compares Dworkin's supposedly absolute formulation of what a right is to European declarations explicitly linking rights to duties to serve "the public weal."²⁴⁶ She offers as a good example of a "strong," although not "absolute," form of rights the Canadian Charter of Rights and Freedoms. It guarantees rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" and subjects a "wide range" of constitutional rights to either a national or local "legislative override procedure."²⁴⁷

Such comparative models suggest a critique, not merely of the rhetoric of rights talk, but of the immunity that a right affords, and a corrective of not merely social, but legal accountability. (Of course, even rights in Dworkin's strong sense are not without limitation, and one might question whether what American courts do in interpreting and adjudicating claims of constitutional rights is in practice dramatically different from interpreting a codified, limited right.²⁴⁸) Below, I will examine Glendon's analysis of

246. *Id.* at 38-39 (discussing example of German property law).

247. *Id.* (quoting The Canadian Charter of Rights and Freedoms, Canada Act 1982, R.S.C. app. II, no. 44 (1985)).

248. Even in the heyday of strong constitutional rights, rights jurisprudence recognized

abortion law, one clear example of her rejection of legal immunity in favor of the accountability she finds in European models (albeit models turning, to some extent, on the presence of conflicting rights).²⁴⁹

As suggested in Part I, Glendon's appeal to craft a refined rights rhetoric from "indigenous resources," such as household table talk, models of compromise, attitudes of tolerance and forbearance, and even political deliberation, raises questions as to what sorts of rights she would support and the respective roles of courts and legislatures in enforcing such rights.²⁵⁰ The same questions arise with respect to the communitarian call for a moratorium on the minting of new rights in favor of an appeal to social virtues and responsibilities.

First, it is unclear whether Glendon's point is that individuals should voluntarily moderate their exercise of rights or that government should restrict such exercises in the general interest of society. Vindication of rights indeed often assumes that there are clear winners and losers, people in the right and people in the wrong. Does government do no wrong when it fails to protect people's rights? Moreover, although the mutual forbearance and compromise of the sort that go on between family members, neighbors, and business partners may be useful models in certain legal contexts, they seem to be poor models for conceiving the relationship between the rights of individuals and the powers and interests of the state.²⁵¹ Thus, some critics ponder whether liberalism's com-

that fundamental constitutional rights may be limited in the face of compelling state interests if the means used are narrowly tailored to further those interests. Stringent judicial protection of constitutional rights in many areas has been watered down considerably since Gerald Gunther wrote that strict scrutiny in the equal protection context was "strict" in theory and fatal in fact." See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Rights that are not fundamental face considerable limitation in the name of legislative pursuit of legitimate state interests and exercise of the police power.

John Finnis suggests that most of the practical import of the type of limitations in European codifications (of the sort that Glendon admires) is captured in the clause, "due recognition and respect for the rights and freedoms of others"—a limiting condition even on a strong defense of rights. JOHN C. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 214-15 (1980) (quoting and interpreting Article 29 of the Universal Declaration of Human Rights).

249. See *infra* subsection IV(C)(1); see also *supra* text accompanying notes 62-63.

250. See *supra* Section I(B).

251. Cf. JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 157 (1980) (arguing that an important feature of rights is that "[k]nowing that one has rights makes

mitment to individual freedom could survive the weaker form of rights that Glendon appears to advocate, particularly in the case of vulnerable individuals (for whom the protections of rights are so important, and the promises so often unrealized) being asked to moderate their claims against the state.²⁵²

Second, the communitarian eschewal of further rights talk in favor of appeals to social virtues seems forgetful both of the extent to which prior victories in securing, for example, civil rights involved challenging and disturbing the community status quo and of how the language of social virtues and the common good (as well as the costs of social change) may be deployed to reject such challenges. Would communitarians accept rights at least as a fall back position if an appeal to social virtues fails? Finally, if a communitarian model of rights would shift responsibility from courts to legislatures, that move itself would seem to suggest both a less central role for rights and more attention to the costs of rights to the community.²⁵³

In conclusion, it is not clear how communitarians would factor social costs and responsibilities into defining, justifying, and enforcing rights.²⁵⁴ Is the message of the irresponsibility critique that rights are privileges, protected only as long as they are exercised responsibly?²⁵⁵ A similar concern attends conditioning enforcement of rights on a determination of community approval or of the interests of the community.²⁵⁶ One of liberalism's core values

not only claiming (and self-respect) but also releasing (and magnanimity) possible").

252. Barton, *supra* note 36, at 807, 812.

253. I find the communitarian literature somewhat murky on this point. See, e.g., David Schuman, *Communitarian Search and Seizure*, 3 RESPONSIVE COMMUNITY, Spring 1993, at 32, 33-38 (advocating a "law first, rights second" approach to search and seizure law and a shifting of responsibility and initiative in this area from courts to legislatures).

254. Cf. West, *supra* note 9, at 79-85 (arguing for a defense of rights that would require "public regarding arguments" to support rights by referring to the responsibilities that they entail and by demonstrating that freedom is deserved).

255. See Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 510 & n.8 (1993) (citing the Platform, *supra* note 5, as an example of contemporary communitarians implying such an understanding of rights).

256. Addressing the question of rights vulnerable to interest balancing at their core, Feinberg observes,

It is only a small parody to interpret the prima-facie right as permission to do anything except what one shouldn't, and to interpret the nonabsolute "right" as permission to do anything for which permission is not subsequently withdrawn. These are hardly "rights" that one can stand upon, demand, fight for, or treasure. They are "rights" that make men humble, not claims that make men bold.

is individual liberty, which includes "the right to be different, the right to pursue ideals one's neighbor thinks wrong, . . . and so forth."²⁵⁷ If responsive communities come up with lists of values we all share and hold people accountable to some collective notion of social and moral duty, is there any longer a right to pursue ideals one's neighbor thinks are wrong? If recognition of a right is conditioned on whether it has desirable consequences for or imposes costs on others, it may no longer be a right in any meaningful sense.²⁵⁸

4. *Which Costs Count?* Even assuming, as the communitarians do, that the social costs of rights should factor into the recognition and enforcement of rights in a manner different than they do in liberal accounts, such a communitarian project must reach conclusions about how to measure social costs relative to the value of rights, as well as when to use legal (versus nonlegal or social) means of linking rights and responsibility. For example, how would communitarians weigh the costs of protecting rights against the costs of not doing so? What is the cost to individuals of coercion

FEINBERG, *supra* note 109, at 83.

257. HOLMES, *supra* note 8, at 4.

258. See Marion Smiley, *Is Corporatism the Answer? Fox-Genovese's Feminist Theory*, 18 LAW & SOC. INQUIRY 115, 130 (1993) (commenting on the quest for a socially obligated and personally responsible freedom (as opposed to the supposed prevailing conception of liberty as license) and observing that "any right that can be taken away from individuals on the grounds that it is no longer in sync with communal beliefs is not much of a right"); see also George Kateb, *Democratic Individuality and the Meaning of Rights*, in LIBERALISM AND THE MORAL LIFE, *supra* note 8, at 183, 202 (arguing that a right is "denatured" if it hinges on a collective determination of well-being).

How do or should the consequences of rights enter into their defense or limitation? For example, notwithstanding his account of the First Amendment, which may permit social harm, *supra* note 195, Justice Scalia has rejected an analysis of liberty under the Due Process Clauses that fails to examine the consequences of the exercise of that liberty. He has suggested that such an analysis would be like recognizing a liberty to fire a loaded gun into someone else's body. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989). On this analysis, Justice Scalia rejected the assertion of a biological father's constitutionally protected right to a relationship with his daughter because of the consequences for the mother's familial relationship with her husband and the daughter. *Id.* at 127. Justice Scalia, joining Chief Justice Rehnquist and Justices White and Thomas, would apply this analysis and gun analogy to abortion, which he sees as a uniquely destructive act distinct from other exercises of liberty. See, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2859 (1992) (Rehnquist, C.J., concurring in part and dissenting in part). In both cases, Justice Scalia would not recognize a fundamental constitutional right. In discussing abortion below, I ask about the implications of assessing constitutional rights with reference to their consequences. See *infra* text accompanying notes 385-87.

or restriction? What is the cost of the risk of government error in weeding out costly exercises of rights?²⁵⁹ An inquiry into which costs count and how much they count will likely yield considerable, conscientious disagreement.

The one clear example of a near-absolute right that the communarians defend strongly, and even use to illustrate how rights may license irresponsible and socially harmful conduct, is the First Amendment.²⁶⁰ Communarians balance the values of the First Amendment and the risks of censorship against the harms of hateful, racist speech quite differently than do critical race theorists and other scholars who argue that the costs of such speech fall disproportionately on members of the groups at whom the speech is directed and thus imperil their equal citizenship.²⁶¹ Similarly, to the extent that the communarians address and recognize the harms of pornography,²⁶² it is doubtful whether they would support civil rights measures advocated by some (although certainly not all) feminists who argue that pornography is not "only words" and that it contributes centrally to the inequality of women and to violence against them.²⁶³ The very comparative law enterprise that Glendon favors, however, lends support to limits on rights of

259. For a discussion of the government error rationale, see *infra* text accompanying notes 334–36. For an analysis of the costs of protecting or restricting rights from a law and economics perspective, including the risk of government error, see Richard A. Posner, *Free Speech in An Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986).

260. See *Platform*, *supra* note 5, at 13 ("The First Amendment is as dear to communarians as it is to libertarians and many other Americans.").

261. See MARI J. MATSUDA ET AL., WORDS THAT WOUND (1993); see also CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 180–93, 197–208 (1993); Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992).

262. Compare Amitai Etzioni, *Sexual Harassment, Second Degree*, 3 RESPONSIVE COMMUNITY, Winter 1992–1993, at 54, 54–56 (raising doubts about characterizing exposure to Goya's *Naked Maja* portrait, pin-up calendars, sexual jokes, and flirtations as sexual harassment and arguing that "[a]cts that merely contribute to a sexually drenched climate"—rather than pressure to engage in sexual acts—should be treated as a lesser, or "second degree," form of sexual harassment) with Sharon J. Pressner, *Pornography: Free Speech vs. Civil Rights*, 3 RESPONSIVE COMMUNITY, Summer 1993, at 78, 78–82 ("But, before we dismiss the civil-rights legislative approach outright, can we continue to tolerate brutal images that may contribute to incidents of sexual violence against women?").

263. CATHERINE A. MACKINNON, ONLY WORDS (1993). For communitarian discussion, see Pressner, *supra* note 262. For feminist positions opposing the model ordinance drafted by MacKinnon and Andrea Dworkin, see Nan D. Hunter & Sylvia A. Law, *Amici Curiae Brief of Feminist Anti-Censorship Taskforce et al.*, American Booksellers Ass'n v. Hudnut, reprinted in 21 J.L. REFORM 69 (1988); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993).

expression in view of individual and social harms, competing rights, and the violation of community standards.²⁶⁴ It is not clear why such a stance is not more communitarian than the strong defense of the First Amendment that the new communitarians offer.²⁶⁵

To offer another example, the new communitarians depict the two-parent heterosexual family as a principal "seedbed of civic virtue" and place reinvigoration of such families, by using a combination of facilitative, persuasive, and coercive measures, at the core of their project of moral revival. In contrast, Robin West, a "progressive" feminist scholar, submits that "progressive" feminists believe that the greatest harms to women come from male violence against them in the home and on the street and from the injustice that the nuclear family imposes on women and children.²⁶⁶ She argues that constitutional rights of negative liberty immunize the private realm from interference by the state despite the costs to the positive liberty of women and other subordinated people.²⁶⁷ Although one might challenge this feminist critique of constitutional privacy rights, it nonetheless indicates a view of the family as less a "haven in a heartless world" than a "hellhole."²⁶⁸

One could foresee similar disagreements over which costs count, and how much, with respect to a wide array of individual

264. See, e.g., *Regina v. Butler*, 1 S.C.R. 452 (Can. 1992) (classifying pornography as obscene, and therefore falling outside the Canadian Charter of Rights and Freedoms, and upholding restrictions on it in view of the harm to society, including the effect on attitudes toward women); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341 (1989) (citing Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, which outlaws racist propaganda).

265. Cf. Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

266. See West, *supra* note 235, at 775. West also argues that the free exercise of religion has contributed to the subordination of women. *Id.* at 776. For an account of the alleged harms to women from organized religion, see Mary E. Becker, *The Politics of Women's Wrongs and the Bill of Rights*, 59 U. CHI. L. REV. 453, 458-86 (1992). But see Randy Lee, *A Look At God, Feminism, and Tort Law*, 75 MARQ. L. REV. 369 (1992) (noting West's and Becker's criticisms but arguing that second-stage feminism should take into account Judeo-Christian values).

267. West, *supra* note 235, at 775-76 (arguing that the greatest harms to subordinated members of society come not from state power but from "private power, whether of a patriarchal, racist, homophobic, or capitalist sort"). Of course, some of the injustice that West is discussing is the uneven division of labor in the home, which some communitarian literature also criticizes.

268. For the formulations in the text, see CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD* (1977); MacKinnon, *supra* note 9, at 1311.

rights. Such disagreements raise the question of the relative costs of protecting responsibility as autonomy and promoting responsibility as accountability. To evaluate such costs, it is important to consider the justifications for a regime of rights. A consideration of the second strand of the irresponsibility critique, wrongness, illuminates those justifications.

B. *The Wrongness Critique*

The wrongness strand of the new communitarians' irresponsibility critique of rights involves a feature of legal rights captured by the communitarian slogan, "the gap between rights and rightness;" that is, one may have a "right" to do "wrong" acts. As the Responsive Communitarian Platform explains, "To say that 'I have a right to do X' is not to conclude that 'X is the right thing for me to do.' . . . [Rights] do not in themselves give a person a sufficient reason to perform [protected] acts."²⁶⁹ In explaining this gap and its implications for the communitarian agenda, William Galston states, "Between rights and rightness lies a vast terrain where moral argumentation and (in some cases) forms of public persuasion have a legitimate role."²⁷⁰ Indeed, because the language of rights is said to be morally incomplete, people fail to appreciate the distinction between, and tend to equate, rights and rightness. Moreover, Etzioni asserts, "Many Radical Individualists confuse the right to be free from government intrusion with a non-existent 'right' to be exempt from the moral scrutiny of one's peers and community."²⁷¹

If such a gap exists, the wrongness critique challenges defenders of legal rights to justify those rights. I challenge communitarian arguments about the messages of rights, drawing not only on liberal defenses of rights but also on contemporary societal debate over a number of constitutional rights. I suggest that justifications of rights assume that rights protect and call for the exercise of responsibility, although one must differentiate notions of responsibility as accountability from those of responsibility as autonomy. Liberal responsibility talk emphasizes that rights protect autonomy, i.e., that they locate in individuals the responsibility to make im-

269. *Platform*, *supra* note 5, at 14.

270. GALSTON, *supra* note 5, at 281.

271. ETZIONI, *supra* note 2, at 38.

portant decisions in accordance with, or accountable to, the responsibilities of conscience. Communitarian responsibility talk, by contrast, stresses that rights require accountability, i.e., that individuals exercising rights should not be guided primarily by untutored conscience but by the responsibilities, duties, and moral claims laid on them by the moral voice of the community. I argue that the deployment of responsibility talk in Dworkin's recent work²⁷² offers an opportunity to assess a liberal vocabulary of rights that addresses the issue of responsibility in the sense of both autonomy and accountability. Pressing questions in this area include how that liberal account of rights and responsibilities compares with the proposed communitarian correctives and what role government may properly play in encouraging responsibility.

1. *The Morally Incomplete Language of Rights.* The Responsive Communitarian Platform's observation of a distinction between rights and rightness is neither a new nor a controversial assertion about the relationship between legal rights and what is morally right. As Dworkin observed in *Taking Rights Seriously*, "[t]here is a clear difference between saying that someone has a right to do something [in the strong sense of a legal right] and saying that it is the 'right' thing for him to do, or that he does no 'wrong' in doing it."²⁷³

What is the significance of this difference? To charge that the language of legal rights is morally incomplete implies that legal rights fail us as a guide to what we ought to do because they do not talk about moral rightness or moral responsibility. Yet contemporary liberal rights theorists do not claim that the purpose of declaring individual rights is to signal the requirements for "a fully human and morally satisfactory life" or that the menu of one's legally permissible choices is a full account of one's moral duties and responsibilities.²⁷⁴

272. See DWORKIN, *supra* note 17.

273. DWORKIN, *supra* note 12, at 188 (offering the example of gambling). Generally, this discussion focuses on legal rights to moral independence and not on the philosophical question whether there is a moral right to do the wrong thing. Some philosophers have argued that there is a moral right to do wrong, but Galston denies that there is such a right. See Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21 (1981); William A. Galston, *On the Alleged Right to Do Wrong: A Response to Waldron*, 93 ETHICS 320 (1983); Jeremy Waldron, *Galston on Rights*, 93 ETHICS 325 (1983).

274. See, e.g., FEINBERG, *supra* note 251, at 156 ("[K]nowing that one has rights and being prepared to act accordingly are not sufficient (but only necessary) for a fully hu-

There may be constraints on rights that are legal, moral, or social and take the form of duties or responsibilities owed to self, other persons, the community, or humanity. Independent of the community's raising its moral voice or laying moral claims,²⁷⁵ people might consider themselves under moral duties, for example, to engage in benevolence.²⁷⁶ The communitarians rarely dwell on internal convictions of duty, manifesting a lack of faith in a conscience unbolstered by the community's moral voice. Indeed, to put the point bluntly, when communitarians state that rebuilding community is vitally important "because the social pressures community brings to bear are a mainstay of our moral values,"²⁷⁷ it makes one wonder whether the form of accountability they seek is not primarily the social pressures of an old-fashioned shame society, in which people refrain from acting out of fear of gossip or that "people will talk."

Yet communitarians charge that rights talk so exalts individual autonomy that right-holders view themselves as properly exempt not only from responsibilities but from any moral scrutiny or dis-

man and morally satisfactory life."). By saying "contemporary," I acknowledge that, in earlier historical periods, the notion of a right apparently was linked to "the right," and a right was understood as a right to act rightfully or justly. Some political and legal philosophers suggest that the separation of a right in the sense of a power or liberty to act from a normative notion of rightness or justness began with Grotius and culminated in Hobbes's separation of law and rights. See FINNIS, *supra* note 248, at 205-10; RICHARD TUCK, *NATURAL RIGHTS THEORIES* 67-68, 130 (1979). For a contemporary Catholic natural law account speaking of rights and duties as correlative, see John Langan, *Catholicism and Liberalism—200 Years of Contest and Consensus*, in *LIBERALISM AND THE GOOD*, *supra* note 210, at 105, 109-14.

275. In contrast to the accounts of legal rights, which regard my right as logically correlative with other people's duties, see *supra* text accompanying notes 198-203, the communitarians' intent is to make the moral claims of others correlative with the moral duties of a right-holder and thus constrain legal rights by recourse to moral duties.

276. Explaining why she went to Bosnia to stage a play, Susan Sontag stated that she felt it was her duty to go and that it would not have been wrong if she died there. See *MacNeil/Lehrer NewsHour: Conversation* (PBS television broadcast, Aug. 31, 1993) available in LEXIS, NEWS Library, SCRIPT file (statement of Susan Sontag). Similarly, Joel Feinberg asserts that, without knowing the duties correlating to rights, there could be no sense of going beyond what is required to supererogatory conduct towards others. See FEINBERG, *supra* note 251, at 156-57.

277. ETZIONI, *supra* note 2, at 30, 40 (arguing that "individuals' consciences are neither inborn nor—for most people—self-enforcing"). Presumably, the Platform is one source of exhortation. Communitarians also might favor a Declaration of Responsibilities to give moral guidance to right-holders about "the right thing to do." See *Harper's Forum*, *supra* note 20, at 51 (statement of Mary Ann Glendon); *id.* at 53-54 (statement of Benjamin Barber).

approval. Worse still, other people shrink from expressing such disapproval or making moral claims on them. I now turn to those charges.

a. Does rights talk foster indifference? The new communitarians contend that people generally hesitate to use moral suasion because they think that legal rights do, or should, insulate people from the moral scrutiny of their neighbors and peers.²⁷⁸ "Liberal virtues"²⁷⁹ of tolerance, it is argued, make people hesitant to make judgments about the choices (and characters) of others.²⁸⁰ People may refrain out of an attitude that we should live and let live, that the choices of others are not our business. Such an attitude might reflect the very atomism of contemporary life, the threadbare social fabric that the communitarians lament. Alternatively, not making moral claims on one's neighbor as she exercises her rights might reflect respect for human moral agency, along with a notion of the difficulty of assessing what is right for another person to do without full knowledge of her circumstances.²⁸¹ Do such attitudes somehow stem from an inference of a right to insulation from moral voices and attitudes of indifference toward, or disinterest in, the choices of others? Do liberal justifications of rights foster such indifference?

Leading liberal defenses of rights, such as those advanced by Mill and Dworkin, do not advocate indifference by members of society concerning each other's choices. Protection of rights does not preclude citizens from a range of expression and behavior concerning the exercise of rights. Although they take individual moral independence seriously, defenders of liberty from Mill to Dworkin do not claim that citizens have no interest in the moral choices of other citizens.

Mill urged that his advocacy of the harm principle, which governs the realm within which a society might legitimately act

278. See ETZIONI, *supra* note 2, at 34-39; cf. West, *supra* note 9, at 71-72 (arguing that, under "liberal legalism," when we afford people their rights, it exhausts our relationship to them).

279. GALSTON, *supra* note 5, at 213.

280. *Id.* at 222; GLENDON, *supra* note 1, at 127; Sherry, *supra* note 16, at 11; cf. MACEDO, *supra* note 8, at 233-40 (discussing the consequences of a "plurality of values").

281. See MACEDO, *supra* note 8, at 234 (noting the "difficulty of entering into the experiences of others in a way that would be adequate to fathom and evaluate their personal projects and choices").

coercively against individuals, should not be understood as an assertion that people have no interest in each other's actions; he urged citizens to take an interest in each other's happiness and well-being.²⁸² As noted above, in the realm in which society may not act coercively, he recognized a wide range of acceptable means by which society could attempt to influence individuals in their exercises of liberty and signal disapproval of some exercises.²⁸³ At the same time, Mill recognized that social disapproval could amount to compulsion or tyranny and praised variation, change, and diversity in lifestyle. A Millian would be dubious about the communitarian allusion to a chorus of moral voices, the appeal to tradition, and the certitude that we can come up with a list of values we all share and hold each other to them.

Dworkin envisions liberal citizens who care passionately about what they think is good and indeed argue with and persuade each other about their convictions of the good life.²⁸⁴ For example, in defending the right to procreative autonomy, he urges that he not be interpreted to counsel indifference toward the decisions of friends, neighbors, and other citizens, because people's choices do have an impact on the moral environment.²⁸⁵ Citizens must be tolerant, however, and are denied "one weapon:" the use of majoritarian power to prohibit individuals from, or punish them for, acting on their view of what life is best for them.²⁸⁶

The core of communitarian argument about indifference appears to be an attack on liberal "neutrality," or the idea that government should refrain from making substantive moral judgments about the worth of citizens' ways of life by either prohibiting certain choices or premising distribution of resources on them.²⁸⁷ The communitarians' leap from a requirement of government impartiality to an inference of citizen neutrality is unwarranted. Communitarians themselves claim that they reject the use of public coercion to make citizens embrace a communal vision of the good

282. See MILL, *supra* note 205, at 70-72.

283. See *supra* text accompanying note 213.

284. See Dworkin, *supra* note 8, at 113-15.

285. See DWORKIN, *supra* note 17, at 167.

286. Dworkin, *supra* note 8, at 115-16. Liberalism, however, is not "neutral toward ethical ideals that directly challenge its theory of justice." *Id.* at 117 (arguing that liberalism's ethical toleration is not compromised "when a racist is thwarted who claims that his life's mission is to promote white superiority").

287. See, e.g., GALSTON, *supra* note 5.

life in their own lives.²⁸⁸ As I discuss below, one of the important questions that the irresponsibility critique raises is what, in communitarian and liberal accounts, may take place within the realm between government coercion and noninterference.²⁸⁹

b. Contemporary illustrations of the moral vocabulary of wrongness and irresponsibility. Whatever liberal theorists say about the social meaning of rights, communitarians contend that the gap between rights and rightness cannot be closed without a richer moral vocabulary that invokes principles such as decency, responsibility, and the common good. Notwithstanding the recurrent images in the irresponsibility critique of rights as knives, guns, or porcupine quills,²⁹⁰ recognizing and protecting legal rights does not preclude citizens from having views about the right, or responsible, thing to do or communicating those views to each other.²⁹¹ There is considerable evidence available in contemporary society that people do recognize the distinction between rights and rightness and do engage in the sort of moral suasion that the communitarians urge.²⁹² There is nothing wrong with this behavior in

288. *Id.* at 178, 182.

289. See *infra* Section IV(C). Galston's proposed liberalism shorn of neutrality seems to envision not only citizens but also government taking a view about better or worse ways of life and educating and persuading citizens about them. See GALSTON, *supra* note 5, at 222.

290. See, e.g., *MacNeil/Lehrer NewsHour: Conversation* (PBS television broadcast, May 25, 1993), available in LEXIS, NEWS Library, SCRIPT File ("[I]t's that . . . our rights, which are kind of knives that . . . cut us off from our identity and membership in the American Nation [T]hat's the problem I think with rights.") (statement of Benjamin Barber); Birnbaum, *supra* note 128, at 16 ("I have [an] image of human beings as porcupines, with rights as their quills. When the quills are activated, people can't touch each other.") (quoting Roger Conner, executive director of the American Alliance for Rights and Responsibilities); cf. ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 36 (1986) ("The right is a loaded gun that the right holder may shoot at will in his corner of town [T]he give-and-take of communal life . . . [is] incompatible with this view of right").

291. In this Article, I discuss examples involving certain constitutional rights. My monitoring of newspapers for the terms "irresponsible" and "irresponsibility," however, reveals frequent use of such terms, within and outside the context of rights, both to criticize and to condemn decisions, conduct, or speech and to justify conduct or decisions (e.g., for me to do otherwise would have been "irresponsible"). Such references involve individuals, corporations, institutions, and governments and include, in addition to the popular category of journalistic irresponsibility, such categories as fiscal, government, corporate, environmental, parental, sexual, and personal irresponsibility. Consistent with the thesis of this Article, charges of the failure of responsibility both as accountability (i.e., the costs and consequences of irresponsibility) as well as autonomy (i.e., failure to make wise, well-considered, or careful decisions) are common.

292. Of course, the corrective of suasion works only on those who are sensitive to

principle, nor anything about it that is necessarily inconsistent with liberalism.

Vigorous political and societal debates over a number of constitutional rights, prominently the First Amendment, the Second Amendment, and rights of procreative autonomy, illustrate that citizens often perceive a gap between having a right and doing the right thing and that they are raising their voices to close that gap. In all these areas, frequent charges of irresponsible use of rights abound, as do campaigns to urge people to behave responsibly and do the right thing. Often campaigns targeting irresponsibility state the point exactly as the Platform does: they charge the right-holder with confusing a right to do something with doing what is right.²⁹³ They grant that the right-holder has a right to do X but urge that the right-holder has a responsibility not to do X for a number of reasons, prominently, the impact on society.²⁹⁴ People engaging in such efforts may invoke the social and moral responsibility of a community to create a climate in which exercising rights in certain ways that are harmful and disrespectful of others be-

moral condemnation and may be ineffective on the "sensible knave," "insensible" to such pressure, who exploits others without breaking the law. See Annette Baier, *What Do Women Want in a Moral Theory?*, XIX NOÛS 53, 59 (1985).

293. Commenting on the absence of self-regulation by the gun industry, one observer remarked, "The premise seems to be that if they've got the right to do something, than that's the right thing to do." Erik Larson, *The Story of a Gun*, ATLANTIC, Jan. 1993, at 48 (quoting Colonel Leonard Supenski, a national firearms expert with the Baltimore County Police Department).

294. The notion that social responsibility should factor into the exercise of rights is prominent in debates over responsible and irresponsible entertainment, entertainers, and corporate producers of such entertainment. One example is the reaction to the song "Cop Killer," included on rap singer Ice-T's album, *Body Count*, which was released by a Time Warner subsidiary and subsequently withdrawn at Ice-T's request, after vociferous protests (particularly by law-enforcement groups) and calls for boycotts and divestment. See Chris Morris, "Cop" Removal Satisfies Foes, *To a Point*, BILLBOARD, Aug. 8, 1992, at 1 (reporting that law enforcement groups had protested Time Warner's "irresponsibility" and had called for assurances that Time Warner would be "responsible" in the future, asserting their "right" to expect Time Warner to exercise "social responsibility").

The controversy over rap lyrics is part of a larger debate over representations of violence and the alleged link to violent and other anti-social behavior, particularly when an audience of young people and the possibility of imitative conduct are involved. See Bernard Weinraub, *The Talk of Hollywood: From Target of Reno's Attack, an Uneasy Defense*, N.Y. TIMES, Oct. 22, 1993, at C3. For example, Touchstone Pictures received praise for being "socially responsible" after promising to delete a scene from its movie, *The Program*, after three teenagers imitated a scene in the movie, resulting in the death of one and injuries to the other two. See Joan K. Bernard, *Lethal Risks: Young Copycats*, NEWSDAY, Oct. 23, 1993, at 20; *infra* text accompanying notes 299-301.

comes unpalatable and unthinkable.²⁹⁵ Moreover, right-holders themselves invoke notions of taking responsibility and avoiding social irresponsibility to explain why they have voluntarily refrained—perhaps after the suasion of others—from arguably protected conduct.²⁹⁶

Of course, when people say that a person ought not to do something, they sometimes mean not simply that it is the wrong thing to do but also that there is not, or should not be, a legal right to do it.²⁹⁷ That conclusion may flow from a perception that there is too great a gap between rights and rightness to rely on suasion alone to secure accountability. For example, consider the recurring warning that society will not tolerate a free press that “abuses its freedom and fails to fulfill its social responsibilities,” thereby failing to live up to the moral right of freedom.²⁹⁸

295. See *MacNeil/Lehrer NewsHour* (PBS Television broadcast, Sept. 15, 1993), available in LEXIS, NEWS Library, SCRIPT File (statement of Minister Calvin Butts explaining the campaign by African-American community leaders to fight “Gangsta rap” because of its degrading depictions of African-American women and its reinforcement of behavioral stereotypes harmful to the black community). A recent example of public condemnation of speech and appeals to citizen, as well as to community, responsibility to publicize and condemn such speech involved a speech by Nation of Islam Minister Khalid Abdul Muhammad, given at Kean College on November 29, 1993, which was characterized by many as bigoted, racist, anti-Semitic, anti-Catholic, and homophobic. See *Confronting a Hate Speech*, N.Y. TIMES, Jan. 26, 1994, at A20 (stating that “responsible black political and organization leaders have risen to deplore and denounce” the speech and that the “responsible academic community” has an obligation to fight Muhammad’s “hate-filled notions”).

296. See, e.g., Georgia Dullea, *In Your Face*, N.Y. TIMES, Mar. 14, 1993, § 9, at 5 (reporting that *Vanity Fair* retouched a photo of a pregnant model to remove a cigarette because “to show smoking during pregnancy would have been an irresponsible act” in light of the possible message sent to young female readers); Calvin Sims, *Radio Station Bans “Harmful” Music*, N.Y. TIMES, Nov. 13, 1993, at A8 (reporting a rap station’s decision to ban “socially irresponsible music” in order to “serve our community”). In addition, there was strong condemnation of the Olin Corporation’s Winchester Ammunition Division for engaging in “a particularly ugly brand of corporate irresponsibility,” dangerous to public health, by producing the Black Talon bullet, which unfurls sharp claws on impact. *High-Tech Death from Winchester*, N.Y. TIMES, Nov. 13, 1993, at A22 (urging Olin to bow “to morality and common sense” and make legislation unnecessary). Olin subsequently ceased production of the bullet, announcing that the controversy threatened the “good name” of Winchester, “which has stood for the safe and responsible use of ammunition and firearms for 125 years.” Ronald Smothers, *Manufacturer to Withdraw Controversial Ammunition*, N.Y. TIMES, Nov. 23, 1993, at B9.

297. See DWORKIN, *supra* note 12, at 189 n.1. Consider the success of Mothers Against Drunk Driving and other expressions of social outrage that have shaped a public perception that drunk driving is not a legal right.

298. See Lee C. Bollinger, *Why There Should Be an Independent Decennial Commission on the Press*, 1993 U. CHI. LEGAL F. 1, 7 (citing COMMISSION ON FREEDOM OF

Thus, discontent with the irresponsibility that certain constitutional rights are said to permit sometimes leads to calls for restricting those rights,²⁹⁹ as is evident in the area of gun control³⁰⁰ and in proposals to regulate television violence.³⁰¹ With respect to gun control, the issue is often framed as an issue of competing rights: pitted against asserted Second Amendment rights are people's rights to safety and security, said to be threatened by the proliferation of guns and gun-related violence.³⁰² At the same time, at-

THE PRESS, A FREE AND RESPONSIBLE PRESS 80 (1947)); *see also* Julia A. Loquai, Comment, *Keeping Tabs on the Press: Individual Rights v. Freedom of the Press Under the First Amendment*, 16 HAMLINE L. REV. 447 (1993) (arguing for protecting individual rights against the recurring problem of an "irresponsible press"). Many state constitutions contain provisions on freedom of the press that meld freedom with responsibility as accountability for abuse of such freedom. *See, e.g.*, COLO. CONST. art. II, § 10 ("No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty."); FLA. CONST., art. I, § 4 ("Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right."). My research indicates that at least 40 state constitutions have a similar provision on freedom of speech and press.

299. Justice Scalia has argued, "Legal constraint—the opposite of freedom—is in most of its manifestations a cure for irresponsibility. . . . Law steps in—and will inevitably step in—when the virtue or prudence of the society itself is inadequate to produce the needed result." *See* Scalia, *supra* note 195, at 4.

300. Gun control efforts appear to be enjoying some success, which can be attributed to the level of public concern over safety and violence. *See State of the Union, supra* note 32, at A17 (statement of President Clinton praising the passage of the Brady Bill and calling for further steps "to keep guns out of the hands of criminals"); Isabel Wilkerson, *After 2 Weeks of Mayhem, The Nation Is Asking Why*, N.Y. TIMES, Dec. 14, 1993, at B7 (reporting support for banning guns). Additionally, in the wake of tragic stories of children killed by firearms stored in the home, numerous states have passed or are considering legislation aimed at the irresponsible storage of firearms. *See, e.g.*, Ill. H.B. 3072, 87th Leg., 1991–1992 (introduced March 31, 1992) (reporting a finding that "a tragically large number of Illinois children have been accidentally killed or seriously injured by negligently stored firearms, [and] that placing firearms within the reach or easy access of children is irresponsible . . . and should be prohibited"); *see also* FLA. STAT. ch. 790.173 (1992) (expressing a similar concern).

301. *See* Edmund L. Andrews, *Cable Industry Endorses Ratings and Devices to Lock Out Violence*, N.Y. TIMES, Jan. 22, 1994, at A1 (reporting that self-regulation might prevent national legislation); Ellen Edwards, *Reno: End TV Violence*, WASH. POST, Oct. 21, 1993, at A1 (reporting on Attorney General Reno's exhortation to television industry representatives to "acknowledge their role and their responsibilities" and stating that "the regulation of violence is constitutionally permissible").

302. At the swearing in of Judge Louis Freeh to the position of Director of the FBI, President Clinton stated, "You, the American people, have a right to freedom from fear. Your families have a right to security and to safety." *Remarks by President Clinton and Attorney General Janet Reno at the Swearing-In Ceremony of FBI Director Louis Freeh*, Federal News Service, Sept. 1, 1993, available in LEXIS, NEWS Library, FNS file. The gun control debate raises questions about the proper interpretation of the Second

tempts to regulate the sale of firearms draw charges that regulations would punish citizens who use their rights responsibly and would threaten those citizens' safety.³⁰³

Another issue at the heart of an intense social and political controversy is a pregnant woman's right to decide whether to terminate a pregnancy. Opponents of a legal right to choose abortion not only seek to abolish such a right but also engage in speech or actions designed to persuade individual women not to choose abortion, and physicians not to perform it. Some acts go beyond suasion (or harassment, depending on one's point of view) and literally prevent women from exercising their rights in the name of serving higher law.³⁰⁴ To recall the communitarian notion of raising the moral voice, the steady attempts by abortion protestors to use various forms of pressure to stop pregnant women from getting abortions and to cut off the availability of legal abortion makes it difficult to believe that, as a social matter, abortion rights insulate people from the moral claims or scrutiny of others. Such acts, particularly those directed against physicians, appeal to public shaming by "exposing" physicians within their communities, places of worship, and children's schools as "murderers" and "abortionists." These tactics, some critics argue, are responsible for such violent consequences as the actual shooting of

Amendment. The Responsive Communitarians support civil disarmament and hold that "the Second Amendment confers no individual right to bear arms." AMITAI ETZIONI & STEVEN HELLAND, *THE CASE FOR DOMESTIC DISARMAMENT* 34 (1992) (Communitarian Position Paper, on file with author) (proposing draft legislation which would prohibit all handguns). Supporters of gun control charge the National Rifle Association with taking an irresponsible, absolutist stance against all reasonable gun control. See *Dear Member of the N.R.A.*, N.Y. TIMES, Mar. 28, 1993, § 4, at 14. For a call to repeal the Second Amendment for the sake of security and peace, see James M. Banner, Jr., *The Unthinkable Solution to Gun Violence*, WASH. POST, Dec. 4, 1993, at A17.

303. A sampling of letters to the editor concerning gun control following the shooting of passengers on the Long Island Rail Road reveals such uses of the language of responsibility. See, e.g., Susan C. Chambers, *Licensed Gun Owners Don't Commit Crimes*, N.Y. TIMES, Jan. 17, 1994, at A16 (letter to the editor) (describing herself as a former prosecutor who has practiced firearms law and stating, "[L]et's discuss how we can take the guns out of the hands of criminals, instead of disarming the good, accountable and honest members of the social fabric."); Ben Macaulay, *Letter to the Editor*, TIME, Jan. 10, 1994, at 6 ("How many lives might have been saved if there had been on that commuter train at least one law-abiding, responsible, documented citizen carrying a good, working, concealed semi-automatic?").

304. See, e.g., *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (rejecting a federal civil rights claim brought against Operation Rescue members who were blocking access to abortion clinics).

physicians.³⁰⁵ In sum, although the above illustrations are hardly exhaustive, they suggest that responsibility talk and the use of social suasion concerning the exercise of rights are widespread with respect to a number of contemporary problems.

2. *The Messages that Rights Send.* The above discussion suggests that people recognize a gap between rights and rightness with respect to the rights of others but does not tell us what message right-holders themselves think the existence of rights signals. The silence of rights talk about responsibility is said to send people the message that the existence of a legal right implies the nonexistence of a responsibility or even societal approval of the conduct that the right protects. As Justice Scalia describes the inference, "[t]here is a perhaps inevitable but nonetheless distressing tendency to equate the existence of a right with the *nonexistence* of a responsibility," that is, to assume that, if one has a legal right to do something, it is "*proper* and even *good*" to do it.³⁰⁶ With respect to abortion, for example, he describes as a "natural," although not "accurate[,] line of thought" the idea that, "[i]f the Constitution *guarantees* abortion, how can it be bad?"³⁰⁷

This inference is neither "natural" nor "inevitable," despite the silence of rights talk about responsibility. Offering a dispositive response to the irresponsibility critique's charges concerning what messages people draw from legal rights would be difficult because it would involve both testing intuitions and answering empirical questions. I cannot demonstrate that the existence of a legal right sends no message, but I question the premise that the message is a simple equation of rights with rightness (e.g., as Justice Scalia puts it, "how can it be bad?"). Any assumption, like Justice Scalia's, that rights signal rightness stems from an authoritarian notion of law, one that concludes that what the law prescribes is right, what it permits is good, and what it forbids is bad.³⁰⁸ In

305. See *Activists: National Reactions to the Violence in Kansas*, AM. POL. NETWORK, ABORTION REP., Aug. 20, 1993 (quoting National Organization for Women President Patricia Ireland), available in LEXIS, NEWS library, CURNWS File.

306. ETZIONI, *supra* note 2, at 201 (quoting Scalia, *supra* note 195, at 3). It seems odd for someone like Justice Scalia to make this assertion, given his own positivist insistence on the gap between the full scope of natural or inalienable rights and constitutional rights.

307. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., concurring in part and dissenting in part).

308. As argued above, the communitarians seem ambivalent as to what the proper

reality, however, if a citizen does not believe that law is completely coterminous with morality, she might conscientiously question the justice and morality of a law and believe that the acts it prohibits are morally right or just and should be protected by a legal right, or, conversely, that the acts the law permits are immoral or unjust and should be prohibited.³⁰⁹

Thus, the existence of a legal right might be read in a number of different ways. To take the abortion example discussed by Justice Scafia, a shift from criminalizing certain conduct to treating, as a fundamental right, the decision whether to engage in it may in fact reflect a changing consensus about what is moral. Of course, there are vexing causal questions about whether changes in law *cause* changes in mores or *reflect* such changes, or some combination of the two. For example, such a legal change might reflect a changed consensus as to what is moral or simply as to the extent to which law must track morality.³¹⁰ Recognizing a right might reflect acknowledgment that society will not disintegrate if the protected conduct is not criminally prosecuted and punished or that the social costs of criminal sanction at the discretion of the government outweigh the costs of freedom.³¹¹

role of law should be, simultaneously lamenting the extent to which people look to law as a primary carrier of moral messages and arguing that law should have aspirational aims and signal values that society holds dear. *See supra* text accompanying notes 51–53, 60–65, 77–81; *see also* GLENDON, *supra* note 1, at 86–87 (criticizing the acceptance of Justice Holmes's idea of the proper separation of law and morality and his notion that law is designed to enable the "bad man" to predict the material consequences of his actions).

309. One important implication of recognizing that rights do not equate with rightness, or that law and morality are not necessarily coterminous, is the moral responsibility, and perhaps moral right, of citizens to oppose unjust laws and engage in civil disobedience. *See* RAWLS, *THEORY*, *supra* note 8, at 388–91 (explaining that a citizen acts conscientiously if, after assessing how political principles underlying the Constitution apply in a particular situation, he engages in civil disobedience); DWORKIN, *supra* note 12, at 184–222. On the notion of unjust laws in the context of slavery, *see* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 159–91 (1975); DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* 58–104 (1993).

310. *See* Kristin Luker, *The Hard Road to Roe*, N.Y. TIMES, Feb. 20, 1994, § 7, at 7 (reviewing DAVID J. GARROW, *LIBERTY AND SEXUALITY* (1994)) (stating that "[b]etween roughly 1967 and 1972, there was a huge shift in American attitudes about sexuality" as to the moral permissibility of both premarital sex and abortion).

311. *See* Bowers v. Hardwick, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting) ("We have ample evidence for believing that people will not abandon morality . . . merely because some private sexual practice which they abominate is not punished by the law.") (quoting H.L.A. Hart, *Immorality and Treason*, in *THE LAW AS LITERATURE* 220,

A different view might be that the existence of a fundamental right signals that this decision and a range of possible choices are protected out of respect for human dignity and personhood.³¹² Allocating decisionmaking responsibility to the individual may suggest a societal (or constitutional) judgment that it is legally permissible to make such choices and not prudent or appropriate to use law to prohibit them. That there is a range of legally permissible choices, however, does not signal that all choices are equally responsible or equally moral, or even that all legally permissible choices are morally permissible. As I suggest below, the wrongness critique invites the question whether communitarians have a conviction that certain choices protected by rights are never morally appropriate for anyone, indeed, are predictable proxies for irresponsibility.

3. *Is There a Right to Make "Incorrect" or "Irresponsible" Choices?* The wrongness strand of the irresponsibility critique also raises the issue whether there is a right to make "incorrect" or "irresponsible" choices. Liberal justifications of rights often derive basic rights and liberties from a conception of persons as having certain moral powers or human capacities. In that sense, a regime of rights makes assumptions about the possession of capacities for responsibility, maturity, and judgment and does not premise rights on a case-by-case inquiry into the demonstration of such capacities.³¹³ A liberal regime may seek to ensure the development and exercise of moral capacities (e.g., through education), but protecting the opportunity for the exercise of moral powers does not guarantee full development of such powers or their wisest use.³¹⁴

225 (Louis J. Blom-Cooper ed., 1961)); *cf. id.* at 211 ("[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.")) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943)).

312. See *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer & William A. Parent eds., 1992).

313. See *MACEDO*, *supra* note 8, at 32-33; *id.* at 33 (observing that "[n]o 4-year-olds, but most 18-year-olds, attain levels of judgment and responsibility that justify the possession of a range of liberties"); *RAWLS, POLITICAL LIBERALISM*, *supra* note 8, at 19 (describing the second moral power as the capacity to "form, to revise, and rationally to pursue a conception of one's rational advantage or good").

314. See *RAWLS, THEORY*, *supra* note 8, at 504-15 (securing the preconditions for the development and exercise of moral powers); see also *RAWLS, POLITICAL LIBERALISM*, *supra* note 8, at 324-40 (same). For a discussion of the potential problems raised by Rawls's assumption of a society of people with the capacity to be "normal and fully

Along those lines, one reading of the wrongness critique is as a charge that persons are failing to exercise their moral capacities in a responsible way and that the logic of liberal toleration and rights talk precludes consideration of such issues. Of course, a critical question is whether a communitarian corrective would insist on not only moral or social but legal accountability. In either case, the critique manifests a lack of trust in people as moral agents exercising freedom of conscience, capable of behaving with integrity, and living pursuant to genuinely held convictions. The communitarians frankly fear that individual conscience is too weak without the strong reinforcement of the moral voices of others. In that sense, they resemble those critics of liberalism (and, more generally, of post-Enlightenment thought) who charge that people are not good enough for liberalism and fault it for its apparent "fatally flawed assumption . . . that autonomous individuals can freely choose, or will, their moral life."³¹⁵

A common liberal formulation of the issue is that rights protect individuals who act in ways thought wrong by society or by others but that reflect those individuals' own views of the good. Dworkin's analyses often use such a formulation.³¹⁶ Similarly, Roger Pilon argues, "The mere 'irresponsible' exercise of rights, short of violating the rights of others, is itself a right. What else could it mean to be responsible for oneself?"³¹⁷ A right or freedom to exercise rights irresponsibly, he argues, stems from the acceptance of the notion of individual responsibility to pursue happiness as one sees fit, consistent with the rights of others.³¹⁸ Likewise, Stephen Holmes argues that one of liberalism's "core norms or values" is "individual liberty," understood as "a broad sphere of freedom from collective or governmental supervision,

cooperating members of society over a complete life," see MARTHA MINOW, MAKING ALL THE DIFFERENCE 150-51 (1990) (arguing that Rawls's emphasis on autonomy and rationality in forming the social contract leaves out mentally disabled persons, children, and others deemed to lack capacity for rational thought); Holmes, *supra* note 131, at 42 (questioning whether "systematic and self-conscious neglect of the non-cooperator . . . transform[s] justice-as-fairness into a form of just exchange").

315. WILSON, *supra* note 75, at 250. My formulation may suggest too stark a contrast between individual choice and adherence to community suasion. The point is not to deny that persons are importantly shaped by their relationships and communities but to observe that the communitarians give slight attention to inner motivation and convictions.

316. See, e.g., Dworkin, *supra* note 8, at 115; *infra* note 327 and accompanying text.

317. Pilon, *supra* note 255, at 510.

318. See *id.* at 510-11.

including freedom of conscience, the right to be different, the right to pursue ideals one's neighbor thinks wrong, . . . and so forth."³¹⁹ In support of that kind of right to be different, Mill argued that individuals have their own well-being most at heart and know best, or better than the majority (which does not share their particular circumstances and perspectives), what is right for them.³²⁰

Such liberal themes resonate in our constitutional jurisprudence, which, in justifying rights to individual liberty and autonomy, observes that there are competing conceptions of the good (particularly as to matters about which "women and men of good conscience" disagree) and that there may be more than one right choice (especially concerning complex moral matters about which there is deep disagreement).³²¹ That diversity may extend to interpretations of responsibility and of what is the responsible thing to do.³²² Thus, one possible response to the wrongness critique, to the idea of a gap between rights and rightness, is to ask, "Whose idea of rightness, anyway?" or, "Irresponsible in whose view?" Indeed, communitarians, liberals, and others may disagree over substantive moral questions such as whether homosexuality, abortion, sex outside of marriage, and single parenthood are seldom, generally, or always immoral.³²³

Although such a response is arguably a powerful one, linking protection of rights to the diversity of human moral choices need not stem from a complete moral relativism or skepticism, or a denial that there are better and worse, or moral and immoral,

319. HOLMES, *supra* note 8, at 4.

320. See MILL, *supra* note 205, at 71–72, 78–79. Dworkin calls this the "evidentiary" view of why we should protect autonomy, which he argues is inadequate in light of cases in which people act contrary to their own best interests. See DWORKIN, *supra* note 17, at 222–24.

321. Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2807–09 (1992) (opinion of O'Connor, Kennedy, & Souter, JJ.); Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting) (quoting Wisconsin v. Yoder, 406 U.S. 205, 223–24 (1972); (stating that it is not for the majority to say that a minority choice is wrong and the majority alternative right)).

322. See *infra* text accompanying notes 341–43; cf. Dworkin, *supra* note 145, at 497–99 (rejecting the notion that community cohesion demands a unitary sexual ethic and finding it implausible, in a diverse political community, that there could be one uniform "set of standards of sexual responsibility").

323. Perhaps a communitarian vision of ordered liberty would consist in not making certain permissible choices but adhering to conventional views about morality and responsibility.

choices.³²⁴ It instead appeals to what Rawls calls the "fact of reasonable pluralism."³²⁵ that it is an inevitable fact (and not to be regretted) that, in a society that protects basic liberties, such as liberty of conscience and freedom of association, people exercising their moral powers will form and act on divergent conceptions of the good. Moreover, this approach assumes that a stable political order does not require a unitary conception of the good life, a unity that would be possible, if at all, only through the exercise of oppressive state power.³²⁶ In Dworkin's account of liberal toleration, a liberal society rejects the use of such coercive power to compel an individual's adherence to the life others think best for her (even if they may be correct) out of the requirements of equal concern and respect and the view that a life lived "against the grain" of one's own conviction is not a good one and has not been improved.³²⁷

Such defenses of individual freedom, echoed in our constitutional jurisprudence, treat the risk that some people may make incorrect (or irresponsible), although legally protected, decisions as a lesser evil than the outright denial to everyone of the right to make decisions profoundly affecting their individual destiny.³²⁸ Allowing people freedom to make decisions with serious consequences for themselves, and to make mistakes in doing so, respects their dignity and autonomy.³²⁹ Moreover, the development and

324. This seems to be one common basis for criticizing liberal "neutrality." See GALSTON, *supra* note 5, at 89-97.

325. RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 36.

326. *Id.* at 37.

327. See DWORKIN, *supra* note 17, at 167-68; Dworkin, *supra* note 145, at 484-87 (arguing that paternalism cannot improve one's "critical well-being"); Dworkin, *supra* note 8, at 50-51, 115-16 (making similar argument and also arguing that using law coercively deprives an individual of equality of circumstances and resources). Dworkin has argued for a right to "moral independence" rooted in equal concern and respect. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 353-59 (1985). For one powerful criticism, see H.L.A. HART, *Between Utility and Rights*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 198, 210-11, 213-21 (1983).

328. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 781-82 (1986) (Stevens, J., concurring); see also *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2840 (1992) (Stevens, J., concurring in part and dissenting in part) (linking "[t]he authority to make . . . traumatic and yet empowering decisions" to "basic human dignity").

329. *Casey*, 112 S. Ct. at 2842; see also MILL, *supra* note 205, at 56 (noting that, although one "might be guided in some good path, and kept out of harm's way," one might not have much comparative worth as a human being if one had "no need of any other faculty than the ape-like one of imitation").

exercise of personal and moral responsibility require freedom within which to exercise discretion and judgment.³³⁰ Dworkin argues that the fact that, despite accepting the responsibilities of judgment and of living life well, we may make mistakes is "at the very foundation of our ethical lives."³³¹ Thus, a legal right securing the opportunity to exercise moral responsibility may protect mistaken, incorrect, bad, or irresponsible choices.³³² What else could responsibility for oneself mean? Such a possibility is an implication of securing rights and a cost of preserving freedom.

4. *Rights and Responsibilities in Liberal Justifications of Fundamental Rights.* In contrast to the communitarians' account of the morally incomplete language of rights, one could argue that the existence of a legal right, far from obscuring the issue of responsibility, calls for the exercise of moral responsibility precisely because it protects and affords a realm of choice. I have begun to illustrate such an account of rights by drawing on constitutional jurisprudence involving fundamental rights associated with liberty, privacy, and substantive due process and analyzing liberal justifications for such rights. My argument in this subsection elaborates on that account. In the next Section, I offer a brief sketch of responsibility talk in the context of abortion.

There are several ways in which legal rights protect and imply responsibility in liberal rights talk and justifications of constitutional rights.³³³ Such justifications seek to protect responsibility as

330. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 300 (1988) (arguing that responsibility connotes freedom and that "at the core of the notion of responsibility is the exercise of discretion"). This realization may be why communitarians sometimes use the term "responsibility" rather than "duty", see *Harper's Forum*, *supra* note 20, at 54 (statement of Benjamin Barber) ("prefer[ing] the word 'responsibility' to 'duty' because "[t]he modern conception of duty has to balance itself with the individual's autonomy, with human choices" and arguing that democracy—giving law to ourselves—"provides the link between autonomy and duty"); *id.* at 51 (statement of Mary Ann Glendon) (drafting a "Declaration of Responsibilities," instead of one of "dut[ies]," because of a preference for "the hortatory mode over the coercive").

331. DWORKIN, *supra* note 17, at 206; see Martha Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD*, *supra* note 210, at 203, 229 (arguing for the importance of a government role in moving citizens "across the threshold into capability to choose well").

332. MACEDO, *supra* note 8, at 231 ("[T]o be free is to be capable of making choices, of making mistaken or even bad choices.").

333. I focus on constitutional rights because they occupy so central a place in Glendon's critique (e.g., the right of privacy) and because a constitutional right (the First Amendment) is used in the Platform to illustrate the rights versus rightness point. See

autonomy by locating responsibility for making certain fundamental decisions in the right-holder, rather than in the state or other persons, and by recognizing the moral capacity of the right-holder by affording her room to exercise moral responsibility in making decisions or engaging in protected conduct. Moreover, in exercising rights, a person may reflect on her responsibility to herself and to others, as well as on the responsible decision to make in her circumstances.

In explaining the Platform's tenet that rights do not equate with rightness, Etzioni (invoking Justice Scalia) says that rights protect the freedom to be irresponsible and even socially harmful because "the alternative would sweep away too much good . . . along with the bad."³³⁴ That explanation appeals to the risk of government error and reflects a concern that government officials might not exercise their power wisely or responsibly. Although such risk is certainly one reason for affording a sphere of legal immunity from government interference for a range of personal conduct, there are other prominent justifications for rights that more directly implicate notions of the individual responsibility of the right-holder. In those justifications, legal rights protect people against government coercion within certain zones of thought and conduct out of respect for an underlying conception of human personhood, autonomy, moral independence, dignity, or equality. Such conceptions in turn locate moral responsibility in the right-holder. Indeed, some would argue that legal rights stemming from such conceptions have their ultimate basis in moral rights or inalienable, natural rights.³³⁵ In any event, all these ideas suggest a defense of rights that is rooted in respect for human moral capacity and for human moral agency.³³⁶

GLENDON, *supra* note 1, at 45-75, 145-70; *Platform*, *supra* note 5, at 14.

334. See ETZIONI, *supra* note 2, at 201 (quoting Scalia, *supra* note 195, at 4).

335. For a discussion of moral rights, see DWORKIN, *supra* note 17, at 130-31 (discussing moral rights against the government made into legal rights by the Constitution). For a discussion of inalienable rights, see Peggy C. Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. (forthcoming April 1994) (manuscript at 34-35, 43-45, on file with author) (characterizing the abolitionist struggle as being in the name of inalienable civil rights); Pilon, *supra* note 255, at 513 (suggesting that the Ninth Amendment confirms that the people retain certain natural rights).

336. Such commitments are manifest in the liberal political theories of John Rawls and Stephen Macedo, as well as in Galston's responsive communitarian/liberal account of liberalism. See GALSTON, *supra* note 5, at 173-75, 227-31; MACEDO, *supra* note 8, at 207-12, 214-16; RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 19, 334-38.

In understanding this type of justification of rights, it is important to keep in mind a relationship between rights and irresponsibility different from those elaborated by the new communitarians but relevant to understanding constitutional rights and their justification. American history reveals that characterizing groups of people as irresponsible (e.g., characterizing African-Americans as childlike and ignorant) has served to justify denying them rights.³³⁷ We also learn from history that those challenging such denials have argued that recognizing rights affords people wrongly excluded from the community of moral agents the status of persons capable of exercising moral and intellectual responsibility.³³⁸ Peggy Davis argues that appreciating this historical context of the Fourteenth Amendment helps to situate its antitotalitarian (or anticaste) notions of liberty and its restrictions on government interference with moral independence in the realm of individual and family choice.³³⁹

Thus, appeals to human personhood, autonomy, moral independence, dignity, or equality offer powerful accounts of principles in constitutional law concerning the proper limitations on the exercise of legitimate government power against individuals.³⁴⁰ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, its most recent account of the cluster of cases associated with substantive due process, the U.S. Supreme Court spoke of the "right to

337. PHILLIPS, *supra* note 7, at 72.

338. Davis, *supra* note 335, at 55 ("The deepest critiques of slavery were based on an understanding of human rights as they related to human capacities."); see also Elizabeth B. Clark, *Religion and Rights Consciousness in the Antebellum Woman's Rights Movement*, in *AT THE BOUNDARIES OF LAW* 188, 200-01 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991) (noting the influence of abolitionist arguments concerning natural rights and human capacities on feminist arguments for women's rights).

339. Davis, *supra* note 335, at 55 ("Totalitarian control of decisionmaking and social interaction robs the enslaved of the ability to act from moral conviction or to contribute to moral reasoning in the larger community."); see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 787 (1989) (interpreting privacy cases as manifesting an "anti-totalitarian principle"). Davis argues that protecting choice recognizes moral agency and capacity, and contrasts such protection to the experience of slaves, who were controlled and dominated, uprooted from communities, and given no choice. See Davis, *supra* note 335, at 43-52. Such a moral argument for choice has a different underlying premise than some communitarian critiques of choice, which claim that liberalism overlooks that people derive meaning and identity from their communities. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 522-25 (1989).

340. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 8, at 217 (discussing the liberal principle of legitimacy).

define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" and noted that "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state."³⁴¹ *Casey* echoes judicial and scholarly interpretations of constitutional rights that appeal to the idea that a certain realm of freedom with respect to fundamental decisions, which typically implicates ethical or religious convictions, is critical to respect for decisional autonomy or liberty of conscience and to the development of personality and a sense of moral responsibility.³⁴² The issue before the Court in *Casey* was constitutional protection of a woman's decision to continue or terminate a pregnancy: the Court analogized such a decision to a decision about contraception and characterized it as being deeply personal and concerning "not only the meaning of procreation but also human responsibility and respect for it," matters on which there is reasonable disagreement.³⁴³

Dworkin stresses themes of moral responsibility, dignity, and individual integrity in his justification for the Court's privacy jurisprudence. Additionally, he argues that with respect to decisions concerning life and death—abortion and euthanasia—freedom of conscience protected by the First Amendment is in play, calling for toleration by the government.³⁴⁴ Such a justification stresses the importance of allowing room for responsibility as autonomy.

Dworkin also emphasizes the importance of how people exercise their freedom: "It matters as much that we live up to our freedom as that we have it. Freedom of conscience presupposes a personal responsibility of reflection, and it loses much of its meaning when that responsibility is ignored."³⁴⁵ Dworkin's elaboration of the personal responsibility of reflection certainly contemplates

341. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2807 (1992) (opinion of O'Connor, Kennedy, & Souter, JJ.).

342. Indeed, the much-praised and often-maligned notion of the "right to be let alone" also involves protection of Americans in their thoughts, emotions, and sensations by reference to "the significance of man's spiritual nature, of his feelings and of his intellect." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). For a discussion of liberty of conscience as embracing decisional autonomy, see James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 253-56, 294-97 (1993). But see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 172-75 (1992) (asserting that liberty of conscience does not protect autonomy or choice but only religious obligation).

343. *Casey*, 112 S. Ct. at 2807-08.

344. DWORKIN, *supra* note 17, at 160-68.

345. *Id.* at 239.

that it may include taking into account others' views and one's connections to them, but it emphasizes the reflective exercise of freedom of conscience. Although most people, he argues, treat living as a "sacred responsibility," this exercise of personal responsibility is difficult and complex.³⁴⁶ Moreover, even people who share beliefs in certain intrinsic values may disagree deeply over how best to respect those values and whether particular decisions are responsible or irresponsible.

Indeed, Dworkin suggests that government may encourage responsibility in the exercise of freedom of conscience in deciding whether to have an abortion or to request euthanasia. He admonishes, however, that the government may not insist on conformity in making that decision or use coercion to obtain a particular decision.³⁴⁷ I now turn to consider how Dworkin's liberal approach attempts to meld responsibility as autonomy with responsibility as accountability in the context of abortion and to compare his efforts with Glendon's communitarian approach.³⁴⁸

C. *Responsibility as Accountability Versus Responsibility as Autonomy: Glendon and Dworkin on Abortion*

1. *Glendon on Abortion: Is It the Message that Matters or Is Abortion a Wrong Right?* Glendon uses American abortion law as an example of the extremes of rights talk, and her analysis illustrates key features of the irresponsibility critique. Her stance on legal abortion offers an instance in which the irresponsibility critique goes far beyond the rhetoric of rights to the substance of the underlying right itself. Initially, in *Abortion and Divorce in Western Law*, Glendon offered an "anthropological" approach to abortion law to learn about the constitutive message abortion law sends or

346. *Id.* at 205-06, 238.

347. See *infra* text accompanying notes 366-78.

348. Glendon has favorably described the European laws as "communitarian." See GLENDON, *supra* note 19, at 33-39, 133-34. Some communitarians have stated that the European abortion laws Glendon describes in *Abortion and Divorce in Western Law* have "many virtues" and that her analysis shows that to frame the abortion issue in terms of rights is "to inhibit realistic, morally engaged social debate about the nature of abortion," BELLAH ET AL., *GOOD SOCIETY*, *supra* note 5, at 129-30. In describing Glendon's approach as communitarian, however, I do not intend to attribute it to the Responsive Communitarian movement as a whole. As noted previously, the Responsive Communitarians themselves have taken no public position on abortion and have observed that the divisiveness of the issue may make a solution impossible. See *supra* note 189 and accompanying text.

the "story" it tells about a society.³⁴⁹ She contrasted America's "extreme and isolating version of individual liberty"³⁵⁰ (as endorsed in *Roe v. Wade*) of a pregnant woman who has no responsibilities to others and to whom nothing is owed by society, with Western European laws striking a balance between women's liberty and their responsibilities as members of society who are carrying unborn life.³⁵¹ Glendon suggested that America, as well as women's interests, might be better served by a "compromise" abortion law, such as the French law, which guaranteed "the respect of every human being from the commencement of life" but permitted, and paid for, first trimester abortion if a woman stated, after a waiting period and counseling in favor of childbirth, that she was in "distress."³⁵² Deflecting questions over the actual impact the respective laws would have on the practice of abortion, particularly on the number of abortions, Glendon asked her readers on both the pro-life and pro-choice sides to accept that, even if the access to abortion and numbers of abortions were the same, a different abortion law would send a different message about respect for life and the seriousness of the abortion decision.³⁵³

In *Rights Talk*, Glendon argues that the "lone-rights bearer" imagined by the right of privacy, an isolated individual with the "right to be let alone," bears little resemblance to and poorly serves the needs of "vulnerable pregnant women." She asks whether women might not fare better under a legal approach envisioning a woman as "situated within, and partially constituted by, her relationships with others."³⁵⁴ Her contrasting European example, West Germany's abortion law (prior to the unification of Germany, the passage of a more liberal law, and the recent invalidation of that law by the Federal Constitutional Court), balanced women's statutory right to free development of their personalities

349. See GLENDON, *supra* note 19, at 1-9.

350. *Id.* at 62.

351. See *id.* at 40-57. Glendon's book has received considerable praise, but her empirical account of European law and its contrasts to America law has been criticized. See, e.g., Brief of Amicus Curiae Int'l Women's Health Organizations in Support of Appellees at 2-20, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605); Jane M. Cohen, *Comparison-Shopping in the Marketplace of Rights*, 98 YALE L.J. 1235 (1989) (reviewing GLENDON, *supra* note 19).

352. GLENDON, *supra* note 19, at 18-20, 52-58, 155-57 (providing the text of the French Abortion Law of 1975).

353. *Id.* at 59-62.

354. GLENDON, *supra* note 1, at 48, 60-61.

(subject to the limits of the "moral code" and the rights of others) against fetuses' right to life.³⁵⁵ The West German law seems to have restricted abortion (after compliance with an informed consent procedure aimed at facilitating continuation of the pregnancy) to instances of a medical determination that a pregnancy would pose a serious danger to a woman's physical or mental health that could not otherwise be averted. Glendon argues, however, that this step was simply one more procedure signalling the "gravity" of the decision and that abortion was "relatively easy to obtain" in the first trimester of pregnancy.³⁵⁶

Recently, Glendon's name appeared among those individuals and organizations calling for "A New American Compact: Caring About Women, Caring for the Unborn."³⁵⁷ The proposers of the Compact (whose other signatories include fellow Responsive Communitarian The Reverend Richard John Neuhaus, along with many organizations and public figures prominent in opposition to legal abortion³⁵⁸) call for serious moral reflection by the American people, whose voice must be heard through the "normal procedures of democracy." "America," the Compact announces, "does not need the abortion license," which "has ushered in a new era of irresponsibility toward women and children," but instead needs policies that "responsibly protect and advance the interests of mothers *and* their children, both before *and* after birth." Thus, the

355. *Id.* at 61-65. In 1992, the German Parliament passed legislation intended to reconcile the restrictive laws of the former West Germany with the more permissive laws of the former East Germany. The resulting statute was invalidated by the Federal Constitutional Court because it was held to violate constitutional guarantees said to protect a fetus's right to life. Marc Fisher, *German Court Rules Most Abortions Illegal*, WASH. POST, May 29, 1993, at A20.

356. GLENDON, *supra* note 1, at 65. On the question of access under the former law, see Jonathan Kaufman, *Liberal German Abortion Law Falls*, BOSTON GLOBE, May 29, 1993, at 1 (noting that, "in practice," sympathetic doctors could approve abortions for a wide range of reasons, but women's degree of access to abortion varied from "relatively free" to "difficult" depending on the geographical location and religious affiliation of doctors).

357. *A New American Compact: Caring About Women, Caring for the Unborn*, N.Y. TIMES, July 14, 1992, at A23 [hereinafter *Compact*].

358. For example, Robert P. Casey, Governor of Pennsylvania; officers of Feminists for Life of America; Sidney Callahan; and Nat Hentoff and law professors Gerard V. Bradley and Michael McConnell are signatories. The actual text of the Compact strikingly parallels many of the ideas prominent in the rhetoric of signatory Feminists for Life of America. See Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, in FEMINIST NIGHTMARES: WOMEN AT ODDS (Jennifer Fleischner & Susan Ostrov Weisser eds., forthcoming 1994).

goal should be the "enactment of the most protective laws possible on behalf of the unborn," ideally, a law prohibiting abortion but recognizing an exception in the "very rare[]" cases in which pregnancy poses "a threat to maternal life or health." The Compact sounds the theme of choice—not choice "faced by isolated women exercising private rights," but choice by citizens collectively to determine "[w]hat kind of a people are we?," "[w]hat kind of a people will we be?," and "[w]hose rights will we acknowledge?" The Compact condemns *Roe* for its denial to "every human being, for the first nine months of his or her life, of the most fundamental human right of all—the right to life," a denial reversing America's progress toward justice for all. It is time, the Compact proclaims, "to reconstitute the story of America as a story of inclusion and protection."³⁵⁹

In view of the Compact, it seems reasonable to say that much more than the rhetoric of rights and rights talk, the message the law sends, or the law's use as a tool to educate and exhort are at issue for Glendon.³⁶⁰ To make the story that the law tells come out right, the law must prohibit abortion, except in very rare cases. Ironically, notwithstanding her earlier disavowal of a competing rights model as impoverished, it is precisely the language of rights (i.e., the fetus's right to life) that supports the West German law and that is used in the Compact to justify rejecting an abortion right for women.

For Glendon, responsibility with respect to pregnant women seems to mean accountability, the obligations and duties that society may reasonably demand of them,³⁶¹ and it appears that such

359. *Compact*, *supra* note 357, at A23.

360. This observation is not meant to reject the possibility that Glendon has changed her mind about an appropriate abortion law since writing her books and now would argue that even the European laws are too lenient. My main point is that, in presenting these European laws, she has emphasized the relative ease of obtaining abortions notwithstanding the written laws. The Compact, in calling for a law prohibiting abortion with an exception only in the very rare cases of threats to maternal life or health, suggests a different stance on the relationship between law as written and as enforced.

361. For example, Glendon notes that the West German Court specified that legislation must proceed in principle "from a duty of bringing the pregnancy to term" and quotes the following language from the opinion as to the purpose of legislative provision of welfare and social assistance:

In this context it will be principally a matter of strengthening the willingness of the person about to become a mother to accept the pregnancy with responsibility to self and to bring the fetus to full life. . . . It should be the most eminent purpose of government efforts on behalf of the protection of life to reawaken and, if necessary, strengthen the maternal protective will [in cases] where it has

responsibility should be secured through the coercive power of law, not through mere suasion or exhortation by the moral voice of the community. Although Glendon's earlier praise of the French scheme might suggest some support for responsibility as autonomy (subject to such suasion), her advocacy of the West German law as preferable to *Roe*, as well as her support for the Compact, suggest that responsibility does not entail the exercise of autonomy by a pregnant woman in deciding whether to terminate a pregnancy—or rather, that the only permissible, responsible outcome of a pregnancy (absent threat to life or health of a pregnant woman) is continuation to term. Indeed, the issue is one of societal, rather than individual, choice. For Glendon, the right of privacy from the outset had a regrettably atomistic cast, but it took a fateful turn when it evolved into a defense of individual autonomy, rather than marital and family privacy.³⁶² Like many opponents of *Roe*, she rejects any fundamental right that affords a realm of legal immunity, or unaccountability, wherein women may choose to terminate pregnancy.

Glendon's critique of American abortion law attacks both the legal immunity that abortion rights afford the right-holder and the social messages that she claims such immunity sends. For Glendon, abortion rights also are wrong rights because they license the irresponsibility of women's male partners and of society, allowing them to be unaccountable to and ignore the needs of pregnant women and mothers.³⁶³ Thus, she rejects a woman's right to autonomy, yet she argues that abortion does not further women's equality and that women neither need nor want the autonomy

been lost.

GLENDON, *supra* note 19, at 27, 28 (quoting Judgment of Feb. 25, 1975, BVerfG, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.), translated in THE ABORTION DECISION OF FEBRUARY 25, 1975, OF THE FEDERAL CONSTITUTIONAL COURT, FEDERAL REPUBLIC OF GERMANY 63 (Edmund C. Jann trans., 1975)).

362. GLENDON, *supra* note 1, at 56–57 (describing the decisive move from *Griswold v. Connecticut*, 381 U.S. 479 (1965), to *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

363. See *id.* at 65–66. An instructive contrast in this regard is the equality arguments that some feminist legal theorists use in defense of abortion rights. Such theorists stress the unequal conditions under which women become pregnant and/or mothers and the society-wide lack of support for pregnant women to challenge assumptions of female irresponsibility, to illustrate why women lack full autonomy, and to explain why, under conditions of sex inequality, abortion should be legally protected. See, e.g., MacKinnon, *supra* note 9; see also McClain, *supra* note 358 (contrasting MacKinnon's position with that of Feminists for Life of America).

bestowed on them by the right of privacy.³⁶⁴ Instead, she would appeal to social virtues and responsibility and a model of mutual responsibility and accountability.³⁶⁵

2. *Dworkin on Abortion: Taking Rights Seriously by Exercising Rights Responsibly?*

a. Responsibility versus conformity. Dworkin interprets the Supreme Court's privacy jurisprudence as protecting from coercion by state or majoritarian judgments a realm of decision-making critical to the "sense of moral responsibility."³⁶⁶ In his recent book, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*, responsibility talk features prominently, not only the responsibility of the individual right-holder to make protected decisions reflectively but also the responsibility of government to encourage the responsible exercise of rights.³⁶⁷

"People," Dworkin argues, "have the moral right—and the moral responsibility—to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions."³⁶⁸ The legal right that protects that moral right, he argues, finds constitutional bases or "textual homes" not only in the liberty protected by the Fourteenth Amendment but also in the freedom of conscience secured by the First Amendment.³⁶⁹ Dworkin describes autonomy as accountability to self, the responsibility to live up to one's freedom by exercising one's rights reflectively.

364. See GLENDON, *supra* note 1, at 58–61, 65–66. The Compact charges, "Unfettered access to abortion on demand has addressed none of women's true needs; nor has it brought dignity to women. It has, in fact, done precisely the opposite. It has encouraged irresponsible or predatory men, who find abortion a convenient justification for their lack of commitment." *Compact*, *supra* note 357, at A23. It is beyond the scope of this Article to address the ways in which Glendon's presentation reads female agency and the efforts of the women's movement out of the story of the recognition of the legal right to abortion.

365. As Glendon puts it, "[W]hat the pregnant woman can be required to sacrifice for the common value is related to what the social welfare state is ready and able to do to help with the burdens of childbirth and parenthood." GLENDON, *supra* note 19, at 39 (characterizing opinions of the West German and Spanish constitutional courts).

366. Ronald Dworkin, *The Great Abortion Case*, N.Y. REV. BOOKS, June 29, 1989, at 49, 51.

367. DWORKIN, *supra* note 17.

368. *Id.* at 166.

369. See *id.* at 160–68.

To say that citizens must answer fundamental questions of conscience for themselves, however, does not mean that states, pursuant to their "responsibility for guarding the public moral space in which all citizens live,"³⁷⁰ do not have the power to "encourage their citizens to treat the question of abortion seriously."³⁷¹ Decisions about abortion and euthanasia, he argues, implicate the intrinsic value of "sanctity," or the sacredness and inviolability of life,³⁷² and do have an impact on the ethical environment that we share.³⁷³ Dworkin argues that, although the *Roe* Court correctly concluded that a fetus was not a constitutional person with "derivative" rights and interests subject to government protection, the Court did not address whether a government might constitutionally seek to protect the "detached" value of sanctity by encouraging women to exercise their right to choose abortion responsibly.³⁷⁴ He concludes that *Casey* correctly observed that there is no "right to be insulated from all others" in making a decision and that a state may encourage a woman to learn that there are philosophical and social arguments in favor of continuing a pregnancy.³⁷⁵ Dworkin concludes, however, that *Casey* erred in upholding the informed consent restrictions before it because of

370. *Id.* at 150.

371. *Id.* at 153. Dworkin argues that abortion lies at the intersection of the traditions of personal freedom and government responsibility.

372. *Id.* at 81-84.

373. *Id.* at 167. On first reading, Dworkin's justification of abortion regulation in the name of guarding the public moral space, or his reference to the ethical environment, may sound surprising, given his earlier rejection of the appeals to the moral climate or ethical environment to forbid private pornography consumption or to criminalize homosexual activity. See DWORKIN, *supra* note 327, at 349-59; Dworkin, *supra* note 145, at 480-84. For example, T.M. Scanlon finds Dworkin's reference to "maintaining a moral environment" a "slightly surprising phrase." See T.M. Scanlon, *Partisan For Life*, N.Y. REV. BOOKS, July 15, 1993, at 45, 47 (reviewing DWORKIN, *supra* note 17). Arguably, Dworkin is consistent in acknowledging the impact of individual choices and acts on a community's ethical environment, in distinguishing some degree of permissible regulation from prohibition, in rejecting coercion, and in affirming an ultimate position of freedom to choose for oneself. See, e.g., Dworkin, *supra* note 145, at 480-82. One wonders whether he might support regulations encouraging the responsible exercise of First Amendment speech rights on the basis of the impact on the ethical environment.

374. See DWORKIN, *supra* note 17, at 148-54. Dworkin argues that the state does not have a "derivative" interest in prenatal life because fetuses do not have rights and interests, but that it may have a "detached" interest, stemming from the important shared value of sanctity of life. See *id.* at 107-17, 148-51.

375. See *id.* at 153. For a discussion of "insulation" in the context of privacy rights to procreative autonomy, see McClain, *supra* note 9, at 1244-56; McClain, *supra* note 18, at 127-33, 141-45, 164-72; West, *supra* note 9, at 71-72, 79-85.

the burden that they impose, the unlikelihood that they in fact contribute to reflective decisionmaking, and the possibility of encouraging responsibility in more effective and less intrusive ways.³⁷⁶

Dworkin draws what he argues is a crucial distinction between two possible state goals with respect to decisionmaking about matters of conscience: responsibility and conformity.³⁷⁷ Indeed, he argues that the two goals are incompatible because the former encourages individuals to exercise moral responsibility by deciding for themselves and the latter dictates a result and thus precludes the exercise of responsibility. The Constitution does not preclude states from pursuing the goal of responsibility, he contends, as long as they do so in ways "that respect the crucial difference between advancing that goal and wholly or partly coercing a final decision."³⁷⁸

How does Dworkin's argument look when viewed through the lens of the irresponsibility critique? His enterprise of making a philosophical argument aimed at accounting for people's opinions about the morality of abortion and translating such an argument into a legal argument for the right of procreative autonomy belies communitarian charges that liberal justifications of rights flee from substantive moral argument.³⁷⁹ A critical question to ask in assessing Dworkin's project of bringing people closer to consensus is whether the costs, or consequences, of abortion decisions will be perceived differently if citizens believe that women making the choice are faithful to a responsibility of reflection. Furthermore, his explicit invocation of responsibility talk may imply a broader conception of both sanctity and responsibility in the context of procreative autonomy and in other areas.

b. Immunity and wrongness. Dworkin argues for legal immunity in the sense of the right to decide free of coercion. He

376. See DWORKIN, *supra* note 17, at 153, 173-74 (suggesting means, such as providing financial aid to poor mothers, to eliminate financial necessity as a ground for deciding whether to have an abortion). Moreover, Dworkin argues that, if we understand the abortion dispute as involving contested views of what the sanctity of life requires, then we quite possibly should revisit the public funding cases because opposition to such funding rested on particular religious opposition to abortion. See *id.* at 174-76.

377. *Id.* at 150-51.

378. *Id.* at 151.

379. See Sandel, *supra* note 339.

analogizes the abortion controversy to the religious wars of prior centuries³⁸⁰ and calls for toleration of an individual's exercise of her freedom of conscience.³⁸¹ Legal immunity, however, does not insulate women deciding whether to have an abortion from state efforts to encourage responsibility in decisionmaking. Moreover, as noted above, although citizens must adhere to the principle of toleration (e.g., not use the law to enforce conformity with their own view of the right decision), it is understandable and appropriate that citizens care very much about how strangers, neighbors, and friends make decisions concerning abortion because of the impact of such decisions on the ethical environment. Thus, in Dworkin's account, a legal right to procreative autonomy carries with it neither a right to insulate oneself from state encouragement of responsible reflection nor a right to insulate oneself from the interests of others in one's decision.

Although Dworkin rejects coercing exercises of conscience, he is not agnostic on whether or when abortion is the right or responsible thing to do. He maintains (akin to the liberal stance that, he argues, most people share³⁸²) that abortion is presumptively bad because it destroys life and thus insults the sanctity of life, unless not to have an abortion would be a greater waste of life or an insult to what respect for life requires.³⁸³ In that view, there are a range of circumstances in which abortion can be a morally responsible choice.³⁸⁴

380. DWORKIN, *supra* note 17, at 4, 15.

381. *Id.* at 167-68.

382. Dworkin's characterization of the majority, liberal position suggests an impressive degree of fit between public approval of reasons for abortion and women's actual reasons. Other assessments suggest less of a fit. See McClain, *supra* note 18, at 164-72 (citing other assessments).

383. Dworkin writes, "Abortion wastes the intrinsic value—the sanctity, the inviolability—of a human life and is therefore a grave moral wrong unless the intrinsic value of other human lives would be wasted in a decision *against* abortion." DWORKIN, *supra* note 17, at 60.

Dworkin's liberal position might not capture, for example, feminist arguments that start from the premise not of the presumptive "badness" of abortion but of a moral and legal right to abortion based on the requirements of women's well-being and reproductive health. See, e.g., ROSALIND P. PETCHESKY, ABORTION AND WOMAN'S CHOICE 368-401 (rev. ed. 1990).

384. DWORKIN, *supra* note 17, at 32-34, 97-100 (arguing that, in addition to cases of rape or incest, liberals think that abortion is justified in instances of serious "frustration" of the life of the eventual child or of the woman and other family members, e.g., a "very grave physical deformity" of the child, "economically barren" family circumstances, risk to the pregnant woman's life, or a permanent and grave impact on the woman's or

c. *Some questions about encouraging responsibility to protect sanctity.* Again, Dworkin suggests that states may constitutionally regulate decisions implicating the sanctity of life to encourage responsible reflection but may not coerce a particular result. Although Dworkin concludes that the *Casey* Court erred in upholding the particular provisions before it, his endorsement of *Casey* as to the permissibility of encouraging women to learn of philosophical and social arguments in favor of continuing a pregnancy countenances that the state, for all practical purposes, may equate encouraging responsibility with conveying a message against abortion.³⁸⁵

Dworkin's analysis may reflect the assumption that abortion decisions impose costs on society, specifically, on the ethical environment. Indeed, both Dworkin's account and the joint opinion in *Casey* seem to reflect or resemble communitarian attention to the social costs of exercising rights. *Casey* gave a prominent place to abortion as a unique act "fraught with consequences for others" (and hence not merely an exercise of conscience), including not only the consequences for prenatal life but also the impact on society of living with the knowledge that a procedure that some regard as an act of violence is being conducted in the community.³⁸⁶ In this context, responsibility as accountability, as well as autonomy, seems to be the goal: it is appropriate for citizens to

her family's life or the life of the child if born).

385. See McClain, *supra* note 18, at 141-50 (arguing against *Casey*'s conflation of encouraging the "wise exercise" of reproductive liberty with adopting measures designed to persuade against abortion). In an earlier article, Dworkin suggested that the state not only may encourage responsibility about the decision but also may express a collective view about (although not insist on conformity with) the appropriate decision. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 409-10 (1992). In *Life's Dominion*, he does not appear to restate this view.

386. See *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2807 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). An interesting question I leave for consideration elsewhere is whether, read in light of the communitarian diagnosis of irresponsibility, informed consent schemes premised on a state's preference for childbirth over abortion counsel women to make choices likely to be deemed socially irresponsible. As we have seen not only in communitarian literature, but in numerous fora, the increased rates of births outside of marriage, teen pregnancy, and single-parent (usually female-headed) households serve as prime exhibits in the communitarian analysis of moral decline, social crisis, and irresponsibility. See *supra* notes 121-24 and accompanying text. If a state encourages responsibility in making a decision to continue or terminate a pregnancy, how should a pregnant woman weigh competing assessments of her moral and social responsibilities?

signal through law that certain decisions of great consequence should be taken seriously.

Dworkin's immediate task is affirming freedom of conscience in decisions involving the sanctity of life, prominently, abortion and euthanasia. Many other protected decisions, however, implicate deep human views about responsibility and sanctity and arguably have consequences for others. Should encouraging responsibility in decisions extend to a broader range of human decisions? To what other areas might Dworkin's moral environment argument apply?

Like the irresponsibility critique, Dworkin's responsibility talk raises significant questions about what government may do in the realm between noninterference and coercion and about precisely how to delineate coercion from persuasion.³⁸⁷ Many of the implications of Dworkin's analysis remain to be explored. For our purposes, the main point is that Dworkin's theory of rights does take responsibility seriously, primarily responsibility as autonomy but also responsibility as accountability. It offers a better starting point for thinking about rights and responsibility than the evisceration of responsibility as autonomy that Glendon's approach entails.

V. CONCLUSION

I have argued that a discontent with rights and rights talk is today commonplace. I have examined the new communitarians' discontent, focusing especially on their claims about the links between rights and irresponsibility. I have contended that, on close examination, much of the irresponsibility critique does not really establish a strong case against rights, although it provides an opportunity to reflect on an array of social problems. At the same time, the critique does reflect ambivalence about core features of

387. For example, one of the most widely cited constitutional precedents for protection against coercion in one's beliefs and conduct notes that the state may not compel, but may seek to encourage, patriotism. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (upholding an injunction to limit the enforcement of a regulation requiring public school children to salute the American flag).

T.M. Scanlon suggests that Dworkin's attention to impersonal intrinsic values is a "significant departure," not only for Dworkin but for a contemporary moral philosophy that concentrates almost exclusively on such notions as rights, interests, duties, and obligations. Scanlon, *supra* note 373, at 46. Of course, one might argue that the sanctity of life is, in a sense, a public or political value. *Cf. RAWLS, POLITICAL LIBERALISM, supra* note 8, at 243-44 & n.32 (suggesting that the analysis of abortion should include political values of respect for human life and equality of women).

rights, summed up by the notions of immunity and wrongness. There is a corresponding ambivalence about when communitarian correctives to link rights and responsibilities would embody the moral voice of the community in law and when they would draw boundaries between suasion and coercion, and between community and state. If the communitarians are to gain widespread acceptance of their agenda, they will have to explain more clearly and precisely how far their discontent with rights and rights talk, as well as with liberalism, extends.

It may well be that we are always dreaming of community³⁸⁸ and that the calls to attend to responsibility result from a language of rights that says too little about the social glue that communitarians insist holds our society together. I have argued that although the language of legal rights does not offer a full account of moral responsibility, inquiring about what rights do and why we protect them reveals that the protection of rights reflects respect for the exercise of individual responsibility as autonomy in a pluralistic constitutional democracy. Furthermore, communitarians overstate the case when they suggest that prevailing notions of rights accept no limits on individual freedom in view of social costs and discourage or preclude individual and societal reflection on responsibility. That the protection of rights yields some irresponsibility is undeniable, yet it is better to bear that cost than to incur the sacrifices of individual freedom that a communitarian model based primarily on responsibility as accountability would require. Ultimately, the new communitarianism must reject such a model if it is to be consistent with American ideals and deeply held values about the vital importance not only of responsibility but also of rights.

388. See PHILLIPS, *supra* note 7, at 3.