Rights and 'Rights Talk' (reviewing Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991))

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BOOK REVIEW

RIGHTS AND "RIGHTS TALK"


Reviewed by Richard A. Epstein2

American culture and American legal institutions have of late been overwhelmed by a chronic uneasiness and discomfort. Violence between the races, tension between the sexes over harassment and employment policy, disenchantment with welfare, stagnation in educational achievement, and the breakdown of the family all loom larger and more intractable today than they did a generation ago. Our inability to dent, let alone solve, these problems with billions of dollars in government spending has spawned public frustration about the wisdom of our collective political choices and the effectiveness of our political institutions. Our collective confidence in America as a nation has reached a low ebb.

In this setting comes Mary Ann Glendon’s provocative book, Rights Talk. Writing with energy, elegance, style, and verve, Glendon offers her diagnosis of one unappreciated component of the current malaise: the impoverishment of our political discourse by shrill, divisive dialogue. In her view, our nation is afflicted with an excessive preoccupation with individual rights and with the demands that these rights entitle their holders to make on other citizens, often through litigation (pp. 44–45). As extravagant claims proliferate, the public forum becomes a battlefield between rival political factions and interest groups that bolster their positions with loud assertions of rights (pp. 14–15). People use speech as a club to intimidate or posture, not as a tool to teach and learn. According to Glendon, informal mechanisms of dispute resolution, which rest on the gentler discourse used to resolve family differences around the dinner table, are all too often lacking in modern American life (p. 15). Glendon argues that the American concern with rights has become an obsession that fills the air and drowns out the more subtle forms of public dialogue that once allowed healing and uplifting to displace conflict and confrontation (pp. 15–17).

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Glendon finds the problem of misguided “rights talk” pervasive. Whether the issue is flag burning (p. 110), abortion (pp. 164–68), privacy (pp. 48–61), or property rights (pp. 20–32), we discover the same decline in the public dialogue that shapes our collective lives. As our nation grows more heterogeneous, the decline in public discourse exacts an ever higher price. But far from learning from each other or from other nations, Americans turn inward and dismiss the experiences other nations have had with similar problems (pp. 145–46). As Glendon explains:

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. All of these traits promote mere assertion over reason-giving (p. 14).

Glendon is no thoughtless realist or naive utopian who thinks that the legal system can get along without any conception of rights and duties (pp. 15–16). But she forcefully insists that individual claims of rights without the acceptance of correlative sets of duties are the main source of the unrealistic demands that Americans make on each other and on their public institutions (pp. 45–46, 76–89). Many elements in her indictment ring true, for the relentless pursuit of individual and group self-interest through uncompromising “rights talk” has had a corrosive effect on both public discourse and public institutions.

Nonetheless, for both historical and theoretical reasons, I think Glendon places too much blame on rights discourse. Each generation has had its own shrill debates on matters it deemed central. Far uglier forms of public discourse infected this nation and the world during the 1930s, when virulent forms of political extremism — jingoism, racism, communism, fascism, and Nazism — pervaded and degraded public life. It is also sobering to recall the massive Southern resistance to integration during the 1950s and the bitter political conflicts over the Vietnam war. At times, Glendon writes as if these major social movements are influenced by the rhetoric that lawyers and judges bring to the cases before them (pp. 95–96). But I suspect that the truth is otherwise. These struggles over war and peace, religion, and race are for better or for worse perpetual items on the public agenda, and there was, and is, little that judges and lawyers
could do to moderate public debate over these issues. "Rights talk" does not fall within the exclusive province of lawyers. It may well be that highs and lows in political dialogue are beyond the control of any social or legal order.

Instructive evidence against Glendon's Rights Talk thesis is marshaled by Gerald Rosenberg in his recent book The Hollow Hope.\(^3\) Rosenberg painstakingly examines a number of political controversies since World War II, most notably civil rights\(^4\) since Brown v. Board of Education\(^5\) and abortion,\(^6\) and concludes in each case\(^7\) that the moral discourse that shaped public dialogue — and the ultimate substantive results — had little to do with what was done and said in the courts. Instead, Rosenberg finds that parties on all sides advanced their claims and responded to opponents with moral arguments based on sources ranging from Biblical texts to contemporary social theory.\(^8\)

At one level, Rosenberg's argument reinforces Glendon's position by showing that misguided rhetoric can often intensify political debate. But for Rosenberg, the situation is quite the opposite. Public debate may be rich and informed, or it may be ignorant or impoverished. But in either case the state of that debate will be determined by social conditions that lawyers did little to create and can do little to change.\(^9\)

I do not want, however, to dwell on matters of historical perspective and public debate. I want instead to challenge the basic proposition in Rights Talk directly. Glendon's particular substantive views are often unclear, for she does not address the major regulatory and constitutional reforms of the New Deal; but she makes clear her general approval of the present constitutional order at least in the reduced level of protection it affords private property (pp. 27–32). She finds a close fit between the individualistic ethic that she believes underlies concepts of private property and the decline of public discourse and debate (p. 14). Historically, this is a curious assertion, because the decline in the judicial protection of property rights in the name of the community long predates the decline in our public discourse. On a theoretical level, Glendon errs in two quarters. She misperceives the nature and function of property rights and ignores important ways in which the vigorous protection of property rights

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\(^4\) See id. at 39–169.


\(^6\) See Rosenberg, supra note 3, at 173–265.

\(^7\) The other topics, covered more briefly, include reapportionment law, criminal law, and environmental law. See id. at 269–335.

\(^8\) See id. at 139–50.

\(^9\) See id. at 75–82.
may, perhaps, paradoxically promote more restrained and enlightened public discourse. I deal first with the questions of private property and takings with which Glendon begins her book; thereafter I cover more briefly two other issues to which she devotes considerable attention: the good Samaritan question in torts and the question of abortion. Although the specifics of each debate differ, one common theme remains: she attaches too little weight to the content of the rights and overlooks the powerful ways in which that content shapes dialogue.

I. PROPERTY AND TAKINGS

A. Disputes Between Neighbors

In *The Uses of Absolutism* (pp. 18–46), Glendon directs her initial salvo against an absolute conception of property rights. She zeroes in on Blackstone's familiar paean to property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (p. 23). Glendon isolates what she considers the ostensible vice in Blackstone's thinking: "Property rights are absolute, individual, and exclusive" (p. 23).

What is wrong with a system of absolute rights that allows individuals to exclude some persons on a whim and admit others only by mutual consent? By and large, nothing. Over vast ranges of human activity, absolute rights are the indispensable baseline against which various kinds of market transactions are conducted. The greater power to exclude includes the lesser power to admit on conditions. It is exactly this principle that allows a seller to hold out for a higher price and the buyer to insist upon a lower one. Each is allowed to walk away from the deal if his terms are not satisfied. The principle that applies to price carries over to other terms as well, including terms regulating financing and use. Effective markets in land cannot function without the secure baselines guaranteed by the absolute system of property rights at common law. As long as there are many buyers and sellers, robust markets will emerge in which any abuse of discretion in the exercise of rights is effectively restrained, not by the heavy-handed use of government power, but by the presence of alternative buyers and sellers. Those who exercise absolute rights in a capricious fashion pay for their folly by losing their markets.

10 Glendon quotes 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

There are, of course, situations in which the preconditions that make absolute rights workable are not satisfied. Unfortunately, Glendon nowhere in her book analyzes property rights in resources such as water, for which the mix of common law and statutory rights does not assume the same absolute form that it takes for land and chattels. There is, moreover, ample reason for the difference. Water, unlike land, is not neatly divisible. A system that allows any riparian owner to dam a river and to convert all its water to private use deprives everyone of the "going concern" value of the river, including the river's its uses for recreational, navigational, and aesthetic purposes. To preserve the value of these common uses, the common law of Blackstone's time provided for none of the absolute rights that Glendon attributes to the common law of property. On the contrary, the "natural flow" theories of water rights dominant in Blackstone's England stressed the correlative nature of rights and duties — a theme close to Glendon's heart (pp. 76–108). Efficient markets in water resources could not emerge if each of a hundred riparian owners could block the others from making any use of a common resource.

Glendon does not adequately address the details of the complex subject of property rights and their optimal configuration. Her attack on absolute property rights is flawed by her failure to identify and assess the substantive consequences that result from the systematic adoption of such absolute rights. In this context, it is not sufficient to condemn all systems of absolute rights on the ground that they sometimes leave some people out in the cold. A strong critique must also consider the dangers of forcing individuals to open their property to persons whom they would prefer, for whatever reason, to exclude. There are many hard cases on the right to exclude, which I cannot


15 For a discussion of some of the complications, see Carol M. Rose, Energy and Efficiency in the Realignment of Common-Law Water Rights, 19 J. Legal Stud. 261 (1990). Rose develops the thesis that the reconfiguration of property rights was driven largely by the changes in the relative values of the different uses to which water could be put. In essence, when water had little productive use, a system that prevented extensive private exploitation of a river without the consent of neighbors had low social costs. Once mills became an important source of power, however, the blockade right created under the natural flow theory yielded by twists and turns to a reasonable user theory, which allowed more intensive instream use of water without the consent of neighbors. There is, accordingly, a sensible efficiency explanation for the switch between different configurations of water rights. See id. at 294–96.
deal with here. But it is useful to look at one system that eliminates that right of exclusion: rent control.

Rent control repudiates the absolute system of property rights in land because it allows the tenant to remain in possession of the landlord's property in defiance of the terms of the lease at a rent fixed by the state — usually fixed by a local government controlled by a political coalition of similarly situated tenants. Glendon does not address this system and its grotesque resource misallocations; she may well disapprove of it. However, it offers a powerful counterexample to her thesis because it shows how the abandonment of absolute rights can lead to a decline in levels of public discourse. Rent control does not merely set maximum rents; it protects current tenants — who are current voters — from their landlords. The political coalition supporting rent control would dissolve instantly if landlords could expel current tenants on the condition that new tenants be offered the controlled price. What tenant would vote for a scheme that would expose him at the end of a lease to eviction and to his landlord's vengeance?

Rent control provides the antithesis to Blackstone's relentless individualism — and it leads inexorably to the very impoverishment of political dialogue that Glendon rightly deplores in Rights Talk. Glendon works in Cambridge, Massachusetts and must be aware of that city's continual titanic battles between landlord and tenant. How

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16 One such system that I do not discuss here is that of the civil rights laws, which contain explicit limitations on the right to exclude. Although I cannot develop the case against these laws here, I call for their repeal in Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (forthcoming 1992) (manuscript on file at the Harvard Law School Library). Earlier and shorter statements of my position may be found in Richard A. Epstein, Two Conceptions of Civil Rights, Soc. Phil. & Pol'y, Spring 1991, at 38, 58-59; and Richard A. Epstein, The Paradox of Civil Rights, 8 Yale L. & Pol'y Rev. 299 (1990). The connection between unsound legal regimes and impoverished discourse is illustrated by the desultory debate over the 1991 Civil Rights Act, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 42 U.S.C.), which resulted in the joyless signing of a convoluted piece of social legislation by a reluctant President hounded by an irritable Congress.

17 It is not accidental that rent controls are not set at the state level. The delegation of power down to local communities permits the selective imposition of controls, and thus allows political power to be concentrated with far greater effectiveness than would otherwise be possible.

18 I have voiced on several occasions my categorical opinion that all forms of rent control are flatly unconstitutional under the Takings Clause, U.S. Const. amend. V, and I affirm that position again here. See Epstein, supra note 12, at 186-88; Richard A. Epstein, Rent Control and the Theory of Efficient Regulation, 54 Brook. L. Rev. 741, 742-50 (1988).

can such dialogue be anything but shrill and impoverished? An enormous gulf separates the maximum rents that tenants will pay to remain in their present apartments and the minimum rent that landlords will take to remain in business. Each side is therefore prepared to spend large sums of money and political capital to tilt the overall rate structure in its favor. The system thus invites an endless cycle of political competition in which valuable resources are always wasted on distributional struggles. The losses should not be calculated in narrow economic terms: they also sow ill-will and class conflict in public discourse. The Cambridge political side-show does not take place in Chicago (a city certainly known for divisive politics on other issues), where leases turn over uneventfully each year at the end of May and October. The deterioration in political discourse in Cambridge therefore cannot be attributed to the temper of our troubled times, or to a shift in social attitudes toward rights, or to different world views in Cambridge and Chicago. Its causes are local and prosaic and depend upon the specific incentive structures created by positive law. If rent control is introduced in Chicago, Chicago will go the way of Cambridge, New York, Berkeley, and Santa Monica.

It would be a mistake, however, to assume that all disputes over property rights, even in land, should be resolved by turning to Blackstone's regime of absolute rights. Although those rights work well when free entry ensures the creation of competitive markets, they function poorly when no close substitutes to the property held by a single individual are available. In many settings, especially those involving neighbors, the physical circumstances of adjacent ownership create bilateral monopoly problems. Simple rules of forbearance against physical invasion, so useful in many contexts, cannot resolve these disputes because of the bargaining difficulties that ensue from bilateral monopolies. If the law held that any physical invasion, however trivial, constituted a nuisance that could subject its creator to actions for damages and injunctions, who would prove the winner from so grotesque a scheme? Everyone would violate the rules in question and would be faced by a host of demands for damages or injunctions brought by disgruntled or vengeful neighbors. If a system of absolute rights entails that result, surely no one should want it. The system of neighborliness that Glendon praises is as appropriate for low-level boundary disputes as a system of regulation is inappropriate for setting rents in apartment units.

20 This theme is developed by other authorities as well. See, e.g., Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J. LEGAL STUD. 13, 14-20 (1985); see also Stewart E. Sterk, Neighbors in American Land Law, 87 COLUM. L. REV. 55, 57-59 (1987) (suggesting that bilateral monopolies foster "strategic bargaining problems" that impair the operation of the Coase Theorem).

What Glendon should have added is that the common law rule of "live and let live" permits reciprocal, low-level interferences between neighbors and thus effectively undermines all actions for damages and injunctions. The rule fosters a dialogue of accommodation by encouraging small adjustments on each side and by imposing penalties on persons who act with malice in neighbor situations. This rule is not the product of some modern communitarian concept. Rather, it is most forcefully expressed in the nineteenth-century writings of Baron Bramwell, an able intellectual descendant of Locke and Blackstone and perhaps the most consistent champion of property rights ever to sit on an English or American court. The Restatement of Torts has adopted the rule, and it lies at the heart of some of the most sensible interpretation of property rights by conservative economists who are ordinarily opposed to any governmental restrictions on land use.

The "live and let live" rule, however, does have its limitations. Glendon describes at the outset of the book a suit brought against a tenant by his landlord, on behalf of co-tenants, over the tolerable levels of noise that the tenant could make in his apartment (p. 18). In his own defense, the tenant argued that his home was his castle, and that he therefore could make as much noise in it as he wanted. The judge noted that the maxim was inappropriate because the tenant's castle was directly above his neighbor's castle and that some accommodation should be made for the "auditory intimacy" associated with modern apartment living (pp. 18-19). Nonetheless, the judge held that the tenant below had to bear the noise, because the levels were reasonable in light of the approaching Christmas season. His wise counsel was that "[t]hey are all nice people and a little mutual forbearance and understanding of each other's problems should resolve the issues to everyone's satisfaction" (p. 19).

But what about the lease? It stated that no tenant or family member should "make 'disturbing noises' or otherwise interfere with the 'rights, comforts or conveniences of other tenants'" (p. 18). Glendon has little patience with the lease and notes that in relying on it the landlord took an "equally extreme" position as the defendant, who treated his home as his castle (p. 19). But she does not explain why the lease should be dispatched so quickly in favor of Baron Bramwell's external norm of reasonableness. There is a vast difference between a sensible presumption when parties are silent about their preferences

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23 See RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (1977) ("[E]ach individual in a community must put up with a certain amount of annoyance . . . .").
and an iron command even when they have made their wishes clear. One great virtue of the law of property (including the law of leases) is that it allows smaller groups and communities to deviate from the general standards of the legal system without having to gain a majority vote of some larger body to express their preferences. If the noisy tenant's conduct violated the lease, eviction was warranted if the lease so provided.

The common law rule that contract "trumps" torts has powerful implications for Glendon's basic thesis. This voluntary sorting allows some groups of tenants to live in exceptionally quiet buildings while other groups live in noisier buildings. Abandoning rigid and uniform presumptions of certain proper conduct between neighbors allows for a greater degree of human satisfaction than would result under an authoritarian legal regime that forces all persons, regardless of preferences, to come together under a single set of predetermined rules. The key to a harmonious society does not lie — as Glendon suggests — in forcing nice people to reason together until their disputes may boil over; the key is allowing them to go their separate ways when they cannot agree. By substituting hundreds of small, decentralized decisions for a few monolithic, political ones, the institution of property removes the festering sources of conflict that account for much of the current decline in public discourse. Glendon gets the thesis backwards. Communal rights may be the source of communal disorder, but what she labels as the source, or manifestation, of the disease — absolute property rights — is often its cure.

B. Takings and Public Use

The point made above is true not only in private disputes, but also in disputes between citizen and state, an area in which property rights have steadily declined over the course of this century. In this context, too, Blackstone's view of property rights, as embodied in the Takings Clause, is far superior to the ostensibly more reasonable position taken by Glendon in Rights Talk — a view that is all too sympathetic to the current Supreme Court's takings jurisprudence. Glendon and I agree that some form of eminent domain power should reside in the state. To this extent, property rights are not absolute, for individual owners are not allowed to hold out against the community at large if the community is prepared to pay them just compensation for their losses. The only differences between my view (or Blackstone's) and Glendon's (or the current constitutional law) are the

25 The sorting point is of great importance in understanding what is wrong with the present civil rights law. See Epstein, supra note 16, (manuscript at 41, on file at the Harvard Law School Library).

26 U.S. Const. amend. V.
terms and conditions on which state take-over should be allowed. Here, Glendon is attracted to the continental models of property rights. Philosophically, she believes that they represent a better intellectual balance because they begin, not with the absolute property rights associated with Locke and Blackstone, but with the more moderate communitarian views of Rousseau and Kant (pp. 34–37). In Glendon's view, recognition of the claims of the community has borne fruit in the German treatment of takings. In my opinion, the text of the German Constitution on this point begs every important question of principle imaginable. Unfortunately, the analogous body of American law is equally devoid of principle and all too often reaches the same unsound conclusions.

My critique is a reprise of the criticism of private disputes offered above, for again the current takings law that Glendon defends suffers from the very vice that she deplores: the impoverishment of community values and political discourse. I will not dwell on these comparisons here because I have spoken about these issues elsewhere. Instead, I turn here to the "public use" requirement of the Takings Clause. Glendon goes to considerable lengths to illustrate the debasement of "rights talk" that occurred when the Michigan Supreme Court sustained a forced transfer of property from one private owner to another. It is useful to set out her vivid description in its entirety:

The most striking example of how low the right of property has sunk in the official hierarchy of constitutional values is a case decided at the state level in 1981. It is a case that illustrates dramatically how cramped and impoverished rights talk can be. In order to induce General Motors Corporation to build a new Cadillac assembly plant that was projected to bring 6,000 jobs to the area, the City of Detroit agreed to use its power of eminent domain to acquire a site that GM wanted. This was not just another forced transfer from one private

27 The German Constitution states:

(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.

(2) Property imposes duties. Its use should also serve the public weal.

(3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation.


29 See, e.g., EPSTEIN, supra note 12, at 143–45 (dairy regulation); id. at 279–82 (labor relations); id. at 131–34 (zoning).

owner to another: The land in question was an entire ethnic neighborhood known as "Poletown," complete with 1,400 homes, schools, 16 churches, 144 local businesses, and a neighborhood organization that begged the Michigan Supreme Court to save the community from the wrecker's ball and the bulldozer. Originally a place where generations of Polish immigrants had made their home, Poletown was, by the time it was marked for destruction, one of Detroit's oldest racially integrated communities. The neighborhood residents — with the combined power of City Hall, General Motors, the United Auto Workers, the banks, and the news media arrayed against them — naively thought that the courts would protect their property rights. No amount of compensation, they pointed out, could repair the destruction of roots, relationships, solidarity, sense of place, and shared memory that was at stake.

But our legal system did not afford them a ready way of talking about such harms (pp. 29–30).

Glendon proceeds to explain that the plaintiffs lost their case when the court held that the taking was for a public use, even though the property ended up in the hands of a private company.

Glendon's own evidence should lead her to revise her views on the takings power. She rightly recognizes that she cannot attribute the indefensible outcome in Poletown to the absolute nature of property rights. On the contrary, the Poletown court accorded the state an expansive power to infringe property rights (p. 30). However, Glendon does not recognize that the political machinations in Poletown were made possible by the very communitarian orientation that she embraces. She also fails to recognize a responsiveness to community, associations, relationships, and sense of place in the ancient and well-established common law tort of interference with prospective advantage, which would have led a court to the opposite result in Poletown. Similarly, the common law rules governing goodwill recognized that, even though intangible, goodwill was an alienable and protectable property. At common law, if a private party destroyed an ongoing business, the loss of goodwill would have been one element included in the damage calculation. Modern courts, however, have systematically cut back the constitutional protection for goodwill in a series of indefensible decisions and have solemnly concluded that goodwill is not taken by the state or a third party, but is merely de-


stroyed.\textsuperscript{33} It is precisely such decisions that have produced the result Glendon deplores. Here it is important to return to the classical theory. If the purpose of the Takings Clause was, as Blackstone would have had it, to ensure that the victims are indifferent between their losses and the compensation provided, it is wholly incorrect to base compensation on the state's small gains rather than on the far larger losses of the victim.\textsuperscript{34} The strong "rights talk" of the common law could help prevent the concern about social disintegration that Glendon and I share.

II. DUTIES TO RESCUE

The subject of property rights is not the only area in which Glendon attacks the absolutism of the law. She also fires salvos at the common law tort rule that no person has a duty to rescue a stranger from predicaments for which that person is not causally responsible (pp. 78–83). The standard illustration involves the refusal by an able swimmer to pull a drowning child out of a swimming pool even when the rescue would cause little inconvenience and no risk of harm to the rescuer (p. 79). Glendon deprecates the absolute right to ignore the plight of others, if only because it brings back a vision of limited government that was repudiated in this country during the 1930s (p. 95).

As with property, however, the problems she identifies transcend matters of "rights talk" and implicate substance. The critical point here concerns the interaction between legal remedies and other social pressures and sanctions that can influence individuals whose actions or omissions have grave consequences for the well-being of other persons. Glendon asserts that the law should be the teacher of right and wrong conduct (p. 85), even though she notes, as Gerald Rosenberg powerfully demonstrates,\textsuperscript{35} that few people draw their moral convictions of right or wrong from judicial decisions.

Even if law could teach, however, its lesson plan should not be drafted as Glendon urges. The transition from social duties to legal duties introduces enforcement costs that are not relevant in the purely moral realm. These enforcement costs are far from trivial: lawsuits are expensive, and erroneous results are worse than no results at all. The simple question to be asked is whether the game is worth the

\textsuperscript{33} See, e.g., Community Redevelopment Agency v. Abrams, 543 P.2d 905, 916 (Cal. 1975).

\textsuperscript{34} Compare BLACKSTONE, supra note 10, at *135 (noting that when the state takes private property for public use it pays compensation "for the injury thereby sustained") with Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893) (insisting that "compensation must be a full and perfect equivalent for the property taken"). Unlike "property taken," the injury sustained covers consequential losses including interference with relational interests.

\textsuperscript{35} See supra notes 3–9 and accompanying text.
candle. Some moral duties may be worth enforcing by law and others may not. The duties to avoid aggression and theft are surely moral, as — in the minds of most — are duties to perform benevolent acts, such as rescue. But in the case of the latter, a system of informal norms may influence behavior more effectively than a system of legal coercion.\(^\text{36}\) Even if many people do not act benevolently, the social system can flourish. But a tiny minority can terrorize the rest of the population unless strong prohibitions restrict the use of force.

Consider two polar extremes. When legal remedies are directed against violence, the game is definitely worth the candle. Whatever the defects of the legal process, remedies against force are the only way to keep the social order from sliding into anarchy and chaos. The legal decision not to impose a duty to rescue strangers does not present that stark prospect of social disarray. Who would think it a wise social reform to remove the prohibition against aggression and substitute a modest obligation to be a good Samaritan? The priorities between these two concerns should be clear. But, it may be asked, why not have both? The answer is that imposing affirmative legal duties necessarily increases the total level of coercion, public and private, in society. The risk of excessive government power should not be run because, in the good Samaritan context, self-help remedies are usually effective. It is always possible to swim with a friend. And when prudence fails, bystanders are free to rescue if they so choose, and many will, precisely because they understand the enormous differences between their minor inconveniences and the gift of life that they can confer. Only some professional economists talk\(^\text{37}\) as if there is an impenetrable barrier preventing interpersonal comparisons of utility. Most of us are quite happy to make such comparisons, and do so with confidence, every day of our lives. Fortunately, despite all the expansion of tort liability in many areas, the basic “no duty” rule continues to prevail.

Glendon agrees with this assessment of the tort rule, but she has two proposals. First, she supports the use of criminal sanctions — but not tort actions (pp. 84–85) — to show societal condemnation of the failure to rescue; in particular, she supports the measure adopted in Vermont\(^\text{38}\) (followed by Minnesota)\(^\text{39}\) of imposing a criminal fine of $100 for failure to perform an easy rescue (p. 88 n.39). Glendon grossly overstates, however, the social effects of these still-born statutes when she writes that “[u]nless we are Vermonters or Minnesotans,

\(^{36}\) For the most recent and exhaustive account of this question, see Ellickson, supra note 24, at 52–64.


\(^{39}\) See MINN. STAT. ANN. § 604.05 (West Supp. 1992).
we may have to be reconciled to the fact that, if we collapse on the street, no mere passerby is obliged to help us, even by calling the police" (p. 89). To my knowledge, no reported prosecutions have taken place under these statutes, which suggests that their effects are purely symbolic. If spurning an easy rescue costs no more than a couple of parking tickets, we should all hope that the law is not an effective teacher of what we would regard as morally proper conduct.

Second, Glendon laments the unwillingness or inability of judges to extol constantly the virtues of meeting our social duties (p. 82). It is, however, an excessively law-centered view of the universe that regards judges as the repository of moral as well as legal wisdom. The full range of intermediate social institutions — families, churches, charities, and civic leaders — are, or at least should be, in a better position to do this job, and it is a tribute to Glendon's common sense that she is always searching for ways to strengthen these intermediate institutions. However, the growth of big government and the welfare state, which Glendon endorses, has weakened these intermediate institutions. Glendon again gets the matter backwards: "Our own tradition of the minimal 'night-watchman' state — well-suited for a young nation endowed with vast natural resources and a vibrant civil society — has not generated much highly visible public language about responsibility" (p. 103). Yet the level of civic responsibility in America, the willingness to care for neighbors and to lend a hand to persons in need or distress, was surely greater in earlier days when the strong cleavage between legal and moral duties was understood and respected by the population at large. The night-watchman state is suitable not only for new nations with vast resources, but for any nation, regardless of resource level, that seeks to draw upon the best of its citizenry. It is a mistake to think that legal bonds only reinforce social bonds. In many instances, they overpower and destroy them.

Finally, Glendon also traces the influence of the good Samaritan issue to constitutional law, especially to the decision in DeShaney v. Winnebago County Department of Social Services, in which the Supreme Court decided whether the Due Process Clause of the Fourteenth Amendment imposes a duty on local governments to protect a helpless young boy from beatings and other abuses inflicted by his father. Chief Justice Rehnquist concluded that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." Glendon does not quarrel with the outcome of the case,
but with the Court's failure to emphasize the moral and political duties that governments routinely assume on such matters (pp. 94–95).

Protection against child abuse is, of course, securely on the short list of duties for the night-watchman state, and thus any failure in this regard cannot be attributed to an excessively individualistic view of the law. Instead, the critical question is whether this duty is best enforced by a child's tort action against public officials who could have prevented the beating. Glendon rightly shies away from imposing such a legal duty, because she sensibly fears that it will bankrupt local governments, keep all social workers tied up in litigation, or lead to a withdrawal of needed services for fear of liability (p. 98). In the face of these objections, her rhetorical point seems small, for we all can and should join in a chorus of denunciation of child abuse and the breakup of the family that is one of the causes of such abuse. "Rights talk" remains, and should remain, at the periphery.

III. Abortion

I wish, finally, to address Glendon's treatment of abortion, an issue on which she has written at length elsewhere. Briefly stated, her view is that the constitutionalization of the abortion question produced the worst of all possible solutions (pp. 65–66). Women, particularly young and vulnerable women, are guaranteed the constitutional right to have an abortion, but they are systematically denied the social support structures that would allow them to exercise their rights responsibly (pp. 65–66). According to Glendon, the German (pp. 64–66) and Canadian (pp. 164–68) solutions are superior to ours in several critical respects. First, these solutions place greater reliance on legislation and compromise to create the rules governing abortions (p. 167). Second, the rules thus created tend to give a more nuanced treatment to the competing interests (pp. 165–66). Thus, the Germans regard the survival of the fetus as important but suggest that "educational efforts and social assistance to pregnant women should be foremost among the means used to protect developing life" (p. 64 emphasis in original). As the fetus moves closer to term, the level of protection increases, as an intelligent form of balancing of interests (p. 65).

As Glendon notes, this moderate approach has spared Europe and Canada many of the prolonged political struggles that have racked the United States (pp. 65–66, 168). Nonetheless, I question the normative foundations of the compromise solutions that Glendon endorses. The difficulty stems from the logical force of each of the rival extreme positions. In my view, they share one feature, logical coherence, that Glendon's effort at compromise lacks.

Start with the critical question from which all doctrinal paths descend: is the fetus a person? Most opponents of legalized abortion believe that the fetus is a form of human life and that taking that life deliberately is a form of homicide. Given that most controversial assumption, the only questions worth debating are whether the mother may plead some extenuating circumstance to reduce or defeat criminal charges, and whether third parties (who are not faced with these extenuating circumstances) should bear the full brunt of the law's force. If the fetus is not a person, however, no state interest can counterbalance a woman's liberty interest in doing with her own body what she pleases. If there is a constitutional right to marry at one's pleasure or to have children, abortion falls under the larger rubric of privacy rights. Thus, an enormous gulf divides those who think that abortion is a deadly crime and those who regard it as the exercise of a fundamental personal right.

Each side offers an internally coherent position that resists Glendon's effort to split the difference through responsible compromise. She disapproves of both, but is unable to destroy either because she avoids the central question of the fetus's personhood. To be sure, counselling and educational support to pregnant women might help, as Glendon hopes, but such support will be directed to fundamentally different ends depending on who controls the show. The pro-life camp would use such support to reinforce the fundamental criminal norm of sanctity of life, which is why judges who favor Roe v. Wade have been so suspicious of full information statutes. The pro-choice camp would use education and counselling to reinforce the woman's right to autonomy, self-determination, and control.

I am pessimistic about our society's ability to resolve these differences, because no amount of artful compromise can bridge the huge

45 I expressed many of my views some years ago in Richard A. Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159. These have changed on matters of detail, but on matters quite irrelevant to Glendon's book. There is no prospect of treating abortion as a problem amenable to a market solution because of the evident impossibility of fashioning any contract between mother and fetus, much less a contract for abortion that works to their mutual advantage.

46 410 U.S. 113 (1973).

moral divide represented by the person/nonperson dichotomy. The abortion issue is vastly different from many questions of property and economic liberties because there is, quite literally, no way to divide the baby. On matters such as progressive taxation, persons with fundamental disagreements on the proper structure of taxation can nonetheless pound out some compromise on the matter of rates (steep or gradual). The difficulty with abortion lies in the enduring split in basic value structures in the United States. The secular left and the religious right bring to this debate fundamental differences in philosophy. The good conversation over the dinner table broke down over slavery before the Civil War and split families asunder. For similar reasons, conversation has broken down on abortion as well. It takes no crystal ball, but only a look at the recent controversy over abortion counselling, to see that the current struggles will continue with undiminished intensity in the foreseeable future, no matter what the future of Roe v. Wade.

IV. Conclusion

A sobering message from the abortion cases reveals the most serious difficulty with Mary Ann Glendon's book. The nature of dialogue often depends upon the structure of the legal regime in which individual rights are asserted and denied. I conceive the basic relationship between dialogue and legal regime as follows. When there are multiple players on both sides of a market situation, a system of absolute rights works best, because unanimous consent is not necessary for this market to operate. When there are two or more players that have holdout positions relative to each other, no system of absolute rights is likely to prove tenable, as in cases of low-level nuisance in property law. The major mistake of many modern legal innovations — for example, zoning, collective bargaining, and rent control — is that they gratuitously convert areas of human endeavor in which competitive markets can work into situations in which holdouts can flourish.

At bottom, Glendon believes that it is possible to understand rhetoric without understanding the underlying reality. In this respect, her thesis is a distinguished successor to the forms of legal analysis that flourished until a generation ago, when the dominant mode of discourse in legal circles was cautious and incremental. Academic lawyers usually took their cues about the major premises of the legal system from sources outside the law and were suspicious of attempts at what then might have been called grand theorizing but that now

48 See, e.g., Rust v. Sullivan, 111 S. Ct. 1759, 1764 (1991) (upholding against First Amendment and due process challenges regulations prohibiting federally funded family planning programs from engaging in counseling concerning abortion or referrals for abortion).
travel under the more favorable banner of foundational or paradigm-shifting work. Instead, they conceived of their central mission as applying their technical expertise to make improvements at the margins of the law. A generation of Harvard law students was raised on the hypothetical case of the spoiled cantaloupes from the Hart and Sacks materials.49

The more modern impulse (and I have succumbed to it myself) makes it more difficult for those who seek compromise. Scholars seek to find single overarching themes that link together vast areas of law and social life. The grand theory requires all parts of a problem to be linked together in some programmatic whole, which makes compromise more difficult to reach. There are of course many such grand theories in the modern legal academy. It is now de rigueur for the educated law professor to commit to being a Lockean, Humean, Hobbesian, Marxian, feminist, deconstructionist, libertarian, utilitarian, or communitarian (totalitarian, Freudian, and Spencerian seem to be out today).

None of these systems is manufactured out of whole cloth. Each responds to some powerful sentiments within our ever more heterogeneous society. I confess my inability to solve all these value disputes, and I know of no one else who can solve them either. But we can, and must, learn from our attempts and failures. Indeed, this cultivated sense of informed skepticism offers the most urgent justification for the strong constitutional protection of property rights. Informed skepticism suggests that we shall resolve the fundamental differences no matter what our rhetoric, no matter what our “rights talk.”

Given this conclusion, our first order of business should not be, as Glendon would have it, to improve the nature of public discourse over rights. Rather, it should be to reduce the number of issues that get dragged into the public sphere. Effecting such a reduction minimizes the constant tension between the requirements of unanimous consent and majority will. If we demand unanimous consent, the holdout prevails. If we tolerate the majority will, we risk tyranny by the majority. Yet if instead we develop some grand division of turf by individuals, by private agreement all parties can exchange and use entitlements in ways that work to their mutual advantage. The first concern on any political agenda is who shall make the decision, and not what should be decided. Much useful work can be done in this direction in property, contract, and torts. But abortion, yes abortion, remains the toughest nut to crack.