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Rights Talk: Must We Mean What We Say?

Suzanna Sherry

MARY ANN GLENDON, *Rights Talk: The Impoverishment of Political Discourse*. New York: Free Press. Pp. xiii+218. $22.95.

Mary Ann Glendon has written a powerful and persuasive diagnosis of the ills besetting modern American society. Unlike many other commentators, Glendon refuses to lay the blame on any single group or institution but spreads her accusations widely across society. For that reason, this book is sure to displease ideologues and fellow travelers on both the left and the right, but it is her impartial and relatively apolitical stance that gives the book its major strengths.

Glendon's basic thesis is that much of what is wrong with America stems from the "impoverishment of our political discourse" (at x) through an exaggerated and distorted fascination with rights. She makes very clear that it is not rights themselves that are the problem but our public discourse about rights.[1] Our rights talk is noticeably different from the discourse of other democratic nations insofar as "rights . . . tend to be presented as absolute, individual, and independent of any necessary relation to our responsibilities" (at 12). This leads to a state of affairs that makes it virtually impossible for us to focus on issues, to reason, to compromise, or to resolve the conflicts between individuals and community:

> 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

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1. In noting that language, especially public discourse, can dramatically affect culture (see, e.g., at 97, 109), Glendon is not alone. See Martha Nussbaum, "Comments," 66 *Chi.-Kent L. Rev.* 213, 233–34 (1990).

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> 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 reason-giving. (At 14)

This passage is worth careful rereading, for it identifies with great clarity and specificity the separate but related pathologies that render American rights talk so paralyzing.

First, Americans tend to talk about rights as absolutes. Glendon notes that many Americans, when asked what makes America and its freedoms special, respond with some version of the statement that "you can do whatever you want" (at 8, 9). This absolutist mentality about rights has several debilitating consequences. It is "less about human dignity and freedom than about insistent, unending desires" (at 171) and turns rights into "mere expressions of unbounded desires" (at 45). To the extent that every desire becomes a right—Glendon mentions particularly the expansion of rights to "trees, animals, smokers, nonsmokers, consumers, and so on"—the most important rights and democratic values are trivialized or simply buried under an avalanche of competing claims (at xi, 16). Moreover, the more claims of absolute right multiply, the more likely it is that they will clash with one another, and the absolutist tendencies of American rights talk diminish the possibilities of compromise based on respect for other values. American absolutism about rights is, Glendon notes, "the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over" (at 9).

American rights talk, like American political discourse in general, is also radically individualistic. Glendon nicely illustrates the contrast between American individualism and the more common European focus on interactions between individuals. Where American law developed the right of privacy to deal with the rapid expansion of media intrusion into private lives of public figures, the same problem spawned "rights of personality" in German law (at 48–56, 61–63). While privacy is individualist and inward looking, "personality" is "outward-turning," "not to be envisioned as a right to be barricaded against the world" (at 62). This difference exemplifies the American attitude of radical individualism, which "inevitably impl[ies] that dependency is something to be avoided in oneself and disdained in others" (at 73). Disdain for dependency, in turn, leads us to lag far behind Europeans on such issues as parental leave, child

care, and support for single women who are impoverished and pregnant. As Glendon points out, the much-prized right to abortion in this country—derived from the barricade vision of privacy—leaves such women with "their constitutional right to privacy and little else" (at 65). As the abortion issue illustrates, the individualism of American rights talk both increases its tendency toward stridency and lack of compromise and leads us to ignore any problems that cannot be easily solved by attaching a rights label to them.

Glendon's chapter on responsibility (chapter 4, "The Missing Language of Responsibility") is perhaps the most interesting of the substantive chapters. She eloquently describes our "habitual silences concerning responsibilities" (at 76). Our public discourse lacks the "ready vocabulary" to express either a communal "responsibility for the less fortunate" or a willingness by individuals "to take responsibility for themselves and their dependents" (at 105). Thus we foster individual irresponsibility and also fail to aid those whose problems are not of their own making. This further exacerbates the individualism and absolutism of American rights talk. The lack of discourse about responsibility complements and fosters our peculiar modern strain of individualism, which is "characterized by self-expression and the pursuit of self-gratification, rather than by self-reliance and the cultivation of self-discipline" (at 173).

She provides two telling examples of our inattention to responsibility. Unlike most European countries, we generally reject "Good Samaritan" laws; moreover, our public jurisprudence suggests that even the state is not required to provide affirmative aid to those in need unless the state itself created the danger.[2] In many European nations, by contrast, individuals are expected to take some responsibility for strangers and the government is constitutionally required to protect its citizens. For both types of assistance, however, she notes that the European legal obligation is largely hortatory: positive rights against the government are "programmatic" and therefore need legislative implementation (at 99–100), and Good Samaritan laws contain provisions only for small fines (at 84).[3] Thus the law serves as a moral model more than as a direct command. The American preference for viewing law as command rather than as a shaper of society leads us into difficulties where responsibilities are concerned: especially in light of the commitment to individualism, it is difficult for American jurisprudence to impose liability for what we see as mere moral failings.

2. She uses DeShaney v. Winnebago County Dept. of Social Services, 109 S. Ct. 998 (1989), to illustrate this point nicely. In particular, she suggests that the Court might have reached the same result in different language, thus avoiding the misleading appearance of a lack of obligations.

3. She also notes that where Americans rely on tort remedies, Europeans often see stranger-in-peril cases as "involving civic duties rather than private rights" and thus impose criminal rather than civil sanctions (at 84).

The second example Glendon gives of our neglect of responsibilities comes from family law. In cases of divorce, some European countries put the financial burden of supporting the children on the parent or parents, with strong child-support laws strictly enforced (especially against noncustodial parents). Others, stressing the independence of the custodial parent, are less strict with the spouse but instead provide adequate government financial aid to single parents. American law, by contrast, stresses independence—and thus has weak support obligations—but fails to provide sufficient state aid to enable single parents to become independent. Glendon aptly describes this as not only no-fault divorce but also "no-responsibility divorce" (at 107).

Glendon also notes insightfully that it would be less problematic for law to ignore responsibilities if other forces in the community could reinforce the moral value of responsibility. Unfortunately, "law is now regarded by many Americans as the principal carrier of those few moral understandings that are widely shared by our diverse society" (at 87). Legal silences are thus much more influential than they might otherwise be.

A chapter on the neglect of civil society offers similar diagnoses and examples. She notes that our rights talk "neglect[s] the social dimension of human personhood" (at 109). The American legal system cannot comprehend the value of groups or communities—which she calls "the seedbeds of civic virtue" (*id.*)—and thus sees them either as collections of individuals or as politically suspect "interest groups" (at 115, 122–23). She is careful to note, however, that the answer is not to substitute groups for individuals by endowing them with rights of their own. Pitting groups against one another—and against the state—simply "raise[s] spectres of individual oppression, of new tribalism, and of the old problem of faction" (at 137).

Her criticism of our blind spot toward groups is particularly trenchant when she describes how Americans and Europeans define and treat families: where Americans see a collection of individuals, Europeans see an institution whose primary purpose is rearing the next generation (at 122–27). This obviously leads to rather different policy decisions on everything from zoning to health care, and Glendon highlights the irony of including an unmarried childless couple (whether heterosexual or homosexual) in employee health benefit programs while excluding a grandmother raising two nonsibling grandsons from a "single-family" neighborhood (at 124–25). But American rights talk, with its focus on isolated individuals, is unable to perceive child rearing as anything more than "just one more 'life-style' as to which the state must be 'neutral' " (at 134–35). Perhaps Glendon's most concrete and practical suggestion is that "we must be attentive to the ways in which governmental or employer

policies may inadvertently be discouraging, impeding, or even penalizing those who are responsibly trying to carry out family roles" (at 135). Our failure to do so, she suggests, stems largely from a public discourse that cannot recognize the importance of families (and other groups that are necessary or conducive to human flourishing) as fundamental units within society.

Glendon lastly turns her attention to American insularity. Unlike many other nations, we tend to ignore the jurisprudence and lessons of the rest of the world. While the courts of other nations draw on varied international legal traditions, we remain oblivious to any traditions but our own. This deprives us of a tremendous opportunity for "self-renewal and for creative adaptation to new and challenging circumstances" (at 170). Glendon nicely uses two examples—homosexuality and abortion—to illustrate how the U.S. Supreme Court's approach is much narrower and more provincial than those of other nations.

As this brief survey suggests, the heart of the book is primarily an elaboration of the themes suggested in the passage quoted early in this review. Each of the peculiarly American traits she identifies in the key passage—absoluteness, individualism, insularity, and isolation from either responsibility or community—fills a chapter in which she canvasses contrasting European attitudes, attempts to assess the causes of our aberrational discourse, and suggests in more detail how the particular trait operates and how it diminishes our ability to deal with real problems. In elaborating how each of these peculiarly American traits operates, Glendon draws nicely on her previous work—her best examples focus on topics she has written on extensively, such as family law and abortion.

Despite their breadth, however, these individual chapters are not as satisfying as the introductory diagnosis in the preface and first chapter. In part, that is simply because I would have preferred a different book, with less focus on comparative law and more on causes and cure. In part, however, it is because although her diagnosis is penetratingly accurate, it lacks sufficient context: her quasi-historical analysis of the pedigree of American rights talk lacks sufficient depth to add significantly to the introductory statement of the problems, and the illustrations of the pathologies in action tantalize the reader but fail to address serious questions about the real conflicts underlying the rights talk.[4] The result is a book that seems almost scattershot in its approach, with many interesting tidbits and one excellent thesis but little cohesiveness. In a way, this is merely a complaint that she did not write the book I would have written, but it is also an

4. Richard Epstein suggests that the problem is not "rights talk" but the nature of the rights themselves: certain conflicts are simply not amenable to compromise, and discourse about them necessarily seems strident, absolutist, and radically individualist. Richard A. Epstein, "Rights and 'Rights Talk,'" 105 *Harv. L. Rev.* 1106 (1992).

argument that had she better understood the historical context and/or the underlying conflicts, she might have written a book that does more than simply identify a problem.

In explaining the American penchant for taking rights too seriously, Glendon focuses almost exclusively on the tradition of individual rights she says we inherited from Locke and Blackstone. From the Declaration of Independence—which, unlike the nearly contemporaneous 1789 French Declaration of the Rights of Man and Citizen, entirely neglected the *duties* of citizens—through Holmes's denunciation of the "confusion between legal and moral ideals,"[5] to modern legal education's almost total neglect of moral concerns, Glendon sees a common pattern that has created and reinforced our dangerously exaggerated rights talk.

This explanation is both historically inaccurate and overly simplistic. The Lockean tradition of individual rights—especially positive, written rights—is only one strand in our jurisprudential heritage. Mingled with the tradition are three equally ancient and venerable American values: two interrelated concepts of civic republicanism—one stressing civic virtue and one stressing the importance of community—and a notion of unwritten natural rights based on morality.[6] Overlaid rather awkwardly on top of all these older traditions is 19th-century positivism.

There is a strong congruence between the traditions missing from Glendon's analysis and the traits she identifies as missing from American rights talk. The two concepts of republicanism supply a focus on responsibility and sociality, as well as tempering the radical individualism and absolutism that Glendon finds so prevalent. The idea of unwritten natural rights forms a bridge between law and morality. In light of the influence of these early traditions, it is not until the triumph of legal positivism in the second half of the 19th century that the American legal landscape was ready to be dominated by Glendon's form of rights talk. A brief review of these interwoven traditions suggests that Glendon's view of the role of rights talk in the creation of the American malaise might be somewhat misleading.

Americans inherited their tradition of civic republicanism, ultimately derived from classical philosophy, largely from the English opposition party of the 17th and 18th centuries. In both its classical and Anglo-American versions, republicanism emphasized the communal nature of

5. Oliver Wendell Holmes, "That Path of the Law," 10 *Harv. L. Rev.* 457, 458–59 (1897), discussed in Glendon at 86–87.

6. For various views on the interrelationship and possible conflicts among these different concepts, see, e.g., David N. Mayer, "The English Radical Whig Origins of American Constitutionalism," 70 *Wash. U.L.Q.* 131 (1992); Thomas L. Pangle, "The Classical Challenge to the American Constitution," 66 *Chi.-Kent L. Rev.* 145 (1990); Suzanna Sherry, "The Intellectual Origins of the Constitution: A Lawyers' Guide to Contemporary Historical Scholarship," 5 *Const. Commentary* 323 (1988).

mankind rather than individualism. Society—including both the state and smaller social groups—inevitably shaped individuals and their values; individuals did not come into the world with different exogenous preferences that government was required to mediate and protect. Instead, responsible citizens engaged in rational deliberation about their government and their society. For such a system to work, of course, citizens were required to be both responsible (or virtuous) and community-oriented: a nation of selfish, irresponsible citizens would soon degenerate into tyranny. Indeed, 18th-century Americans viewed the history of the world largely as repeated failures of virtue inevitably followed by despotism.

It is easy to see how the classical tradition of civic republicanism might transform Glendon's pessimistic sketch of the impoverished American rights discourse. Infusing virtue and community into our individualist discourse would temper rights with responsibility and isolationism with inclusion. Indeed, a number of legal scholars are embarked on just such a project.[7] *Rights Talk* might have benefited from a discussion of this growing body of literature about our alternative traditions, both as a complement to Glendon's own vision of the best hope for the future and as a potential source of relief from the unabated individualism Glendon portrays. Republicanism might also have served as a basis—or at least as a taking-off point—for some suggestions about how to remedy the ills that our modern view of rights has created.

Similarly, Glendon's description of rights is itself too narrow. She focuses exclusively on individual rights as a method of barricading oneself against others and as an expression of desires rather than of moral right. Earlier American conceptions of rights, however, included both a moral and a social aspect. The idea of natural, inalienable rights—prevalent in American law from the late 18th century through at least the mid-19th century—was part of a more general philosophy of law as a reflection of morality. Glendon's complaint that "American jurists . . . are somewhat uncomfortable with the idea that law . . . has a role in reinforcing a common moral sense" (at 85) is a particularly inapt description of the American legal landscape prior to the late 19th century. Not only were natural rights important, they were often thought to be derived partly from the sensibilities and customs of the nation rather than simply from abstract

7. For some general overviews of civic republicanism and its modern implications, see, e.g., "Symposium: Classical Philosophy and the American Constitutional Order," 66 *Chi.-Kent L. Rev.* 3 (1990); "Symposium: Roads Not Taken: Undercurrents of Republican Theory in Modern Constitutional Theory," 85 *Nw. U.L. Rev.* 1 (1990); "Symposium: The Republican Civic Tradition," 97 *Yale L.J.* 1493 (1988); Frank Michelman, "Foreword: Traces of Self-Government," 100 *Harv. L. Rev.* 4 (1986); Suzanna Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication," 72 *Va. L. Rev.* 543 (1986); Cass Sunstein, "Legal Interference with Private Preferences," 53 *U. Chi. L. Rev.* 1129 (1986); *id.*, "Interest Groups in American Public Law," 38 *Stan. L. Rev.* 29 (1985).

reasoning.[8] This view of rights seems much closer to Glendon's own view, and including it would have deepened both her discussion of rights talk and her own proposals.

Moreover, many of the most important rights, the ones that eventually found their way into the Constitution, serve a communal or civic purpose. Certainly many of the rights were necessary or useful to a deliberative republican citizenry (freedom of speech is one such right), and others offered "protection to various intermediate associations . . . designed to create an educated and virtuous electorate."[9] This view of rights as integral to society as well as to individuals is entirely missing from Glendon's analysis. For example, she briefly explores the founding generation's view of property rights, noting that in contrast to our modern rhetoric, property rights were never meant to be absolute (at 25–26). She fails to note that in a republican world, property ownership was viewed as a necessary prerequisite to acquiring and maintaining individual virtue, and thus that protection of property rights was as much for the benefit of the society as for the individual.[10] Although she recognizes that modern rights talk exaggerates the absolutist nature of property rights, she seems unaware that it also exaggerates their individualist aspect. Since she finds property rights to be the paradigm for most other rights, this failure infects and weakens her entire discussion. A recognition that at one point in our history we viewed at least some rights as at least partly social sharpens the criticism of today's rights talk and also offers some hope for the future.

Since *Rights Talk* does not purport to be primarily a historical work, Glendon's neglect of our alternative heritage does not seriously compromise the book. However, she does claim to offer some explanation for the distortion that has occurred in our public discourse, and that explanation fails utterly in light of the historical evidence. Moreover, had she focused on 19th-century positivism—which tended to undermine both the republicanism and the natural rights jurisprudence of earlier generations—rather than on Locke and Blackstone as the primary "cause" of the impoverishment of our political discourse, she might well have reached different understandings or conclusions.

In particular, the thoroughgoing positivism that pervades American law may be much more deeply rooted than Glendon recognizes: the prob-

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8. For general discussions of early American views of natural rights and their relationship to natural law, see, e.g., G. Edward White, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–1835* at 676–77 (New York: Macmillan, 1988); "Symposium: Natural Law," *U. Cin. L. Rev.* (forthcoming); Suzanna Sherry, "The Founders' Unwritten Constitution," 54 *U. Chi. L. Rev.* 1127 (1987).

9. Akhil Reed Amar, "The Bill of Rights as a Constitution," 100 *Yale L.J.* 1131, 1132 (1991).

10. See Stanley Katz, "Thomas Jefferson and the Right to Property in Revolutionary America," 19 *J.L. & Econ.* 467 (1976); Gregory S. Alexander, "Takings and the Post-Modern Dialectic of Property," 9 *Const. Commentary* 259 (1992).

lem may not be simply in our discourse about rights but in our very culture of rights. Talking about rights as absolute and individualist may come naturally because we *believe* that rights are absolute and individualist. The lapses in our vocabulary regarding responsibility and sociality may stem from or reflect the relative unimportance of these concepts in our whole value system.

While Glendon accepts that our rhetoric is in some way a reflection of the underlying culture, she believes that it is a very distorted reflection, and that "[t]here is much evidence . . . that cooperative, relational, patterns of living survive in the United States to a greater degree than our individualistic public rhetoric would suggest" (at 174). But she offers very little such evidence, except that in nonpublic situations—"[a]round the kitchen table, in the neighborhood, the workplace, in religious groups, and in various other communities of memory and mutual aid" (at 174)—we don't tend to employ the exaggerated rights talk she condemns. In fact, there is an increasing tendency to use rights in these situations. And in any case, there is a significant difference between small groups with common bonds, interests, and needs, and the diverse and often conflicting population that forms the larger society—and that difference lies not only in the way members of the group talk about their relationships with one another but how they *define* those relationships.

Glendon may be at least partly right that our discourse affords only a distorted reflection of our culture, but it would be helpful to have a keener and more accurate description of the source of the distortion in order to evaluate its extent. If, as I have suggested, peculiarly American rights talk stems mostly from the change in American culture that precipitated and accompanied the move to legal positivism, then it is likely to be a deeper and more accurate reflection of our culture than Glendon seems to think. Her optimism that we can escape our current predicament merely by changing our rhetoric is thus probably unwarranted: If the pathology lies deeper than she suggests, the task of eradicating it will be that much more difficult.

All this criticism should not be taken too seriously, however. A book that accurately and eloquently diagnoses a serious problem in a new way has already performed a great scholarly service, and no serious scholar of American law or politics can afford to ignore Glendon's work.