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RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE. By *Mary Ann Glendon.* New York: The Free Press. 1991. Pp. xvi, 218. $22.95.

In this most interesting book Mary Ann Glendon[1] takes as her subject the feature of American public discourse suggested in the title, namely that more than most nations we are likely to conceive of any issue that divides us in terms of a clash of rights, each stated absolutely, with no apparent way to harmonize them. A familiar instance, addressed at some length by Glendon in an earlier book,[2] is the abortion issue, which is often debated in exactly such terms, one side speaking as if the fetus's "right to life," the other as if the woman's "right to control her body," had no limits. Of course, here as elsewhere both sides in fact usually recognize some constraints: that abortion is to be permitted after rape or to save the life of the mother, for example, or to be prohibited after some period of gestation. But this really supports Glendon's point: our talk of "rights" does not reflect what we know (or would concede) and thus both emphasizes the differences among us and makes them seem unbridgeable. Suppose, by contrast, we habitually acknowledged the limits on the rights we asserted, and hence made salient the matters on which we agreed: the differences between the two positions would seem less stark and more amenable to compromise. We would be beginning a conversation that was more complex and multivalent than a simple clash of assertions.

"Rights talk" of an absolutist and aggressive kind occurs not only in the law but in political debate more generally, indeed in school and family life and throughout our society. It is a general feature of our culture. Glendon tells us, for example, that in her adopted daughter's naturalization proceedings she was given a pamphlet explaining "The Meaning of American Citizenship" in these terms: "When you took the oath of allegiance to the Constitution of the United States, you

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2. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); *see also* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990); Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion,* 58 U. CHI. L. REV. 1181 (1991) (reviewing TRIBE, *supra*).

claimed for yourself the God-given unalienable rights which that sacred document sets forth as the natural right of all men" (p. 12). By contrast, when Jane Jacobs became a citizen of Canada she was told by the judge that "the most important thing about being a Canadian is learning to get along well with one's neighbors" (p. 13).

As an example of the sort of confusion into which our talk about rights can lead, Glendon tells of the American Legion spokesman who explained why the Supreme Court decision that protected the burning of the flag was wrong: "The flag is the symbol of our country, the land of the free and the home of the brave" (p. 8). When pressed as to exactly what this meant, he said, "It stands for the fact that this is a country where we have the right to do what we want" (p. 8) — except, of course, burning the flag. A spokesman for the flag-burner used similar language: "The way I see it, I buy a flag. It's my property. So I have a right to do anything I want with it" (p. 8).

Glendon is thus asking us to think not only about the way we talk in the law, but about the way we talk in our society more generally, and about the relation between these two fields of discourse. In this she functions not only as a legal analyst but as a sociologist of a certain appealingly old-fashioned kind, and her capacity to demonstrate how this kind of double analysis, which is far too rare, can be performed and performed well is one of the great virtues of her book.

Substantively, Glendon's claim is not that we should never talk about rights, but rather that our particular discourse about rights, in the law and out of it, or what she sometimes calls our "rights dialect," has features which make it a very poor vehicle for thought and argument: "It is set apart from rights discourse in other liberal democracies by its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities" (p. x). She argues not for the elimination or reduction of our rights discourse, but for what she calls its renewal and transformation.[3]

I

Having defined her problem in general terms, Professor Glendon's

3. A fuller statement of her position is this:

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

P. 14.

first step is to try to explain how this particular discourse arose and came to have the configuration that it does. Her story begins with John Locke's use of an expanded conception of "property" as the model for rights that individuals have against each other and the government, a conception that was cheerfully adopted by Blackstone, who was himself phenomenally influential in shaping the rhetoric of early American law (pp. 23-24). Property rights themselves are of course far from absolute, and Glendon takes pains to outline the process by which the government has come to claim more and more power over real property. But it is nonetheless true that our talk about "property" has an aura of absoluteness: in ordinary discourse the phrase *That's my property* implies total dominion, and in law it implies at least a presumptive claim to be free to do what you want with it. Another characteristic of property language, at least among us, is that it imagines a host of individuals, each with his or her property, atomistically arrayed against each other and the state. This, as Glendon points out at greater length later on, makes it very difficult to reflect communal or social interests in this way of talking — for example those at stake when the city of Detroit used its right of eminent domain to displace the entire section of the city known as Poletown in order to make room for a General Motors factory.[4]

Against Locke, she poses Rousseau's far more limited vision of the rights of property, namely "that an owner is a kind of trustee or steward for the public good" (p. 34). It is partly the influence of Rousseau, she thinks, that explains the differing European style in these matters, which is to articulate rights in far less absolute form. The West German basic law of 1949, for example, provides: "Property and the right of inheritance are guaranteed. Their content and limits shall be determined by law."[5] It goes on to make the limitations even more explicit: "Property imposes duties. Its use should also serve the public weal."[6] This is a very different way of talking about property from our own, really serving more to express a set of values or attitudes than to define what we would call a "right."

Glendon shows how property conceptions have shaped other rights by giving a brief history of the right of privacy, which commenced as an analogue to property. Indeed its first constitutional uses seem to have been in Fourth Amendment cases, which were heavily dependent on a language of property.[7] After a brief period under *Gris-*

4. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 465-71 (Mich. 1981) (Fitzgerald, J., dissenting) (recounting the history of the Poletown controversy).

5. P. 39 (citing THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 20 (1981)).

6. *Id.*

7. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928); Boyd v. United States, 116 U.S. 616 (1886). In fact, as she also suggests, property law originally served functions we think of today under a "privacy" label. For further discussion see JAMES BOYD WHITE, JUSTICE AS TRANSLATION 204-07 (1990).

wold v. Connecticut,[8] during which the Court talked about privacy as an aspect of the marital union — that is, as a relational right — it quickly became a "full-fledged *individual* right" (p. 57). The ultimate result was the declaration, rather *ex cathedra,* of the quasi-legislative rules in *Roe v. Wade,*[9] an exercise that has not satisfied many critics. But Glendon focuses less on the arguably improper form of these rules, and on the reasoning supporting them, than on their context in the larger social and legal matrix in which they function. When the same question arose in West Germany, the court produced a result that was far less absolutist in tone; equally important, its decision was supported by legislation that provided important services, including "medical care in pregnancy and childbirth and generous social assistance to single mothers, as well as a highly efficient system of imposition and collection of child support" (p. 65). In our country today, by contrast, "poor, pregnant women . . . have their constitutional right to privacy and little else. Meager social support for maternity and child-raising, and the absence of public funding for abortions in many jurisdictions, do in fact leave such women largely isolated in their privacy" (p. 65). This is a consequence, in part, of our habit of thinking of rights in the absolute and atomistic way that we do.

The effects are systemic and work against the very values we seek to promote: "By exalting autonomy to the degree we do, we systematically slight the very young, the severely ill or disabled, the frail and the elderly, as well as those who care for them — and impair their own ability to be free and independent in so doing" (p. 74).

Not only do we tend to see rights as isolated from the social and economic context in which they exist, we often regard the individual person as isolated in another way as well, from responsibility for his or her fellows. Glendon's example here is the well-known common law refusal to impose a duty to rescue strangers, a duty with which the Europeans are comfortable. But this is an issue not only between private citizens, but also between public officials and the public: Has a police officer or firefighter a duty to act to help a person in danger? Has a social worker a duty to protect a child whom he knows is subject to systematic parental beatings? In *Jackson v. City of Joliet,*[10] the first question, and in *DeShaney v. Winnebago County Department of Social Services,*[11] the second was answered in the negative, at least as a matter of constitutional law. Glendon's point is not that either case was necessarily wrong, but that the language in which the Court in *DeShaney* spoke could

> easily sound like an endorsement of an image of government that the

8. 381 U.S. 479 (1965).

9. 410 U.S. 113 (1973).

10. 465 U.S. 1049 (1984).

11. 489 U.S. 189 (1989).

> United States decisively repudiated in the 1930s. Though we as a nation are committed in principle and in fact (if not to the same degree as other liberal democracies) to the education of the young, the protection of public health and safety, and assistance to the needy, the Court's language might suggest otherwise. [The Court's opinion] all too readily lends itself to the interpretation that we are (in the Court's view) a nation of strangers — a nation that *in principle* leaves the helpless to their own devices. [p. 95]

The danger is that this kind of opinion will misinform the public about the nature of its government and the obligations that support it. "[T]echnically proper legal negations of responsibility can easily miseducate the public about what it means to be a citizen. Careless judicial pronouncements can harden the lines on a cultural grid which already seems to have decreasing room for a sense of public obligation" (p. 104).

The absoluteness of our language of rights tends not only to erase the dimension of responsibility from our experience, but tends to erase the dimension of sociality as well. This means that we have a very weak language for the protection of what she calls "social environments — families, neighborhoods, workplace associations, and religious and other communities of obligation — that traditionally have provided us with our principal opportunities to observe, learn, and practice self-government as well as government of the self" (p. 120). This is a serious weakness on the part of our law, a failure to give an appreciative understanding to the importance of intermediate institutions of social organization and collective life.

II

What keeps our rights discourse functioning in this way? There are many causes, but one of special interest to Glendon as a comparative lawyer is our insularity from other systems. Glendon's example here is the relationship between *Bowers v. Hardwick*,[12] holding sodomy laws constitutional as applied to the conduct of consenting homosexual adults, and the treatment of the same issue by the European Court of Human Rights. Not only was the European treatment less absolute and rigid — it condemned the particular prosecution, but held that some degree of regulation of private sexual conduct could be justified (p. 149) — the European case was argued and thought about with a consciousness of American experience, including American cases, while the American case was argued as though the European experience did not exist. To have attended to the European analogues, Glendon argues, would have provided a set of texts and arguments that might have led to opinions that respected more fully the complexity of the case they were deciding.

12. 478 U.S. 186 (1986).

Glendon's concern here is less with the result reached than with the mode of discourse by which that result is given meaning in the judicial opinions. In *Bowers,* the opinion for the majority simply asserted that the privacy doctrine of earlier cases applied only to family relationships, marriage, and procreative liberty, and did not extend "to cover all types of sexual conduct between consenting adults."[13] The opinion for the dissent is similarly abstract and absolute, asserting that the relationships in *Bowers* were indistinguishable from those governing earlier cases. Both opinions unnecessarily diminished views of those on the other side.

> The tone of the [majority] opinion must have been perceived by members of an already stigmatized group as legitimating, if not promoting, a climate of intolerance. . . . Similarly, even if one shares [the dissent's] view that Mr. Hardwick's individual rights should have prevailed, one may lament [its] disdainful brush-off of a community's interest in establishing and maintaining a cultural environment conducive to traditional moral standards. [p. 154]

There is a kind of paradox here: it is the European courts that have become "proficient at the principled, modest, collegial, flexible, pragmatic techniques of judicial decision-making that were once the pride of the American common law" (p. 157), while the American courts have become more dogmatic. Part of the solution to the problem may be to attend, with respectful and serious attention, to courts that function in different ways from our own, in the hope that we may modify to some degree our own habits of mind. For Glendon, the stakes are very high indeed: "Rights talk in its current form has been the thin edge of a wedge that is turning American political discourse into a parody of itself and challenging the very notion that politics can be conducted through reasoned discussion and compromise" (p. 171). She has no ready solution to the problems she describes, except the only one that can work: a process of collective self-education to which this book is meant as a contribution.

III

What is one to think of this? To begin with, as I said above, it seems to me that the kind of work Professor Glendon is doing is of great importance in two respects: (1) the integration of the analysis of law with the analysis of the cultural and social context in which it occurs is all too rare, and her skill at doing it is most impressive; (2) likewise, her focus upon habits of thought and expression, rather than simply upon material consequences, is itself an important step in helping us achieve fuller self-understanding. Few things can equal in significance the nature and quality of the discourse by which we imagine and talk about the world, and Glendon does us all a service to

13. P. 151 (citing *Bowers,* 478 U.S. at 190-91).

insist upon this matter. About her account of the history of "rights talk" I have rather little to say, since I do not know enough to judge that part of her book. Her characterization of our rights talk as absolutist, irresponsible, insular, and the like, does seem to me mainly correct, and her examples are for the most part fine ones. My only real doubt is my sense that the story is still incompletely told.

When I think of the Supreme Court cases decided in the past twenty or thirty years, for example, their characteristic vice seems to me less the assertion of absolute rights than the claim to judge every case by a process of "balancing" one cluster of interests off against another. This phenomenon has been well described and criticized, from different points of view, by Robert Nagel, in his book *Constitutional Cultures,*[14] and by Alexander Aleinikoff.[15] Such "balancing" might at first seem rather close to what Glendon recommends, but I think to say this would be a profound misreading of her work for two reasons: "balancing" is likely to be overparticularized in practice, impeding rather than advancing the sort of general thought she encourages; and "balancing" works by a process of abstracting from a complicated matrix certain elements, conceived of as discrete and subject to independent evaluation, in just the way that she complains rights discourse generally functions. Instead of large absolute rights, we have many mini-rights, called interests; the occlusion of responsibility and sociality, and even the failure to contextualize in an appropriate way, may still be present.

The real vice to which she may be pointing, then, is not so much "rights talk" itself as the features she describes it as having, which can also be features of other elements of our discourse: absoluteness, aggressiveness, atomization, the erasure of institutions of civil society intermediate between the individual and the state, and so on. Perhaps the root of it is this last feature: seeing the legal actor as an individual without a human context, without age or gender or cultural location, but as an abstract bearer of certain rights or interests. This is the inheritance of the Enlightenment, and it is a feature of rights talk as it has developed; but it is a feature as well of interest-balancing and of the economic discourse of which that balancing is a shadow. These ways of talking tend to erase the significance not only of what Glendon calls institutions of civil society, but, beyond that, of human communities, families, and cultures. These too could have "rights," if we choose to think that way, and perhaps should — the right of Poletown to be considered as a community before it is destroyed, or the right of an ethnic group to be free from defamation.

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14. ROBERT NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989).

15. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing,* 96 YALE L.J. 943 (1987).

The other side of this coin is that, to my way of thinking at least, "rights talk" can sometimes be a very good thing indeed, including in its apparent absoluteness. The origins of the Fourth Amendment exclusionary rule, for example, lay in a right of property (limited as all property rights were by the police power), and this language captured a sense of the citizen as residual sovereign in a way that gave real force to this provision in the Bill of Rights. The shift to interest analysis, balancing state needs against individual rights, has led to a systematic erosion of individual power and autonomy. Similarly, the *Miranda* rules have been a great contribution, recognized as such even by many police departments and prosecutors, and I think an important part of their merit lies in their clarity, even their rigidity.[16] And many would say that the Free Speech Clause should be interpreted more absolutely, not less.

If I am right that "interests talk" can have many of the vices of "rights talk," and that "rights talk" is sometimes a very good thing indeed, including when it is rather absolutist in tone, there is more to say about the character of our rights discourse than has yet been said. I do not mean so much to criticize Glendon, for she does what she sets out to do very well, as to suggest that she has marked out a path along which she, or others, may wish to go further.

One difficulty with Glendon's analysis for me is that she tends to treat the law as a unit, in this revealing a European orientation. In our system it is mainly the courts that are responsible for the perpetuation of "rights talk." But this makes a good deal of sense, since they are thought to exist to adjudicate particular conflicts among individuals, or between individuals and the state, and not to provide systemic solutions to social ills. As constitutional actors, in fact, their very task is to decide when the legislature has encroached too far upon the rights of citizens, and to do this without presuming to decide either of two very different questions, namely what the legislature ought to do within its proper sphere of government or the individual within hers. It would be improper for a court to try to think as globally about a social problem as the legislature can, or even to intimate its views on the legislature's exercise of its legitimate powers. And in adjudicating constitutional rights, the court is the servant not of the legislature, but of the Constitution, which does speak in terms of rights.[17] In this

16. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

17. Consider here once more the *DeShaney* and *Joliet* cases. The Court is not really addressing the issue of the duty of the public officers to serve the public, which is in the main a state law question, but the question of competence to decide these matters, which the Court locates in the state legislature or the state courts. Presumably the Court would have no quarrel with a state that worked in just the ways that Professor Glendon wished, within the sphere of power it has marked out. Professor Glendon knows this, of course, as she makes plain on pp. 94-95, where she suggests ways in which the Court might temper the appearance its language might give to those not experienced in reading law.

sense the feature of our discourse to which she draws attention is in part produced by the particular separation of powers achieved by our Constitution, which has its own important merits. Her analysis would thus be more complete if it reflected the degree to which courts and legislators do, and should, talk differently from each other; though I can see why she has not pursued this distinction in her book, where she perfectly and properly paints with a very broad brush, trying to capture qualities of our political as well as our legal discourse. And I should add that her focus on the way that courts talk makes a great deal of sense in a society that converts so many issues that would in other countries be legislative in character into the material of the judicial drama.

Glendon has written a book about discourse: if it worked in the world exactly as she might wish, it would transform the discourse of others, especially judges, legislators, and politicians, who would reduce their commitment to the absoluteness, asociality, hyperindividualism, and insularity of "rights talk" in favor of a discourse that was more complex and open. There would be a more adequate acknowledgement of what can be said on the other side of a particular issue; an inclusion both of the immediate loser and of the powerless more generally in the social and intellectual universe; an insistence upon seeing the interconnectedness of one issue with many others; and, in the process, a more fully civilized approach to law. Professor Glendon defines her sense of what a more satisfactory form of discourse would be in three ways: by describing it in explicit terms; by giving examples, mainly from European courts; and, most important of all, by exemplifying it in her own prose. Here she defines herself as a person interested in social and cultural context, able to keep competing claims in mind and insistent upon addressing her reader as a sensible person with a multiplicity of identities and cultural roles. It is her own performance in her writing that is in the end the best definition of and argument for the position she recommends.