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Rights Talk: The Impoverishment of Political Discourse and A Nation Under Lawyers (Book Review)

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Rights Talk: The Impoverishment of Political Discourse.
By Mary Ann Glendon. (New York: The Free Press, 1991).
xvi, 218 pp. \$22.95.

A Nation Under Lawyers. By Mary Ann Glendon. (New
York: Farrar, Straus and Giroux, 1994). 331 pp. \$24.00.

In these two lively, elegant, and lucid books, Mary Ann Glendon points to an increasing bloody-mindedness in our society, and argues persuasively that law and lawyers are in great part to blame for it. It seems that we are constantly pelting each other with non-negotiable demands backed by the threat of litigation, and that our legal profession has become too venal or too lacking in moral fiber to tell us to lighten up. The first part of the argument is presented in *Rights Talk*, the second in *A Nation Under Lawyers*. Both parts are presented with passion, charity, and a rueful wit, accompanied, especially in the latter volume, with apt reminiscences, and thumbnail sketches of important background figures from Locke and Blackstone through Holmes and Llewellyn to Unger and Kennedy. Glendon is not afraid to express warm admiration for her favorite teachers, or to quote bad student evaluations from her own classes. She tells interesting stories about people who sue their upstairs neighbors because the children make too much noise, and even finds a man who brought a classic law school *reductio ad absurdum* to life by suing the date who stood him up. At the same time, she makes her case on several levels of theory, and supports it with comparisons of European and Canadian material.

The first part of her argument, that presented in *Rights Talk*, is that our current preoccupation with rights has made it impossible for us to give adequate attention to personal responsibilities or societal needs, or even to talk about them. We have turned our political discourse, both in and out of court, into a clash of solipsisms. Either the irresponsible individual operates without restraint or the equally irresponsible corporation or government agency does so. Your right to your job may be so well protected that you cannot be fired for habitual drunkenness at work, and yet you can do nothing if your employer decides to move the whole operation to Hong Kong. Or your right to the privacy of your home may be so well protected that you can get away with murder if the police do not have a search warrant when they find the murder weapon under your bed, and yet you can do nothing if the city decides to take your house by eminent

domain and put up a parking garage on the site. Glendon analyzes at some length our legal treatment of a person who fails to rescue a drowning companion, and the case of an old cohesive neighborhood in Detroit that was torn down to build a factory. She shows that in both situations we not only reach morally questionable results; we lack the legal categories even to discuss reaching better ones.

She indicates that what has brought us to this pass is our peculiar manner of appropriating Locke, Blackstone, and, later, Mill. Blackstone taught us to absolutize property rights, and Mill taught us to absolutize liberty by analogy. Our response to the teaching has been affected by the rugged individualism of the frontier, and by the fact that Blackstone was for many American lawyers in their formative years the only law book available. We have tended to lose sight of contextual limits on the exercise of rights and communitarian limits on property or privacy. The larger libraries and more complex societies of England and Western Europe have supported a more nuanced approach.

A Nation Under Lawyers deals with the part played by the legal profession in the prevailing chaos. As Glendon sees it, the best lawyers are locked into their clients' self-serving agendas, the worst lawyers into their own. She discerns a general decline of professionalism. Lawyers see themselves as engaged in a business like any other, and at the same time see other businesses as engaged in a value-free pursuit of profit. The large firms have begun to reward bringing in business instead of doing it well once it is brought in. Litigators have come to replace counselors as role models, and winning has replaced peacemaking as the goal of legal representation. The special skills that enable lawyers to contribute to social harmony—Glendon has an impressive list of them—are no longer the ones that bring lawyers fortune or respect.

Glendon finds both judges and law teachers heavily complicit in the deterioration of the bar. She chronicles a transition from "classical" to "romantic" judging, the latter being more concerned with righting wrongs than with careful analysis or doctrinal coherence. The romantic style tends to undermine the advisory role of lawyers by making the law unpredictable. It also multiplies litigation by making all kinds of arguments worth trying out. The resulting caseloads make judges sloppy as well as sentimental, and place much of their decision-making in the hands of their clerks.

Romantic judging also atrophies the political process by encouraging everyone to look to the courts for the redress of their grievances. Since litigation is more apt to produce winners and losers than to

discover and enlarge common ground, the whole development contributes to the rights-mindedness described in *Rights Talk*. Worse, to the extent that romantic judging plays out in constitutional cases, the result is officially removed from the political process unless someone puts through a constitutional amendment. Many of the accommodations and compromises that make it possible for people to live together in other pluralist democracies are thus made impossible in ours.

Glendon sees the legal academy as undermining both bench and bar by turning out graduates who cannot cope with law as an independent discipline. In the 1960's there began to appear in the major law schools both students and teachers who were, like the romantic judges, more interested in righting wrongs than in acquiring or deploying professional skills, and who were accordingly skeptical of any claim that law is an independent intellectual discipline. The retiring generation of legal scholars—exemplified for Glendon by the most memorable of her own teachers, Karl Llewellyn—were practitioners of “middling theory,” an amalgam of case-specific analysis and common sense. They could not offer their younger colleagues a coherent philosophical account of their enterprise. As a result, their younger colleagues decided that they were at best anti-intellectuals, at worst lackeys. The new breed of law teachers joined forces with a new breed of students who were more interested in grasping the levers of power—or merely in beating the draft—than in becoming competent lawyers. Together, they set out to turn law into a branch of some other discipline, economics, politics, or whatever, or even to deconstruct it entirely.

Despite their wide-ranging indictment, both books end on a hopeful note. We have not yet really become the nation of irresponsible, unconnected, rights-bearing monads that our institutions and our rhetoric make us out to be. Our churches, our families, our subcultures, our labor organizations—“communities of memory” and “communities of aid”—are very tenacious among us although they do not get much public attention. Also outside the limelight but still to be reckoned with are lawyers who work as “artisans of order” rather than “connoisseurs of conflict,” judges who will not permit their ideology to subvert the technical coherence of the law, and law teachers who make their students analyze cases and statutes. There is hope that the tendency to solipsism, romanticism, and deconstruction has about run its course, and that these largely invisible communities and professionals will come into their own.

Glendon is generally aware that the issues she raises are not all black and white. There have been other periods of venality and

corruption at the bar and ideologically tainted decision-making on the bench. Judicial creativity is not always bad: without it, we could not have adapted the common law of eighteenth century agrarian England to nineteenth century industrial America. And the great analytical law teachers were in fact a bit short on values, even if they were not as vacuous as their juniors made them out to be.

The qualifications demanded by these ambiguities are all duly set forth, but not always with as much emphasis as a purist might require. Also, Glendon falls into occasional inconsistencies. For instance, on page 161 of *A Nation Under Lawyers*, she seems to express disapproval of Judge Skelly Wright's reform of landlord-tenant law, whereas some thirty pages earlier she seems to find similar reforms of other parts of the law by other judges both necessary and appropriate. On page 144 of the same book, she attributes the deterioration of state trial courts to the increased caseloads brought on by increased litigiousness, whereas on page 62 she describes the state trial courts where she occasionally ventured in her first years out of law school in terms that show they cannot have been any different from the ones she complains about now. On page 151 of *Rights Talk*, she takes exception to "the lack of depth and seriousness" in Justice White's opinion in the case upholding the Georgia sodomy statute. But the opinion, from her description of it, seems to be displaying exactly the qualities for which she praises White on page 171 of *A Nation Under Lawyers*. In fact, the judicial attitudes Glendon praises in European judges in the first book are generally not adequately distinguished from the ones she deplors in American judges in the second.

A few discrepancies of this kind are probably inevitable in works such as these, initial attempts to give specific content to a global malaise. They detract not at all from the force of the argument. I mention them only for the benefit of those—myself included—who hope to carry this exuberant polemic farther into the realms of theory.

Proponents of conventional rights doctrine and conventional lawyering have both responded to Glendon's critique. Naturally, many of the criticisms relate to inconsistencies of the kind just described. Others point out that the legal world of the 1950's and 1960's was not as much better than this one as Glendon seems to think. Poor people, women, and minorities were excluded from many of the benefits that looked so good on paper. Many of Glendon's vaunted legal scholars were apt to live in an ivory tower, and to do more harm than good when they emerged. And if the lack of

competitive pressure in the old days made lawyers more dignified and statesmanlike, it also made them more expensive and less useful to their clients.

These criticisms are pretty small change. Glendon does in fact contrast the present with the past, but her purpose in doing so is to point out things wrong with the present. Her argument is not intended as a nostalgia trip, and it is not fair to treat it as one. As for competitive pressure, it is naive to suppose that a freer market will produce better lawyering. Lawyers not only compete with each other for the same work; they also create additional work for each other. One of the most solidly canonical of lawyer jokes is about the small-town lawyer who was starving until another lawyer moved into town, whereupon they both prospered.

There are just two criticisms of these books that need to be taken seriously. The first is that there are rights and rights; the concept is too broad and too variegated to be subjected to a unified critique. Some of the things Glendon advocates in the name of social responsibility are themselves rights, such as the right of workers to be warned of plant closings, and (if need be) retrained, or the right of children to be taken into account in divorce cases. Others would require the exercise of rights for their implementation—grass roots democratic decision-making, for instance, would not work without free speech.

The second objection is that Glendon is attributing to the legal system and the legal profession too large a part in the general deterioration of society. David Luban, writing in the *New York Times*, says that the things Glendon finds wrong with the practice of law are happening:

because of clients and markets, not because lawyers no longer appreciate the common law tradition. A better subtitle for Ms. Glendon's book would have been "How the Transformation of American Society Is Causing a Crisis in the Legal Profession." It's less exciting, but truer to the import of her argument.

Similarly, Cass Sunstein, reviewing *Rights Talk* in *The New Republic* suggests that our preoccupation with rights is more an effect than a cause of the other problems in our society:

Often rights emerge precisely because of the refusal of private and public institutions to recognize and carry out their responsibilities. When the environment is degraded, or when the vulnerable are simply left to fend for themselves, it should be unsurprising to find vigorous claims for "rights."

Both of these objections can be answered, but answering them requires a more elaborate historical and theoretical analysis than

Glendon has undertaken. A good place to begin such an analysis might be Roscoe Pound's *The Spirit of the Common Law*. In his third chapter, "The Courts and the Crown," Pound traces the quest of common law lawyers and judges for a law superior to the enactments of kings and parliaments. He shows that both judicial activism and rights talk have origins in the primordial Germanic understanding of reciprocal obligations between king and people, in the medieval tradition of the independence of the church, in the Scholastic understanding of natural law, and in the Enlightenment attachment to "reason." Glendon's complaint, rightly understood, is, I believe, not that this venerable tradition has been lost, but that it has been trivialized. We have managed to co-opt the noblest principles of our inheritance in support of fatuity, debauchery, chicanery, and greed.

Glendon is certainly right in assigning to the absolutism of Blackstone and Mill an important place among the historical and intellectual forces that brought this situation about. But other forces also played a part, and I think these forces relate more closely to Glendon's critique. One such force was technical. When it came to rights, the consummate legal craftsmen who were Glendon's favorite professors and judges (mine also) had a couple of serious gaps in their craftsmanship.

In the first place, they were all followers of American Legal Realism, and defined law in terms of coercive power. A right, therefore, was an interest you could go to court and enforce. Such a definition artificially forces rights into an adversarial framework. The only way you can be sure of your rights is to sue somebody for violating them. Taking this attitude, we lose the appreciation of law as embodying people's common reflection on how they can live comfortably together, and of rights as something we recognize in other people because they are fellow human beings with lives to live.

In the second place, they followed Hohfeld in holding that rights and duties are necessarily correlative, so that one person's right has to be another person's duty. This also tends to force rights into an adversarial framework. If you have a right that is not being implemented, you are necessarily the victim of someone who is failing in a duty to implement it. Your perception that you are a victim will become more and more acute as you cast about farther and farther for someone to blame. This is the classic problem of assignability; it is inseparable from any doctrine that makes rights and duties correlative. Liberals often ignore it. In doing so, they give ammunition to their opponents by adopting a package of unenforceable rights.

Hard-line conservatives, by contrast, take the problem very seriously. They deal with it by rigorously refusing to recognize any right that does not come with a clearly designated person under a duty to implement it. They follow by refusing to recognize any duty that is not owed to some clearly defined person with a right. Putting the two steps together, they can absolve the rich of any duty whatever to the poor: no one poor person has a claim on any one rich person.

Without departing from the principle that rights and duties are correlative, it is possible to solve the problem of assignability by invoking the concept of social justice. While I do not owe any poor person a share of my wealth, I owe every poor person my best efforts to reform the institutions through which he is impoverished. I have a duty to make the effort, and every poor person has a correlative right to have me make it.

An alternative solution put forward by some scholars, notably Onora O'Neill, would abandon the insistence that rights and duties must be correlative. On this view, duties arise from the principle of universalizability. I have a duty to help the poor because it would be immoral not to. The reason it would be immoral not to is that I would not be content to live in a world where nobody helped the poor: therefore, the view that it is morally acceptable not to help them is not universalizable.

The problem raised by the non-coercive, aspirational aspect of law and the problem of assignability can be dealt with respectably in a number of different ways. But a rights doctrine that fails to deal with them at all is technically sloppy. It appears to be just such a doctrine that Glendon criticizes, and I believe, just such a doctrine that is put forward by many who criticize her.

This brings us to the second major criticism of Glendon's argument—that the changes she has discerned in law and lawyering are in fact inseparable from changes that have taken place in society as a whole, so that it is idle to look within the four corners of the legal enterprise for either a cause or a cure. In a sense an objection of this kind has to be well taken, for history, like law, is a seamless web. The whole present is a result of the whole past; we cannot isolate within it the causes of a single effect or the effects of a single cause. But that should not stop us from finding that law and lawyers have contributed enough to our problem to have some possibility of contributing to the solution.

For instance, the founders of modern American jurisprudence, led by Holmes, had their own version of moral relativism, one rather more pervasive than the one the rest of society learned from John

Stuart Mill. They followed Hume in rejecting as meaningless any philosophical claim that was not either empirical or tautological. Accordingly, they tended to treat moral judgements as merely subjective preferences comparable to liking or not liking parsnips. Systematic moral doctrine they regarded as theology, with which the law of the state had no business to concern itself. They were decent skeptics and usually rendered decent decisions, but they had no basis for a philosophically coherent analysis of litigants' rights or clients' agendas. I believe Glendon gives them more credit than they deserve when she says that they were too preoccupied with their proper job of legal analysis to concern themselves with theory. I believe they were solidly committed to a bad theory, and one that left their enterprise vulnerable to deconstruction by younger colleagues with even worse theories. There were comparable evolutions elsewhere in society, but Glendon is right to see this one as integral to the discipline of law.

A more sweeping examination of the relation between changes in the law and the legal profession on the one hand and changes in society on the other will require us to look at the succession of classes, a subject that neither Glendon nor her critics consider at any length. Glendon is aware that the era of her mentors and exemplars of bench, bar, and academy, the era that was just ending as she began her career in the early 1960's, was preceded as well as followed by a time of more questionable characters and practices. The robber barons' lawyers and the political bosses' judges of the late nineteenth and early twentieth centuries were hardly less objectionable than the venal lawyers and sentimental judges of today.

What I believe is crucial about the intervening period when the profession was at its best is that it was a period of transition between dominance by a capitalist class and dominance by a managerial class. From the 1920's through the 1950's, the legal profession did a highly creditable job of bringing the excesses of capitalism under control, but they did it in great part by empowering a new class of government bureaucrats and corporate managers, the one group to impose controls, the other to respond to them. Being co-opted by the ruling class is an obvious danger for lawyers in any period, but it is an especial danger with this ruling class because lawyers are actual members of it rather than merely its servants. The time of great lawyering, then, was the time when the capitalist class was being brought under control and the managerial class had not yet taken over.

The subsequent decline was not unique to the legal enterprise, but Glendon's critics are quite wrong to claim that law and lawyers did

no more than follow the rest of society downhill. Capitalism could not have been brought under control without them, and in the ensuing managerialism they held and still hold a central place. If the managerial class is to be brought under control in its turn, we shall have to look to law and lawyers to bring it. For the purpose, we shall have to solve exactly the problems Glendon describes in these books.

Robert E. Rodes