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Talking About Rights

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In recent years, a growing recognition of the power of rights talk in American law and life has surfaced in the writing of legal academics, along with a gnawing doubt about that power. In *Rights Talk: The Impoverishment of Political Discourse*, Mary Ann Glendon, a professor of law at Harvard University, gives those doubts systematic, thoughtful, and lucid expression. Glendon has long been one of our most penetrating students of family law and one of our most enlightening students of comparative law. In this book (as in its predecessor and forebear, *Abortion and Divorce in Western Law*), she brings this learning to bear in a work that speaks deeply and broadly to the role of rights-thinking not just in law, but also in politics and social relations.

America, Glendon begins, is the land of rights. It is "undoubtedly one of the most law-ridden societies that has ever existed on the face of the earth" (p. 2), and this has promoted the American tendency to conceive ideas about government, social life, and personal relations in terms of rights. True, rights talk has proliferated throughout the world since the Second World War. But Americans speak a unique "rights dialect" made distinctive by

its penchant for absolute, extravagant formulations, its near-aphasia concerning responsibility, its excessive homage to individual independence and self-sufficiency, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity. (p. 14)

Consequently, American political discourse is impoverished—self-absorbed,

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Talking about Rights

by Carl E. Schneider

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strident, uncompromising, and speaking "less about human dignity and freedom than about insistent, unending desires" (p. 171).

One of the merits of Glendon's book is that she provides clear and concrete illustrations of these general criticisms. She explores the habit of thinking of rights in absolute terms by studying the right of property, which she sees as the American proto-right. She deploys the right of privacy to exemplify the ways American rights talk makes "a radical version of individual autonomy normative" (p. 73). She recruits American law's failure to require people who can safely do so to rescue people in danger to exemplify the ways rights talk discourages people from considering their personal obligations and their government's affirmative responsibilities. She uses the constitutional law regulating government "takings" of private property to illuminate her argument that

[n]eglect of the social dimension of personhood has made it extremely difficult for us to develop an adequate conceptual apparatus for taking into account the sorts of groups [families, neighborhoods, and religious associations, for instance] within which human char-

acter, competence, and capacity for citizenship are formed. (p. 109)

And she contrasts American and European judicial treatments of statutes prohibiting homosexual sodomy to show how the American rights discourse stays insular, how it isolates itself from the richer rights thinking of other countries. The European Court of Human Rights, Glendon observes, could persuasively overturn a sodomy statute because its opinion took the arguments of both sides seriously and rested on a carefully developed and cautiously delimited right of privacy.

It is a measure of the fierce grip rights thinking has on Americans that those who criticize it are commonly taken to desire its complete destruction. Glendon labors hard to show that hers "is not an assault on specific rights or on the idea of rights in general, but a plea for reevaluation of certain thoughtless, habitual ways of thinking and speaking about rights." She "freely grant[s] that legally enforceable rights can assist citizens in a large heterogeneous country to live together in a reasonably peaceful way" (p. 15). Here Glendon's command of European law is particularly enlightening, for she fruitfully uses that learning to demonstrate the possibility and practicality of a rights language less infected than ours with the ills she describes. She observes that European rights talk is generally not phrased in absolute terms, is less vehemently individualistic, allows broader social interests to be taken into account, locates rights-bearers in their larger social context, and, for all those reasons, is generally more useful and less destructive than American rights talk.

What does Glendon expect of the future? Like Robert Bellah and the coauthors of *Habits of the Heart*, she concludes "that cooperative, relational patterns of living survive in the United

States to a greater degree than our individualistic public rhetoric would suggest" (p. 174). She thus finds some hints of hope for a less distorted language of rights and a more generous public discourse.

How convincing is Glendon's case? *Rights Talk* is a work of social criticism in the tradition of *Habits of the Heart* and of Alan Wolfe's *Whose Keeper?* Such works are not susceptible of exact proof and may perhaps be best evaluated by asking whether they ring true in their readers' experience. For myself, I believe that Glendon has done more than most social critics to instantiate her arguments and that she accurately identifies and acutely dissects a powerful strand of American rhetoric and thought. I am constantly struck by how automatically, adamantly, and aggressively my Property and Family Law students speak the language of rights and how offensive they find alternative tongues. And as I listen to public de-

bates and private discussions about both private choices and public duties, I repeatedly hear the same voices Glendon records.

Bioethics provides many instances. In *Rights Talk* and in her earlier *Abortion and Divorce in Western Law*, Glendon charts the way the American rights dialect has helped turn the conflict over abortion into a cankerous and uncompromisable bitterness in American politics. Less dramatically (as I once argued in an article called "Rights Discourse and Neonatal Euthanasia"), the debate over the treatment of defective newborns has been distorted by the anxiety of all sides to frame their case in terms of rights. And the *Cruzan* case exemplifies the way an attempt to constitutionalize an issue can divert a usefully direct conversation about an issue's basic social and moral dilemmas into inapt, tangential, acidulous, and fruitless disputation over rights.

More broadly, Glendon is also right to

worry about how our rights talk erodes people's concern for one another. It isn't just that that talk is exaggeratedly individualistic. A right tells the world that what somebody is doing is none of the world's business. But it is hard to keep sending such a message and yet to expect the world to be interested in and concerned for that person.

To be sure, *Rights Talk* is not without its disappointments. In particular, Glendon is stronger on the faults of our rights dialect than on the specifics of what to substitute for it or how such a substitution might be effected. When she does reach specifics, the changes in rights-thinking she proposes often seem so modest that one wonders whether they would have any large consequences. But these are disappointments inherent in the genre of social criticism to which *Rights Talk* is a telling and troubling addition, and it would be churlish and ungrateful to complain of them.