BOOK REVIEWS

VIRTUE AND THE AMERICAN FAMILY

ABORTION AND DIVORCE IN WESTERN LAW. By Mary Ann Glendon.[1] Harvard University Press. 1987. Pp. 197. $25.00.

Reviewed by Leslie Pickering Francis[2]

Abortion and Divorce in Western Law is seductive and dangerous. It is seductive because it is half right; it is dangerous because it is half wrong on many levels: the data assembled about abortion law, the comparative law methodology employed, and the conclusions drawn for American public policy about privacy and the family.

Glendon's argument is disarmingly simple. American abortion law protects the fetus less than abortion law in any other Western country. American divorce law is as free with the dissolution of marriage as divorce law anywhere, but at the same time, the United States provides less support for maternity and child raising and devotes less attention to the economic consequences of divorce than any other Western country. The explanation for this apparent schizophrenia is that America is individualistic to a fault in letting people choose what to do with their own lives and in leaving them alone with what they have chosen.

Both our law and our lack of social services, Glendon argues, convey messages about American culture: we place the freedom to choose lifestyles above concern and support for innocent fetuses, children, and spouses left behind by divorce. Based on this picture of American law, Glendon advocates several reforms. She recommends the return of abortion regulation to the states and suggests different legal management of divorce depending on whether minor children are involved. She believes that support obligations should follow fair, predictable, and rigorously supervised guidelines and that children's needs must come first. However, Glendon neither proposes further substantive guidelines for support nor makes any recommendations for change in the basic structure of contemporary divorce.

Glendon's book contains a wealth of useful information about American and Western European abortion and divorce law. Her efforts to turn comparative law into cultural commentary and criticism, however, are less than convincing. In this review, I begin with an overview of Glendon's data and raise the concern that, even here, where she is on firmest ground, her values affect the picture she

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portrays. I then explain Glendon's interpretive theory of law and communitarian theory of ethics. Finally, I argue that Glendon draws the wrong conclusions about abortion and is inconclusive about divorce for reasons that stem from her underlying theory of virtue and community.[3] The solution to our condemnable failure to provide support for pregnant women who are poor is not to abandon the constitutional right to privacy, as Glendon would do, but to provide more support. Furthermore, although Glendon rightly criticizes American individualism for ignoring the redistribution issues that arise during divorce, she does not offer a theory of distributive justice — an element needed to defend her criticism and to develop fair reforms in the current structure of child support obligations.

I. GLENDON'S DATA

The major portion of Glendon's monograph is a striking description of Western European and North American statutes and case law[4] pertaining to abortion and divorce. In the past twenty years, seventeen of the twenty nations in her study have significantly liberalized their abortion laws (p. 11). Liberalization in many jurisdictions, however, cannot be equated with the legalization of abortion on demand. Glendon reports that twelve of the nations she studied continue to prohibit abortion except for "good cause" (p. 13). Good cause may be as broad as subjective maternal "distress" or as limited as threatened maternal mortality or morbidity; the common thread between the nations' statutes is the message that abortions require justification. Glendon reports that only six countries in her study — Austria, Denmark, Greece, Norway, Sweden, and the United States — leave the abortion decision to the woman and her physician, at least during the first trimester (p. 22).[5] She notes that the United States is alone, however, "in forbidding *any* state regulation of abortion for the sake of preserving the fetus until viability" and in failing to "*require* regulation to protect the fetus [after viability]" (p. 22) (emphasis in original). Austria, Denmark, Greece, and Norway prohibit abortions after the first trimester, except for serious cause. Sweden places the cutoff for abortion at eighteen weeks (p. 22), after which time permission from a national board is required. Permission rarely is granted after twenty-four weeks (p. 23). The United States, in short, goes further

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[3] Glendon argues that an impoverished theory of rights prevails in America. She responds, however, by advocating an ethics of virtue and community rather than by supplementing the existing theory of rights. *See infra* notes 40–51 and accompanying text.

[4] Glendon's primary focus on statutes and case law rather than on social practices is significant in light of her efforts to interpret and contrast cultures. *See infra* pp. 479–80.

[5] Canada's statute that limited abortions has recently been invalidated on constitutional grounds. *See* Morgentaler v. Regina, 1 S.C.R. 30 (Can. 1988).

than any other Western nation in recognizing in its legal language what Glendon characterizes as a "right to abortion" (p. 24).[6]

The United States is also alone, Glendon argues, in its views about whether the process of informed consent to abortion may include moral suasion. She reads cases such as *City of Akron v. Akron Center for Reproductive Health*[7] and *Thornburgh v. American College of Obstetricians*[8] as forbidding efforts similar to those employed in many Western European countries to inform pregnant women of available alternatives to abortion in a nonburdensome way (p. 19).

In her chapter on divorce, Glendon examines the ease with which marriages can be terminated and the extent to which the state becomes involved with the economic consequences of divorce. Her observations about divorce parallel her claims about abortion. By the 1960's, the formal insistence upon fault as grounds for divorce had been gradually eroded in both the United States and Western Europe. "Fault" had become broadly construed and judicial tolerance of collusion in pleading fault had become routine (p. 65). In 1969, California eliminated fault grounds for divorce entirely (p. 67). Like abortion reforms, however, divorce reforms varied widely. California's approach and Sweden's law, which permits divorce on petition with a six-month waiting period if the other spouse opposes the divorce or if children under sixteen are involved (p. 75), lie at one end of the spectrum.[9] In many other jurisdictions, according to Glendon, divorce law has become a compromise between allowing consensual termination and protecting a nonconsenting spouse against quick and easy action. Britain's statute, which permits divorce only "when a marriage ha[s] irretrievably broken down" (p. 67), allows marital breakdown to be established through traditional fault grounds, by mutual consent after a two-year separation, or unilaterally after a five-year separation, except in cases of grave hardship.[10] France and West Germany are more protective. In France, divorce of an innocent, nonconsenting spouse requires six years' separation and may be denied based on

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[6] Glendon, however, confuses the right to choose an abortion with the right to have an abortion. *See infra* notes 14–22 and accompanying text.

[7] 462 U.S. 416 (1983).

[8] 476 U.S. 747 (1986).

[9] By Glendon's count, 19 American states and Sweden follow this approach. West Germany and the Netherlands come close, although both permit the judge to deny a contested divorce on hardship grounds in unusual circumstances. Canada and 22 other American states allow divorce based on marital breakdown after a waiting period of a year or less and do not allow denial of divorce on hardship grounds (pp. 67–69).

[10] Because it involves no waiting period, collusive allegation of traditional fault grounds has remained the pattern in the majority of British divorces. A recent reform in court rules, however, allows consensual divorce to occur without the parties' appearance in court. This possibility of "postal" divorce has transformed the consensual procedure into a summary administrative affair (pp. 70–71).

"'material or moral consequences of exceptional hardship'" (p. 72).[11] West Germany's reformed divorce law permits divorce on the basis of fault, mutual consent, or five years' separation unless it would work hardship on the nonconsenting spouse.[12]

American divorce law, however, is unique in its use of "no fault" language. Although Glendon regards the term "no fault" as drawn largely and coincidentally from no-fault insurance (pp. 79–80), she generalizes that American legal language accords a "right" to divorce, just as it accords a "right" to abortion (p. 81). Most Western European jurisdictions, by contrast, have adopted the compromise position of adding marital breakdown to traditional fault grounds (p. 67). In Glendon's view, these sharply contrasting approaches to divorce convey the message that, in the United States, marriage, like pregnancy, is terminable at will (p. 108).

The switch to divorce at will, Glendon claims, has the critical practical consequence of depriving the divorced spouse, usually the woman, of economic bargaining power (pp. 81–82). In Western Europe, but not in the United States, the result of this deprivation has been the reconsideration of divorce's economic consequences. Scandinavian systems emphasize spousal self-sufficiency and strong public benefits programs for custodial parents. Community property is divided equally without reference to fault, and child support is assigned according to relatively set formulas backed by an efficient collection system and a comprehensive package of public benefits (pp. 85–86). Other Western European countries rely on the financial obligations of the departed provider, supplemented when needed by the state (p. 82). Case law in West Germany, for example, consistently imposes support obligations, except in cases of gross unfairness (pp. 83–84). France requires the spouse seeking a unilateral divorce based on marital breakdown to assume the costs of the proceedings and to remain bound to duties of support (p. 85). Glendon concludes that in these countries fault continues to play a major role in the economic aftermath of divorce (pp. 84–85).

England and the United States, by contrast, rely heavily on the spouses to work out their own economic arrangements, largely to the

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[11] Glendon reports that French provincial courts have been relatively willing to consider noneconomic hardships such as the innocent spouse's mental or physical state and have denied divorce petitions on that basis in a significant number of cases. Parisian courts, and most French family law scholars, on the other hand, have urged restrictive interpretations of the hardship clause, and this appears to be the trend (pp. 72–73).

[12] West Germany's 1976 divorce statute contained a hardship clause that could not be invoked to deny divorce after the spouses had lived apart for more than five years. In 1981, the Federal Constitutional Court ruled the five-year limitation unconstitutional under a clause in the West German Basic Law that accords special protection to marriage and the family. The five-year cutoff in the hardship clause was repealed in 1986. Glendon reports, however, that the clause was invoked in only two reported cases before its repeal (p. 74).

detriment of the party with the weaker bargaining position. Custodial parents receive less help from the state in meeting their economic needs and in enforcing support obligations imposed on the former provider (p. 83). When these failures are combined with insufficient social welfare programs, as in the United States, the result can be economic disaster for both the children and the custodial parent alike.

The other side of American liberality towards abortion and divorce, Glendon contends, is parsimony to pregnant women and children. Here Glendon's case is at its most devastating. The United States lags in economic support for pregnant women and mothers, in areas such as health care benefits, day care, and maternity leave (pp. 53–55). Child support awards in divorce cases are inadequate and erratic (p. 88). In Western Europe and Canada, by contrast, benefits for married or unmarried mothers and for young children far outstrip those available in the United States.[13]

II. THE NORMATIVE CONTENT OF GLENDON'S DATA

And so the United States, through its abortion and divorce law, conveys messages that are disturbing compared to those conveyed by Western European abortion and divorce law. United States law is least protective of the fetus, least informative about abortion and its alternatives, most cavalier about the termination of marriage, and least economically supportive of motherhood and childraising. On the issue of economic support, Glendon's case is clear. Concern is merited, however, about the accuracy of Glendon's reading of the cultural messages she sees reflected in various laws. Glendon may be overly glowing about the moralism of European law and overly condemnatory of the individualism she sees in American law.

Glendon's overly glowing account of Western European law is illustrated by inaccuracies in her description of French abortion law. First, she describes France as taking the compromise position of prohibiting abortion except for good cause, although she admits that in the early stages of pregnancy, French law comes "close to sanctioning elective abortion" (pp. 21–22). The importance of this statutory structure, she says, is its mandate "that abortion is available only for serious reasons" (p. 22). The French statute, in Glendon's translation, does provide that only necessity can override respect for fetal life (p. 155). Yet it is misleading to regard the statute as requiring weighty reasons for abortion before the tenth week of pregnancy; far from establishing demanding criteria, the statute allows any "pregnant

[13] At least one recent hopeful sign has developed, however. States may now extend Medicaid coverage to pregnant women above the poverty level. *See* N.Y. Times, Mar. 6, 1988, at 1, col. 5.

woman whose condition places her in a situation of distress" to request an abortion (p. 156).

In addition, Glendon celebrates the statute's informational and counseling requirements as a brilliant compromise between respect for life and compassion for pregnant women and characterizes the 1979 amendments as making only "a few minor changes in [those] provisions" (p. 18). Viewing the law in this way, Glendon praises it for reflecting traditions of legislative drafting that are attuned to the hortatory function of statutes (p. 130). Yet the statute's informational requirements — covering medical risks, assistance benefits, and adoption — all were added in 1979. So too were the requirements that the woman be counseled "especially with a view to enabling her to keep her child" and that counseling should not be undertaken where abortions are performed (p. 157). These compromises, therefore, were not part of the initial project of statutory draftsmanship that Glendon celebrates.

Glendon's views also, in some respects, distort the constitutional and moral framework of American abortion law. Once the distortions in her assumptions are recognized, Glendon's conclusion that American abortion law is indifferent toward fetal rights loses considerable persuasive force. Perhaps the best illustration is her claim that the language of *Roe v. Wade*[14] and later abortion cases is the language of a "right to abortion," language that utterly banishes the innocent fetus from consideration (p. 24). In fact, however, the language of *Roe* and later cases is predominantly the language of rights to privacy and choice.[15] *Roe* speaks of a right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[16] The decision explicitly disavows the claim that the woman has an "absolute" right "to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."[17] The right of privacy is not the only concern raised by abortion regulation, because "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young

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[14] 410 U.S. 113 (1973).

[15] The plaintiff in *Roe* claimed she had the right "to choose to terminate her pregnancy." *Id.* at 129.

[16] *Id.* at 153. This language does not distinguish between a right of choice and a right to abortion in the sense of a right to noninterference with the choice to have an abortion. The language, however, does not provide a positive right to have an abortion. Subsequent cases involving restrictions on abortion continue to use the language of liberty, privacy, and choice. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427–28 (1983) ("Central among these protected liberties is an individual's 'freedom of personal choice in matters of marriage and family life.'" (quoting *Roe*, 410 U.S. at 169 (Stewart, J., concurring))).

[17] *Roe*, 410 U.S. at 153.

in the human uterus. The situation therefore is inherently different from marital intimacy . . . ."[18] The potentially compelling state interests are safeguarding maternal health, maintaining medical standards, and, it should not be forgotten, protecting potential life.[19]

Similarly, in upholding statutory efforts to ban the use of federal funds for abortions, the Court has rejected any notion of a right to procure an abortion, recognizing instead only protected choices: "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[20]

Ironically, it is then-Justice Rehnquist's dissent in *Roe* and Justice White's dissent in its companion case, *Doe v. Bolton*,[21] that characterize the right in question as a "right to an abortion"[22] precisely in order to reject it. To some extent, the difference between the dissenting and majority opinions in *Roe* and *Doe* is one of language, not of practice; the plaintiffs are legally permitted to have abortions, however the right is characterized. The difference is important to Glendon's argument about legal language, however, because she criticizes the rhetoric of the American cases for their discordant endorsement of a "right to abortion" (p. 60). The uncompromising language she perceives as characteristic of American abortion law is, however, the language of *Roe*'s critics.

Another illustration of Glendon's overly critical account of American law is her comparison of the "informed consent" requirements

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[18] *Id.* at 159 (citation omitted).

[19] *See id.* at 154. Texas' contention in *Roe* that fetal rights begin at conception is answered by the now-controversial observation that neither American law nor American cultural practices agree about when life begins. *See id.* at 160–62. The state interests involved "grow[] in substantiality" as the pregnancy advances and become compelling at different times. *See id.* at 162. *Roe* has been interpreted as setting a rigid trimesterial timetable for when interests become compelling; in so doing, the decision is said to be "on a collision course with itself" (p. 43) (quoting *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting)). To insist on such a rigid timetable, however, is arguably a misreading of *Roe*; the decision provides only that, given the capacities of then-current medical technology, state interests in protecting maternal health become compelling at approximately the end of the first trimester, and state interests in protecting potential life become compelling at viability. *See Roe*, 410 U.S. at 163–64. Nowhere in *Roe* is viability identified with a particular stage of pregnancy. If viability is the crucial determinant of when state interests in protecting potential life become compelling, technological advances could push the time back. For an argument that late fetal development, not viability, is the crucial determinant, see Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639 (1986).

[20] Harris v. McRae, 448 U.S. 297, 316 (1980) (upholding the Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979), which prohibited federal Medicaid reimbursement for the costs of abortions, except when continuation of the pregnancy threatened the woman's life or the pregnancy resulted from incest or rape).

[21] 410 U.S. 179 (1973).

[22] *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 221 (White, J., dissenting).

permitted in Western Europe to those permitted in the United States. She claims that efforts to inform pregnant women about abortion and its alternatives, which are encouraged and often required in Western Europe, are routinely invalidated in the United States. She does concede that the American statutes that have been struck down carry "a somewhat different message" than, for example, the French statute (p. 20). This concession, however, is too weak; unlike the French statute, which is primarily informational, the invalidated American statutes generally have been formulaic efforts to dissuade women from undergoing abortions.[23] By contrast, the Supreme Court has upheld truly informational statutes, such as the requirement that the woman be informed of particular risks associated with her pregnancy and the technique of abortion to be performed.[24]

Yet another way in which Glendon's picture of the American data is misleading is her discussion of the United States' failure — in contrast to Western Europe — to *require* fetal protection laws. To be sure, the Supreme Court has not mandated fetal protection, but the doctrine of separation of powers limits what the Supreme Court can require. Nevertheless, *Roe* does characterize the protection of potential life as a compelling state interest,[25] and many ways exist in which both federal and state law protects fetuses. At the federal level, for example, regulations governing research on human subjects, which apply to federally funded research or to research involving new drugs or new medical devices, afford special protection for fetuses.[26] A

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[23] *See, e.g.*, *Akron*, 462 U.S. at 444 (invalidating requirements that the pregnant woman be told that "the unborn child is a human life from the moment of conception" and that "abortion is a major surgical procedure"). By prescribing exact language for the physician to use without allowing for individual circumstances, the *Akron* requirements departed both from Glendon's portrait of the Western European statutes (pp. 19–20) and from informed consent standards used more generally for medical care. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 786–87 (D.C. Cir.) (holding that informed consent requires disclosure of what a reasonable patient would want to know), *cert. denied*, 409 U.S. 1064 (1972); *see also* Thornburgh v. American College of Obstetricians, 476 U.S. 747, 760–61 (1986) (invalidating Pennsylvania requirements that physicians describe to all women contemplating abortion the possibility of unforeseeable physical and psychological harms, the medical risks associated with the abortion procedure to be used, the possible availability of medical benefits for childbirth, and the father's liability for child support, as well as offer materials describing the fetus and lists of agencies providing alternatives to abortion). The Court in *Thornburgh* criticized Pennsylvania for intimidating women into continuing pregnancies, *see id.* at 759, and for setting out a litany to be recited to all women seeking abortions, regardless of their particular circumstances, *see id.* at 763. Even a rape victim, for example, was to be informed of the father's obligation to support the child. Although the French statute encourages the woman to continue her pregnancy and contains many of the same informational requirements as the invalidated Pennsylvania statute, it does so by providing for counseling appropriate to the individual woman's situation (p. 156).

[24] *See Akron*, 462 U.S. at 446–47.

[25] *See supra* note 19 and accompanying text.

[26] *See* 45 C.F.R. §§ 46.201–46.211 (1987).

number of states prohibit experimentation on fetuses.[27] Many states prohibit post-viability abortions except when necessary to preserve the health or life of the mother[28] and mandate protection of fetal life if at all possible,[29] both of which regulations are permitted under *Roe*.[30] Yet these legal protections go unmentioned in Glendon's book.

Finally, Glendon's account is incomplete because her data are limited to statutes and case law. She describes the legal rules governing abortion and divorce, but explains little else about the social context of abortion or divorce in the United States or elsewhere. For example, although she admits that in countries such as France abortions are easily obtained in practice, at least through the first trimester, Glendon is not interested in this underlying social reality, but only in the conflicting message conveyed by the continued statutory expression

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[27] *See* ARIZ. REV. STAT. ANN. § 36-2302 (1986); ARK. STAT. ANN. § 20-17-802(b) (1987); CAL. HEALTH & SAFETY CODE § 25956 (West 1984); FLA. STAT. § 390.001(6) (1985); ILL. REV. STAT. ch. 38, para. 81-26 (1983); IND. CODE § 35-1-58.5-6 (1981); KY. REV. STAT. ANN. § 436.026 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 14.87.2 (West 1986); ME. REV. STAT. ANN. tit. 22, § 1593 (1980); MASS. GEN. L. ch. 112, § 12J (1987); MICH. COMP. LAWS § 333.2685 (1980); MINN. STAT. § 145.422 (1986); MO. REV. STAT. § 188.037 (1986); MONT. CODE ANN. § 50-20-108(3) (1987); NEB. REV. STAT. § 28-346 (1985); N.D. CENT. CODE § 14-02.2-01 (1981); OKLA. STAT. tit. 63, § 1-735 (1981); 18 PA. CONS. STAT. ANN. § 3216(a) (Purdon 1983); UTAH CODE ANN. § 76-7-310 (1978); WYO. STAT. § 35-6-115 (1988).

[28] *See* ARIZ. REV. STAT. ANN. § 36-2301.01 (1986); FLA. STAT. § 390.001(2) (1987); GA. CODE ANN. § 16-12-141(c) (1988); IDAHO CODE § 18-608(3) (1987); ILL. REV. STAT. ch. 38, para. 81-25 (1987); IND. CODE § 35-1-58.5-2(3)(c) (1981); IOWA CODE § 707.7 (1987); KY. REV. STAT. ANN. § 311.780 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 40.1299.35.4(a)–(b) (West Supp. 1988); ME. REV. STAT. ANN. tit. 22, § 1598(4) (1980); MD. HEALTH-GEN. CODE ANN. § 20-208(a)–(b) (1987); MASS. GEN. L. ch. 112, § 12M (1984); MINN. STAT. § 145.412 subd. 3–4 (1986); MO. REV. STAT. § 188.030.1 (1986); MONT. CODE ANN. § 50-20-109(1)(c) (1987); NEB. REV. STAT. § 28-329 (1985); NEV. REV. STAT. § 442.250(1)(c) (1987); N.Y. PENAL LAW § 125.05(3) (McKinney 1987); N.C. GEN. STAT. §§ 14-44 to -45.1(a)–(b) (1986); N.D. CENT. CODE § 14-02.1-04(3) (1981); OKLA. STAT. tit. 63, § 1-732(A) (1981); 18 PA. CONS. STAT. ANN. § 3210(a) (Purdon 1983); S.C. CODE ANN. § 44-41-20(c) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 34-23A-5 (1986); TENN. CODE ANN. § 39-4-201(c) (1982); UTAH CODE ANN. § 76-7-302(3) (1978); VA. CODE ANN. § 18.2-74(b) (1988); WIS. STAT. § 940.15(2)–(3) (1985); WYO. STAT. § 35-6-102 (1988).

[29] *See* ARIZ. REV. STAT. ANN. § 36-2301 (1986); CAL. HEALTH & SAFETY CODE § 25955.9 (West 1984); DEL. CODE ANN. tit. 24, § 1795 (1987); FLA. STAT. § 390.001(5) (1987); GA. CODE ANN. § 16-12-141(c) (1988); IDAHO CODE § 18-608(3) (1987); ILL. REV. STAT. ch. 38, para. 81-26 (1987); IND. CODE § 35-1-58.5-7(b)–(c) (1981); IOWA CODE §§ 707.6, .10 (1987); KY. REV. STAT. ANN. § 311.780 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. §§ 14.87.1, .5 (West 1986); *id.* § 40.1299.35.4(C), (D), (E), .36.1(a)(1)(c) (West Supp. 1988); ME. REV. STAT. ANN. tit. 22, § 1594 (1980); MASS. GEN. L. ch. 112, § 12P (1984); MINN. STAT. §§ 145.415, .423 (1986); MO. REV. STAT. § 188.030.2 (1986); MONT. CODE ANN. § 50-20-109(3) (1987); NEB. REV. STAT. § 28-330 (1985); N.D. CENT. CODE § 14-02.1-05 (1981); OKLA. STAT. tit. 63, §§ 1-732(D)–(E), 1-734(C) (1981); 18 PA. CONS. STAT. ANN. § 3210(b) (Purdon 1983); TENN. CODE ANN. § 39-4-206(a) (1982); UTAH CODE ANN. §§ 76-7-307 to -308 (1978); VA. CODE. ANN. § 18.2-74(c) (1988); WIS. STAT. § 940.15(6) (1985); WYO. STAT. § 35-6-104 (1988).

[30] *See* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 482 (1983).

of respect for life (p. 15). Insofar as she limits her argument to the description of legal language, this focus on legal documents is not problematic. But to the extent that Glendon seeks to base more encompassing social commentary on that legal language, the lack of a broader social picture limits her analysis.

If Glendon's aim were merely to present a comprehensive picture of legal doctrine, these discrepancies in the data would not loom large in her overall picture, with the exception of her failure to discuss the considerable body of American legislation that protects the fetus. Yet her aim as a comparativist is not simply to present legal doctrine; it is to analyze and criticize the messages conveyed by the ways in which legal doctrines are written and structured and, ultimately, to recommend reforms. The descriptive and normative aspects of her book clearly influence one another. In keeping with her criticism of individualism, Glendon describes American abortion law in terms that are too severe, both independently and in relation to European abortion law. The severely individualistic messages she hears in American legal language comprise part of her basis for advocating legal change and indicate why her recommendations, as I argue below, emphasize accommodation and compromise rather than the protection of persons through the development of a richer theory of rights.

III. Glendon's Interpretive Theory of Law and Communitarian Theory of Ethics

In Glendon's view, the laws of a society both reveal and shape the moral lives of its citizens (p. 8). A society's moral life is an important part of the cultural autobiography told in its law.[31] Through the study of comparative law, therefore, we can understand the moral lives of different communities. That predominant moral views are likely to take legal form is, of course, an idea as old as Plato (p. 6). Yet Glendon develops this approach to comparative law by relying on two important contemporary intellectual movements. To identify the stories reflected in legal structures, Glendon turns to interpretive theories of law (p. 8); to understand the stories' moral import, she draws on communitarian ethical theory (p. 114). The combination gives Glendon a powerful framework for both legal analysis and ethical criticism, but brings with it the risk that her own ethical framework may structure the messages she finds conveyed by different legal systems.

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[31] For a discussion of the notion of law as autobiographical, see Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

A. Interpretive Theories of Law

In the hermeneutic tradition, legal systems are viewed as doubly interpretive; they interpret culture and are interpreted in light of cultural practices.[32] Understanding legal rules thus requires placing them in their cultural setting and interpreting them as do citizens of that society. This understanding is based not only on legal structures, but, as importantly, on the rhetoric in which such structures are expressed (p. 8).[33]

To develop her interpretive theory of law, Glendon draws heavily from the recent anthropological work of Clifford Geertz (pp. 8, 62, 111).[34] Geertz' work expresses a "feel for immediacies"[35] and richly details legal practices from Bali to Morocco to Washington, D.C. Legal anthropology, Geertz believes, should focus not on legal rules, but on setting legal practice within local "'forms of life'"[36] — within structures of social meaning. The legal comparativist's task is not to collect codes, but to bring the world "into view," to "revel in culture-specific accretions, pore over processes of ratiocination, and plunge headlong into symbolic systems."[37] Geertz is a particularist who insists that both self-understanding and the understanding of others begin in the concreteness of divergent symbolic systems.[38]

Glendon's interpretive theory thus involves understanding the messages conveyed by particular legal structures. Comparative law, Glendon adds, deepens the insight; by studying the forms and rhetoric of other legal systems, we can see how the cultural messages they express differ from our own, and thereby gain new purchase on the ongoing colloquy of our own legal system (p. 8). It is crucial to Geertz' view of the interpretive enterprise, however, not to underestimate the importance of local forms of life; we must "see . . . ourselves amongst others, as a local example of the forms human life has locally taken, a case among cases, a world among worlds."[39] Consistent with this

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[32] *See generally* R. DWORKIN, LAW'S EMPIRE (1986); H.G. GADAMER, PHILOSOPHICAL HERMENEUTICS (D. Linge trans. 1977); H.G. GADAMER, TRUTH AND METHOD (G. Barden & J. Cumming trans. 1975); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982).

[33] For a discussion of law as rhetoric, see J.B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985). For a discussion of the importance of rhetoric in contemporary philosophical theory, see AFTER PHILOSOPHY: END OR TRANSFORMATION? 13–15 (K. Baynes, J. Bohman & T. McCarthy eds. 1987).

[34] *See* C. GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983).

[35] *Id.* at 167.

[36] *Id.* at 180 (citation omitted).

[37] *Id.* at 183.

[38] It is important not to confuse the particularism of Geertz' descriptive anthropology with judgments about the rationality or value of various legal cultures. *See id.* at 154, 181, 225.

[39] *Id.* at 16.

prescription, Glendon strives to understand the social meanings conveyed by American and Western European family law (p. 9). Her attempt to do so is less than successful, however, to the extent that an overarching ethical framework structures what she sees.

B. American Individualism and Communitarian Ethical Theory

Glendon explains and criticizes American abortion and divorce law as a reflection of individualist traditions. She contends that individualism has influenced Anglo-American legal theory more than it has affected continental legal theory (p. 120). Thinkers such as Justice Oliver Wendell Holmes, Jr., she claims, brought Anglo-American law under the sway of the Hobbesian positivist picture of "law as the command of the sovereign" (p. 120). In Glendon's view, American legal theory has confused philosophical defenses of individual liberty and tolerance — such as that of John Stuart Mill — with moral relativism. At the same time, she contends, the United States has little legal tradition from which to resist the idea that justice is simply what the law says it is (p. 124). Glendon argues that the absence of notions of duty and virtue in American law is perhaps best illustrated by its continuing inhospitality to a legal duty to rescue (p. 132).[40] Because of its overwhelmingly liberal bent, Glendon claims, American law expounds moral philosophy only to the extent of formulating constitutional definitions of individual liberty, but not to the extent of employing statutory draftsmanship that consciously prescribes and promotes normative ethical ideals for the entire society, as in France or West Germany (p. 127).

Through her comparative law approach, Glendon demonstrates that American family law has been impoverished by individualism (pp. 114, 142) with its concerns for self (pp. 137–38) and its moral relativism (pp. 122–24). Her diagnosis of what is missing and why is sympathetic to that of Robert Bellah[41] and other recent social commentators[42] who have been heavily influenced by the contemporary re-emergence of classical theories of virtue ethics (pp. 39, 108, 113, 118). In *Habits of the Heart*, Bellah and his coauthors attempt

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[40] For an argument that imposing the duty to carry a pregnancy to term stands in sharp contrast with Anglo-American law's rejection of the duty to rescue, see Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979).

[41] *See* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART (1985) [hereinafter R. BELLAH].

[42] *See* A. BLOOM, THE CLOSING OF THE AMERICAN MIND (1987) (criticizing the loss of Platonic direction in American higher education); Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 970–71 (1987) (arguing that radical individualism misperceives and distorts legal ethical dilemmas by failing to recognize the existence of the family as an organic entity apart from its individual members).

to describe white, middle-class Americans' conceptions of the right way to live.[43] Individualism, Bellah says, has "marched inexorably through our history" and "may have grown cancerous" today.[44] Suffering from a loss of definition, Americans find it difficult to articulate the content of happiness,[45] marital satisfactions that go beyond meeting individual needs,[46] reasons for civic participation that are rooted in civic virtue,[47] and generally what to do with the freedom they value.[48] Life has been fragmented into work and home, public and private; Americans today rarely understand themselves in social terms, as integrated in morally meaningful ways with others. Bellah attributes these losses to selfishness and the belief that moral goals are arbitrary.[49] He prescribes a new social ecology — a recapture of republican egalitarianism — with its rejection of wide chasms between rich and poor, and the development of common views about distributive justice in which Americans "give up [the] dream of private success for a more genuinely integrated societal community."[50]

In Glendon's view, as in Bellah's,[51] part of what new respect for each other requires is a move beyond an "impoverished" discourse of rights to a dialogue about the ways in which we ought to live (p. 39). Glendon hopes that a "reconstruction of moral philosophy" through discussions about virtue will inform our legal dialogue on moral issues such as abortion and divorce (pp. 139–40). Glendon's comments here are very brief, but much is at stake in this move toward virtue and away from rights.

Proponents of virtue ethics, drawing heavily on Aristotle, develop accounts of the good life and the nature of virtuous character traits.[52] They reject the moral pluralism of liberal political theory, with its neutrality among differing conceptions of the good and its insistence that each person should be free to pursue her own good in her own way as long as others are not harmed. They see both consequentialist and deontological moral principles as secondary to the development of good character traits.

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[43] Bellah's account focuses almost exclusively on the white middle-class, significantly omitting nonwhite and lower income perspectives on crises in the American community. *See* Abrams, *Kitsch and Community*, 84 MICH. L. REV. 941, 946 (1986).

[44] R. BELLAH, *supra* note 41, at viii.

[45] *See id.* at 21.

[46] *See id.* at 109.

[47] *See id.* at 204.

[48] *See id.* at 23.

[49] *See id.* at 7. Biblical and republican traditions, Bellah argues, gradually have given way to the utilitarian individualism of Adam Smith and Benjamin Franklin, who argued that if each individual pursues his own self-interest, the general good will emerge. *See id.* at 33.

[50] *See id.* at 286.

[51] *See id.* at 143–44.

[52] *See infra* pp. 482–83.

Virtue ethics, moreover, emphasizes the role of community and historical tradition in the development of character.[53] In the liberal view, the function of politics is to create neutral frameworks within which individuals can pursue their own goals.[54] The virtue ethics tradition, in contrast, emphasizes the educative function of politics — the role of states and social institutions in helping citizens understand the nature of the good life[55] — just as Glendon emphasizes the educative function of law (p. 7).

With the communitarianism of virtue ethics comes a de-emphasis on the importance of rights. In the liberal vision, rights protect citizens against incursions by other citizens. Perhaps even more importantly, rights protect citizens against incursions by the state; Mill's *On Liberty*, for example, was largely directed against the tyranny of the majority.[56] For the virtue ethics theorist, by contrast, rights are derivative at best and dangerous at worst. Whereas in the liberal tradition rights are crucial to respect for persons as individuals,[57] in the virtue ethics tradition rights are seen as isolating individuals from community structures.[58]

Contemporary virtue ethics has developed in an age in which the foundations of ethics are under siege.[59] Alasdair MacIntyre, for example, asserts that unless we abandon liberal neutrality towards the

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[53] *See, e.g.*, A. MACINTYRE, AFTER VIRTUE (2d ed. 1984) [hereinafter A. MACINTYRE, AFTER VIRTUE]; A. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988). MacIntyre develops his theory through the concept of practices: complex, cooperative activities, such as education, portrait painting, or lawyering. *See* A. MACINTYRE, AFTER VIRTUE, *supra*, at 187. Practices yield goods obtainable only through participation in them and are instrumental in the development of human excellences. The goods of a practice can be achieved only through ongoing cooperation among practitioners, including both past and future practitioners. Virtues are human qualities that enable individuals to work well within practices. *See id.* at 187, 191. Because individuals are subordinated to the demands of practices, virtues are defined in cooperative terms. MacIntyre explicitly contemplates self-sacrifice:

> It belongs to the concept of a practice . . . that its goods can only be achieved by subordinating ourselves within the practice in our relationship to other practitioners. We have to learn to recognize what is due to whom; we have to be prepared to take whatever self-endangering risks are demanded along the way; and we have to listen carefully to what we are told about our own inadequacies and to reply with the same carefulness for the facts.

Id. at 191.

[54] *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 11–12 (1971).

[55] *See* A. MACINTYRE, AFTER VIRTUE, *supra* note 53, at 195.

[56] *See* J.S. MILL, ON LIBERTY 3–19 (C. Shields ed. 1956).

[57] *See, e.g.*, J. RAWLS, *supra* note 54.

[58] *See, e.g.*, A. MACINTYRE, AFTER VIRTUE, *supra* note 53, at 81–82, 250–51; Sandel, *Morality and the Liberal Ideal*, New Republic, May 7, 1984, at 15.

[59] This war of attrition has been a major force in shaping contemporary debates about the theory of law. H.L.A. Hart's positivistic insistence on the separation of law and morality, for example, was developed in the shadow of the fear that moral criticism of Nazism was purely arbitrary. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615–21 (1958). Glendon explicitly rejects the positivist tradition (p. 7).

content of the good life, the search for a rational foundation for ethics is doomed.[60] He turns instead to teleology — to the idea that there is purpose to life embedded in historically evolving practices.

An historically and culturally rooted theory of virtue such as MacIntyre's, however, runs the ominous risk of succumbing to moral relativism. If ethical judgments are grounded in tradition, there is no external foothold for criticism. There are only other traditions. Moreover, with the loss of an external critical perspective comes the risk of complacency. Aristotle, for example, is notorious for identifying middle-class traits — such as magnanimity — as virtues and for asserting that slaves and women could never be full members of the community.[61] An even deeper problem is the apparent inability of the historicist to criticize evil practices. How, for example, can one who believes in a theory that roots morality in cultural practices criticize the Nazis, who purported to be purifying the human race in the name of an "Aryan" tradition?

Commentators portray MacIntyre as making the case for ethics historically, but as disavowing the relativism that historicism is generally thought to imply.[62] Indeed, MacIntyre does attempt to rebut the relativist critique. He concedes that evil may result from human cooperative activities, but maintains that these activities must fit within the narrative unity of good lives.[63] The fact that we find moral identity through community membership, he says, "does not entail that the self has to accept the moral *limitations* of the particularity of those forms of community."[64] MacIntyre does not explain, however, how to transcend those limits.

Glendon clearly recognizes that her own ethical theory is equally susceptible to the relativist critique: "[T]wentieth-century experience has made us rightly wary of the classical view that a purpose of law is to promote virtue. Who is to define virtue? we moderns must ask" (p. 139). She responds by deflecting the question into a recognition of American pluralism and the assertion that law cannot remain neutral among visions of the good. However we explain virtue, she argues, the law will have a pedagogical function in shaping the debate by interpreting and influencing how we think about ourselves and our lives (p. 139). Yet this response provides neither a theoretical answer to the challenge of relativism nor any reason for confidence that the communitarian debate will not turn into the oppressive tyranny of the majority that concerned Mill.

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[60] *See* A. MACINTYRE, AFTER VIRTUE, *supra* note 53, at 118–19.

[61] *See id.* at 159.

[62] *See, e.g.*, AFTER PHILOSOPHY: END OR TRANSFORMATION?, *supra* note 33, at 8.

[63] *See* A. MACINTYRE, AFTER VIRTUE, *supra* note 53, at 200–01.

[64] *Id.* at 221 (emphasis in original).

Classical liberal theory values rights for their protection of individuals with different visions of the good life against predatory or evil communities. By contrast, like others who emphasize the roles of virtue and tradition in ethical theory, Glendon turns away from theories of rights. Whatever the strength of her critique of individualism — and I argue in the next section that it does have merit — Glendon must come to terms with the risks of a retreat from a theory of rights.

IV. The Risks of a Retreat from the Right to Privacy

The classic statement of the right to privacy in American liberal jurisprudence is that it is the "right to be let alone."[65] As such, the right to privacy typically is understood as a right to protection from interference, a "negative" rather than a "positive" right.[66] Under this conceptualization, the content of the right to privacy encompasses only what the state *may not* do. The right is not violated by sordid or crowded living conditions — such as those existing in shelters for the homeless — where it is extremely difficult to be alone. It is not violated by the economic dependency of an abandoned wife or her lack of resources to make a decent life for herself and her children.

The abortion funding cases best illustrate the consequence of viewing abortion within a structure of negative rights. Federal funding for abortions under the Medicaid program now is available only when a pregnancy threatens the mother's life. Recent Medicaid funding rules have eliminated even the earlier exception for pregnancies resulting from incest or rape;[67] poor women who are raped, therefore, may have no effective access to abortions. In addition, the most

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[65] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting COOLEY ON TORTS 29 (2d ed. 1888)).

[66] On the standard distinction, "negative" rights are rights to noninterference and "positive" rights are rights to the provision of some good. For example, first amendment liberties of speech, press, and religion are negative rights; rights to food, shelter, health care, and other forms of welfare are positive rights. For an argument that the distinction between negative and positive rights breaks down, see, for example, J. NICKEL, MAKING SENSE OF HUMAN RIGHTS 14, 88 (1987), and H. SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 35–64 (1980). The most thorough treatment of abortion that relies on a theory of negative rights is Thomson, *A Defense of Abortion*, 1 PHIL. PUB. AFF. 47 (1971), which argues that, even if the fetus has a right to life, it does not follow that the pregnant woman has an obligation to provide it with the means of life.

Glendon utilizes the distinction between positive and negative rights. For example, in comparing *Roe* with the holding of the West German Constitutional Court that fetal life is constitutionally protected, she writes:

> The affirmative German right to the free development of one's personality contrasts with the negative American formulation of privacy as a right to be left alone. Whereas the American conceptualization of privacy emphasizes freedom *from* various kinds of restraints, the German version stresses and makes clear what this freedom is *for* (p. 37) (emphasis in original).

[67] *See* 52 Fed. Reg. 47,926, 47,931 (1987) (to be codified at 42 C.F.R. § 441.200).

recently proposed Public Health Service rules governing abortion and agencies that receive title X funding for family planning services are draconian. The rules interpret the statutory ban on using title X funds for abortion counseling and referral to require the complete purification of a title X agency from abortion-related activities.[68]

Exclusively negative theories of rights have come under criticism from many directions.[69] Feminist criticism, for example, indicts the indifference of the right to privacy, as conceptualized by American courts, to what goes on behind closed doors. Catherine MacKinnon argues that the right to privacy as conceived in American liberal jurisprudence ignores the brutal facts of oppression in women's lives.[70] Our right to privacy ignores spousal rape and marital domination and demands that women's bodies conform to the images of men's desires. It ignores the fact that contraception and unwanted pregnancy are viewed as a female problem, not as a human problem.

Glendon's outright rejection of an exclusively negative right to privacy is evident; her greatest outrage is reserved for the lack of support for children and pregnant women in the United States (p. 111). With her indictment of the limits of negative rights I have no quarrel. Glendon's remedy, however, is to move away from rights, rather than to develop an expanded understanding of moral and constitutional rights. It is in this move away from rights that her otherwise seductive argument turns dangerous.

Although Glendon persuasively criticizes the limits of the negative right to privacy, the solutions she proposes, especially for abortion, are deeply problematic. The lesson to be drawn from a comparison of Western European and American abortion law, Glendon argues, is the value of political compromise. *Roe* constitutionalized the abortion issue prematurely (p. 45) and halted the legal development of what our society imagines the reality of abortion to be. *Roe* also closed off compromise between concern for the innocent fetus and the painful recognition that abortion is sometimes a response to urgent needs. To foreclose compromise in this way, she contends, is particularly harmful when public opinion is not united behind the decision (pp. 40–41). Glendon's solution to this dilemma is that *Roe* should be limited gradually to allow the states to return to what she claims is their proper role in regulating abortion (p. 42).

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[68] Explicit examples of prohibited activities include providing brochures of clinics performing abortions for clients who ask for abortion information and making appointments for clients at abortion clinics. *See* 52 Fed. Reg. 33,214, 33,215 (1987) (to be codified at 42 C.F.R. § 59.10). For an argument that these restrictions run afoul of even the limited "negative" right to privacy that prevails in American jurisprudence, see Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988).

[69] *See, e.g.*, J. NICKEL, *supra* note 66; H. SHUE, *supra* note 66.

[70] *See* C. MACKINNON, FEMINISM UNMODIFIED 96–97 (1987).

Glendon speculates that if abortion law had been left to the states, gradual liberalization would have resulted (pp. 48–49). To support this point, she notes that nineteen states had liberalized their abortion laws before *Roe* (p. 48). Yet Glendon may be too hopeful about earlier or current possibilities for compromise in the United States. It is here that her lack of empirical data about such matters as membership in anti-abortion groups, lobbying activities and legislative successes by these groups, regional differences in attitudes toward abortion, and violence against abortion facilities[71] is especially disturbing. Despite *Roe*, wide variations in access to abortions remain, especially in rural areas and in the southern, middle western, and mountain states.[72] Returning abortion regulation to the states might well result in stringent regulation in some jurisdictions and liberalization in others. If so, abortion would remain readily available to those with the economic resources to travel, but would become inaccessible to poor women in states that permit abortion only in very limited circumstances. The risk of abandoning the constitutional right to privacy in reproductive decisionmaking, therefore, is that some women will lose even the limited ability to choose that they now have. Developing a richer theory of rights, including a theory about what ends rights can be used to accomplish, is an available and a preferable alternative.

Moreover, returning abortion regulation to the states might not result in what Glendon deems an improvement in the moral messages conveyed by our abortion law. She assumes that evolving compromises would communicate the messages that fetal life is an important interest (p. 59) and that "the fetus is entitled to protection" (p. 61), as well as the view that compassion for pregnant women can be combined with condemnation of abortion for capricious reasons (p. 62). Yet the resulting patchwork of state regulation might not provide any principled guarantee of fetal entitlements.[73] Moreover, state regula-

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[71] *See* K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 217 (1984).

[72] *See* F.S. JAFFE, B.L. LINDHEIM & P.R. LEE, ABORTION POLITICS: PRIVATE MORALITY AND PUBLIC POLICY 10, 15–16 (1981); J.S. LEGGE, JR., ABORTION POLICY: AN EVALUATION OF THE CONSEQUENCES FOR MATERNAL AND INFANT HEALTH 126 (1985); K. LUKER, *supra* note 71, at 242–43; Hansen, *State Implementation of Supreme Court Decisions: Abortion Rates Since* Roe v. Wade, 42 J. POL. 372, 381 (1980).

[73] I have not discussed the issue of fetal entitlements in this review because Glendon does not do so. The right-to-life movement will be sympathetic to Glendon's complaint that a negative right to privacy is indifferent to the reasons why pregnancies are terminated (p. 62). Yet anti-abortionists should not be satisfied with her solution, because it does not attack what they deem the real issue — the moral status of the fetus. Indeed, they too want a richer theory of rights, a theory in which the fetus' right to life overrides maternal rights, except possibly maternal rights to life, and which requires that the mother provide the fetus with sustenance during the pregnancy. The issue of the moral status of the fetus is deeply complex, with positions ranging from the view that the right to life begins at conception to the view that not even newborn infants have the right to life. For a recent effort to develop the compromise view that the fetus

tion might continue to ignore both compassion and support for the pregnant woman. Compromise, in short, will not necessarily result in respect.

Glendon also recommends an accommodationist position in the divorce context, balancing such factors as individual autonomy, a couple's interest in ending a painful situation cleanly, and protecting the economic stability of the spouse and children left behind (p. 75).[74] Glendon's claims about divorce are certainly less controversial than her claims about abortion; she does not recommend curtailing existing rights in the divorce context, as she does with abortion, but neither does she provide a basis for adequately supplementing them. Her recommendations thus are ultimately incomplete. In stating that the children's interests should be given foremost consideration when marriages dissolve (p. 94), that child support guidelines should be regularized and fair (p. 98), and that child support obligations should be more rigorously enforced (p. 88), she asserts truisms. She does not tackle, however, the harder substantive question: how the burden of support is to be allocated between the spouses or shifted to the larger society. This question needs to be answered if Glendon's plea for the protection of abandoned spouses and children is to be implemented.

Consider, for example, the allocation of support obligations between divorcing spouses. Some of the difficult issues raised here include the support obligations of a nonworking custodial parent, the relevance of former standards of living, and the effect of support obligations on new marriages and children. Many ways exist to deal with these issues in terms of theories of justice. Without a foothold in such a theory, Glendon's assertion that a particular distribution of child support obligations is fair lacks content. Nor should the general role of society be ignored. Largely because of its jurisprudence of negative rights, Glendon argues, the United States has tended to reject increased public redistribution of support for families (p. 89). Mounting a comprehensive attack on this issue, however, entails developing a theory of social justice that addresses such issues as claims to education, health care, and equality of opportunity. Glendon offers no such theory.

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has different types of rights when dependent on the mother than it has as an independent being, see R. GOLDSTEIN, MOTHER-LOVE AND ABORTION (1988).

[74] The moral integrity of the compromise is less clear with abortion than with divorce. Those who believe that the fetus has a right to life from conception, like those who believe that the woman has an absolute right to control her body, will be unable to give principled support to the compromise (pp. 60–62). Views that give fetal interests increasing weight throughout the pregnancy can be given a principled account, however, on the assumption that the fetus' moral status changes as it develops. Although Glendon suggests that the divorce compromise may be as difficult to justify as the abortion compromise (p. 75), it is not clear why this should be so. At issue in divorce are promissory rights and expectations, which are surely not as morally weighty as the right to life is taken to be by anti-abortionists.

V. CONCLUSION

Glendon is correct that our reliance on negative rights has prevented us from supporting each other sufficiently. As she puts it, we say "to parents, especially mothers, that it is not safe to devote oneself primarily or exclusively to raising children" (p. 111). That is why her book is seductive. Yet she draws the wrong conclusions from her analysis, recommending a dialogue about how we ought to live rather than an extended theory of rights. This retreat from rights risks the abandonment of a genuine framework of respect for individuals, be they fetuses, children, women, or men. Glendon's is a theory of dialogue and tradition, of compromise and accommodation, with inequality and oppression as the all too likely results. That is why her book is dangerous.