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BOOK REVIEW

SPEAKING OF RIGHTS

RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE. By Mary Ann Glendon. New York, The Free Press, 1991. Pp. 218. \$24.95

*Reviewed by Janet E. Ainsworth**

The thesis of Mary Ann Glendon's book *Rights Talk* is a provocative one: that the way in which Americans talk about rights is dangerous to our political and social well-being as a nation. Her avowed target is not the assertion of any specific rights, although her rhetoric betrays that she clearly has limited sympathy for progressive rights claims of the left.¹ Instead, she contends that the *form* of rights discourse in the post-war United States, rather than its substance, has done serious damage to our contemporary political culture. In particular, Professor Glendon describes our "dialect" of rights talk as having three major defects. First, she observes that our rights discourse employs a rhetoric in which rights are spoken of as absolute in character, without any limitation or qualification on their scope or effect. Speaking of rights as though they were incontrovertible "trumps" leads political debate into a dead end after the mutual exchange of competing rights claims, inhibiting the chances for political accommodation and compromise. Second, she sees rights discourse as premised on an assumption that the fundamental unit of society is the individual, an atomistic and autonomous self whose paramount ideals of independence and self-reliance necessarily undermine communitarian values and interests. Finally, she indicts our legal culture's preoccupation with the vindication of rights to the exclusion of a symmetrical discourse of duty and responsibility, resulting in an

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1. See MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 5 (1991). For example, when discussing liberal and left-wing rights advocates and their positions, she generally chooses language with vaguely disparaging or trivializing connotations, as when she characterizes academics who championed civil rights as "trendsetters," *id.*, and describes the liberal federal courts and their "academic admirers" as "propell[ing] each other like railwaymen on a handcar," *id.* at 7. In contrast, when she discusses the conservative architects of property rights, her rhetoric is neutral and devoid of editorial comment: they "strengthened the rights" and "extended . . . penalties." *Id.* at 27.

underdeveloped consciousness of the individual's obligations to the community.²

Professor Glendon's book is an ambitious project, providing a historical analysis of the philosophical roots of our contemporary legal culture and drawing on her formidable knowledge of European legal culture to present a contrasting rights discourse, which she suggests is preferable to our own. Her project is marred to some extent by the uneven scattershot nature of her critique, in which she mixes subtle and compelling arguments with unsupported claims, which she treats as self-evident, but which are unpersuasive on their face. For example, among the disastrous consequences that she attributes to rights discourse are "the disdain for politics that is now so prevalent in the American scene,"³ "the atrophy of vital local government and political parties,"⁴ and even the prevalence of the "sound bite" in political campaigning.⁵ If rights discourse is somehow to blame for these ills, as Professor Glendon claims, then she owes it to the reader to spell out the causal connection, which is by no means obvious.

2. *See id.* at 7, 14, 47-75, 109-44.

3. *Id.* at 5. The reasons why Americans are currently alienated from their political system are a fit subject for the multitude of sociology dissertations undoubtedly in progress. No doubt these dissertations will discuss such factors as the rise of big-money political action committee (PAC)-dominated elections, which deprive ordinary voters of a sense of significance in the electoral process, the increasing prominence of highly abstract political problems with obscure origins and cures such as the savings and loan debacle, and the dawning recognition that developments in the world economy are making the political system largely irrelevant to the struggle of average Americans to achieve or even to maintain a middle-class standard of living. All of these factors seem far more compelling explanations for our political malaise than the purported influence of rights discourse on the body politic. Cf. Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477, 479 (1992) (summarizing popular discontent with the United States political system, including the impression that it suffers from "legislative insularity, voter apathy, and special interest influence"); Kenneth C. Smurzynski, Note, *Modelling Campaign Contributions: The Market for Access and Its Implications for Regulation*, 80 GEO. L.J. 1891 (1992) (discussing the unpopularity of special interest groups in American politics and proposing a solution to the problem with respect to campaign contributions).

4. GLENDON, *supra* note 1, at 5.

5. *Id.* at ix-xi. A more plausible account of why political discourse is being reduced to ever-shortening "sound bites" would need to address the increased prominence of the electronic media in shaping the collective political consciousness. *See, e.g.*, Ronald K. L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1095-1107 (1990) (suggesting that television technology, particularly in the context of its overwhelmingly commercial orientation in the United States, has caused public political discussion to be condensed into progressively shorter and more visually appealing "sound bites").

It would be unfortunate, however, if the presence of sweeping and conclusory pronouncements such as these served to undermine the credibility of her more considered observations on rights discourse, which are worthy of a sustained examination. Glendon's critical assessment of American popular legal culture, laden with perceptive observations and cogent reflections, cannot be lightly dismissed. Nevertheless, for all of the power and scope of her communitarian social critique, Glendon's main thesis is fundamentally flawed because, paradoxically, she both overstates the negative impact of rights discourse and underestimates the magnitude of its positive significance.

Glendon's central claim is that rights discourse is so seductive that it precludes us from developing any alternative form of political discourse and thus prevents us from discussing political issues not susceptible to formulation in rights terminology.⁶ Now, it may be true that the characteristics of any particular language, both grammatical and lexical, operate to constrain thought by limiting what is potentially available to be expressed within that language.⁷ Glendon is saying more, however, than that the absence of an appropriate political vocabulary prevents us from saying certain things; she is claiming that the presence of rights talk in our culture acts to preempt the field of political discourse and precludes our development of the vocabulary necessary to address important issues. According to her analogy, we are like travellers in a foreign country limited to saying only a few stock phrases, unable to converse freely with the natives.⁸ Her own analogy, however, undermines her point. Surely a tourist who has learned a few phrases in a foreign language is not thereby inhibited from learning others, particularly if the need for them arises. In arguing that rights discourse precludes other kinds of political expression, Glendon has implicitly adopted another metaphor—that public discourse

6. See GLENDON, *supra* note 1, at 14-15.

7. For a discussion of this idea, generally referred to as the Sapir-Whorf hypothesis after its anthropologist proponents Edward Sapir and Benjamin Whorf, see JOHN LYONS, LANGUAGE AND LINGUISTICS 303-12 (1981). While the Sapir-Whorf assertion about grammatical constraints on thought is controversial, its claim that vocabulary functions as a constraint on expression has been influential in contemporary legal theory. For instance, feminist legal scholars have observed that significant harms to women remain invisible to the justice system unless and until they are given a name. Only when the wrong is named can the law fashion a remedy. See, e.g., Martha A. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 68-71 (1991) (discussing how the creation of the term "date rape" made a category of hitherto-unredressed sexual abuse legally cognizable and urging the adoption of the term "separation assault" to give legal recognition to the presently invisible experiences of battered women).

8. GLENDON, *supra* note 1, at 14-15.

is a container with a finite capacity.⁹ Once "filled" with rights talk, the "container" of public discourse has no room for other political or normative discourse. The problem with this metaphor for discourse is that it is an unexamined metaphor whose validity is never substantiated. Perhaps public discourse actually does "fill up" with some kinds of talk to the exclusion of other potential talk, but Glendon gives the reader no basis upon which to judge the plausibility of this phenomenon. Like many of her other points, she simply presumes it to be self-evident.

One concrete example Glendon gives of a category of potential discourse purportedly crowded out by rights talk is the discourse of responsibility or duty, which she finds to be almost entirely absent from our political and legal dialogue. By way of illustration, Glendon points to the tort-law doctrine holding that, as a general matter, the law imposes no duty upon a person to rescue another in peril, even if the rescue could be accomplished easily and without danger to the potential rescuer.¹⁰ Yet, she acknowledges that two American states, Vermont¹¹ and Minnesota,¹² have enacted "duty to rescue" civil statutes.¹³ Presumably these states, like the rest of America, are imbued with the rights culture that Glendon posits as an impediment to a discourse of duty.¹⁴ The fact that two jurisdictions have implemented a tort duty to rescue tends to impeach Glendon's claim that rights discourse is preventing a discourse of duty from developing in the United States.

This evidence that rights discourse does not prevent the development of new legal doctrines establishing duties should come as no surprise. Legal theorists on the nature of rights have long conceptualized duties as the natural concomitant of rights.¹⁵ Far from precluding a discourse of

9. In identifying an implicit metaphor within Glendon's thought, I do not mean to suggest that the use of metaphors is inappropriate or wrong. Metaphor is one of the primary ways in which any culture mediates cognitive processes; it is impossible to imagine thought without metaphor. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 3-24 (1980). Container metaphors are one of the most common ontological metaphors of thought. *Id.* at 29-32.

10. See GLENDON, *supra* note 1, at 88.

11. See VT. STAT. ANN. tit. 12, § 519 (1973).

12. See MINN. STAT. ANN. § 604.05 (West Supp. 1990).

13. See GLENDON, *supra* note 1, at 88.

14. See *id.* at 76-108.

15. Duties can be expressed as the inverse complement to rights. That is, if A has a right against B, then B will have a duty to A to behave in accord with that right. To say that A has a right against B that B stay off A's land is also to say that B has a correlative duty to stay off A's land. For an influential taxonomy elegantly setting out a matrix of correlations between rights and duties, privileges and powers, see Wesley N. Hohfield, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23

duty, rights discourse logically entails such talk. As every practicing lawyer knows, rights can often be framed with equal effect and plausibility as duties, and vice versa. For example, I cannot talk about my right not to be denied a job due to my race, sex, or religion without implicitly invoking the potential employer's duty not to consider those factors. If such a case went to trial, it is likely that much of the courtroom rhetoric would explicitly draw upon the language of breach of duty. In fact, it is impossible to imagine the cross-examination of the employer without a well-developed rhetoric of duty. Thus, even in civil-rights litigation, lawyers must be fluent in duty talk as well as rights talk.¹⁶

Glendon argues that rights discourse has been devastating to our political system by encouraging citizens to bypass representative political institutions in favor of appealing to the courts to achieve social justice. As a result, the electoral political process has suffered from neglect and may no longer be adequate to the challenges it now faces.¹⁷ To a large degree, Glendon is correct in observing that those seeking full admission to the body politic have tended to resort to the courts to vindicate their claims in preference to relying upon grass-roots political organizing to accomplish their substantive objectives.¹⁸ Moreover, it is a valuable insight to point out that reliance on the judiciary to create and to enforce rights can foster the illusion that these rights are more permanent and secure than they are

YALE L.J. 16 (1913); Wesley N. Hohfield, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfield, *Fundamental Legal Conceptions-1917*].

16. Facility with duty discourse is even more central to lawyers engaged in contract or tort litigation, traditionally characterized by a predominance of duty discourse over rights discourse. See Hohfield, *Fundamental Legal Conceptions-1917*, *supra* note 15, at 710.

17. GLENDON, *supra* note 1, at 6.

18. At one point, Glendon chides civil-rights activists for failing to "exploit . . . fully . . . the . . . one-person, one-vote decisions of the Supreme Court." *Id.* Apparently for Glendon the only political organization that counts is participation in electoral politics. This impoverished definition of political action demonstrates a lack of appreciation for the grass-roots political mobilization of unprecedented scope and success carried out by civil-rights activists within the community. Such organizing still stands as a model for community-based political action today. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 10-13 (1992). Legal rights are limited by the beliefs and norms of contemporary legal culture, by the conservatism of the judicial system, by the restrictions on standing for reform groups, and by the limited effectiveness of legal arguments for attaining specific political purposes or sustaining grass-roots involvement. *Id.*; see also Thomas R. Marshall, *The Supreme Court and the Grass Roots: Whom Does the Court Represent Best?* 76 JUDICATURE 22 (1992) (analyzing Supreme Court voting patterns and doctrines and how they represent grass-roots group attitudes).

in actuality.¹⁹ Resorting to the judiciary to assert rights claims can only be seen as a mistaken strategy if it is presumed that participation in the electoral political process would be as effective in achieving social justice. Although that may be true with respect to claims to which the majority would assent, the electoral political process historically has been notoriously unresponsive to the justice claims of subordinated groups.²⁰ Civil-rights advocates of the 1950s and 1960s understood very well that appeal to the federal courts was essential to their ultimate success; no amount of work within the electoral political system would have supplanted Jim Crow segregation laws.²¹ Although the federal courts today have become a less sympathetic forum for rights discourse, the current political climate hardly inspires confidence that the electoral process can supplant litigation for the advancement of social justice.²²

Glendon further criticizes American rights discourse for its tendency to conceptualize rights as absolute in character, a tendency with two unfortunate consequences. She argues that perceiving rights as absolute, all-or-nothing entitlements, causes us to "express infinite and impossible desires,"²³ admitting no possibility of moderation or compromise. Because all rights are conceived of as absolute, they are necessarily imagined to be of equivalent weight and importance. As the list of undifferentiated rights grows longer, this proliferation of rights tends to cheapen our regard for the truly fundamental rights. Here, Glendon's argument distinguishes between rights discourse as utilized within the legal

19. Glendon points to the historical development of property-rights discourse and its astonishingly swift decline during the New Deal era to demonstrate the inherent fragility of judicially created entitlements. GLENDON, *supra* note 1, at 20-32. One could draw a contemporary parallel in the political inactivity induced in supporters of abortion rights by the Supreme Court decision of *Roe v. Wade*, 410 U.S. 113 (1973). In the aftermath of that decision, pro-choice advocates widely assumed that abortion rights would be protected by the courts indefinitely, and failed to mobilize to counter the political organizations of abortion opponents. As changes in the composition of the Supreme Court put abortion rights in jeopardy, pro-choice activists had to begin belatedly to cultivate the grass-roots political base that they had neglected during the intervening years. See Douglas Jehl, *Pro-Choice Group Targets Nine Politicians*, L.A. TIMES, Oct. 15, 1989, at A1.

20. See Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 393-406 (1988) (discussing the ways in which theories of rights have both helped and hurt the struggle for a more just society).

21. See, e.g., C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 111-47 (1974) (discussing the historical effect of Jim Crow segregation laws).

22. See Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 115 (1990) (discussing the federal courts' granting of injunctions barring civil-disobedience demonstrations).

23. GLENDON, *supra* note 1, at 45.

system and rights discourse in the culture at large.²⁴ Obviously, the legal system recognizes that rights can be placed in a hierarchy of significance and that one right can be balanced against other rights and even against competing interests that are not themselves rights at all.²⁵ On the other hand, if we consider popular cultural invocation of rights discourse, her criticism does explain why rights talk is so often shrill in modulation and reductivist in substance. It is this rigidity of popular rights talk, its unbending insistence on its own primacy and power, that makes it both so attractive as a rhetoric resource and so often ineffective as a tool of persuasion. As Glendon convincingly argues, rights talk in popular culture is a blunt rhetorical instrument.²⁶ The question that she sidesteps, however, is how popular legal culture could be changed without eviscerating rights discourse within the formal legal system, because she identifies formal legal institutions and practices as a primary source of popular legal culture. Moreover, for historically disempowered groups seeking social justice, relinquishing the power of rights discourse would be an unacceptably high price to pay merely to achieve a more temperate public discourse.

If Glendon frequently overstates the negative impact of rights talk on our society, she virtually ignores the positive benefits derived from utilizing rights discourse. With the exception of a brief acknowledgement early in the book that rights talk has been useful to minority groups in the struggle for civil rights, she is unremittingly negative in her assessment of rights discourse. Glendon at best pays lip service to the instrumental and symbolic significance of rights discourse, obscuring what is at stake if we, as a society, were to take up her suggestion and radically alter rights discourse within our political system.²⁷

24. *See id.* at 16.

25. For example, a criminal defendant has a constitutional right under the Confrontation Clause of the Sixth Amendment to a face-to-face confrontation with adverse witnesses at trial. *See* U.S. CONST. amend. VI. Nevertheless, in a variety of circumstances, this important constitutional right can be overcome by strong, but non-constitutional, governmental interests. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 857-58 (1990) (allowing a juvenile sexual-abuse complainant's testimony to be presented at trial via one-way closed-circuit television monitors); *California v. Green*, 399 U.S. 149, 164 (1970) (holding that hearsay evidence can be admitted against the accused even if the declarant is not available for cross-examination at trial); *Illinois v. Allen*, 397 U.S. 337, 346 (1970) (ruling that a defendant whose courtroom demeanor is deemed too disruptive can be physically removed from the courtroom and tried in absentia). Thus, even rights enshrined in the Bill of Rights do not always operate as "trumps."

26. *See* GLENDON, *supra* note 1, at 3, 171-83.

27. *See id.* at 15, 171-85.

Glendon essentially dismisses the historical fact that an appeal to rights-based claims in the judiciary has been instrumentally effective, particularly for racial minorities and women.²⁸ Rights are recognized as "shields" against the exercise of legal power by all actors in the legal system, thus serving to temper state power in ways that would not occur absent the invocation of rights.²⁹ True, such rights-based appeals are not invariably successful; but given the disproportionate lack of access to the material wealth needed to compete in the electoral political arena, subordinate groups should be loath to give up a strategy that has provided some measure of legal protection to them. It is a fact of life, in our media-dominated world that, expensive as litigation can be, it is nevertheless cheaper than political mobilization and lobbying.³⁰ For groups with neither voter strength nor financial resources—the mentally ill, for example—rights discourse may be the only plausible way to protect their interests.³¹

In any event, pressing rights claims in the courts and other forms of political action are not mutually exclusive tactics. In fact, the act of claiming rights can itself be politically energizing, leading to more effective political mobilization and coalition building.³² Politically committed lawyers have long appreciated the synergy generated between courtroom struggles and other forms of political expression and organization.

Nor is the instrumental expediency of rights discourse its only, or perhaps even its major, positive contribution to our social order. The discourse of law is more than just an instrumentalist tool, it is a "species

28. See *id.* at 6.

29. See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (providing a phenomenological account of how an appeal to normative legal discourse acts to constrain judges).

30. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 89 (1991) (discussing the higher costs of getting legislation passed as opposed to challenging existing legislation in the courts).

31. See, e.g., BRUCE ENNIS, *PRISONERS OF PSYCHIATRY* (1972) (examining case studies that explain both how people's lives get disrupted once they are labeled mentally ill and the enormous task these people must undertake within the courts to assert their rights and to remove that label). See generally Horwitz, *supra* note 20 (discussing how the modern, broad conception of rights has provided legitimacy and entitlement to the weak and powerless far beyond what their actual political power could have produced).

32. For a specific instance in which rights discourse had this effect, see Judy Fudge, *The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada*, 17 INT'L J. SOC. L. 445, 446-47 (1989) (detailing the Canadian experience in securing legal guarantees of sexual equality in the 1982 Charter of Rights and Freedoms).

of social imagination" that is "constructive of social realities rather than merely reflective of them."³³ Law, like other cultural systems of signification, both creates cultural meaning and mediates the way in which we ascribe meaning to our experiences.³⁴ Adopting what Clifford Geertz calls this "interpretive turn,"³⁵ we cannot fully appreciate the importance of rights discourse in our society without considering the role of rights discourse as a system of encoded signification through which we project meaning onto our experience.

Claiming a right is an act with potent symbolic significance in our culture, for it is through this act, more than any other, that the claimant achieves public acknowledgement of her status as a full-fledged member of the community.³⁶ Status as a full person, entitled to be heard, cannot be claimed for oneself in private reflection but must be conferred by an open and collective recognition of that status by others.³⁷ The invocation of a right is simultaneously a demand that a particular entitlement be

33. CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 232, 232 (1983).

34. For a more general discussion of the role of legal practice and doctrine in the social construction of reality, see Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) (arguing that changes in the social construction of childhood over time have affected the institutional practices of juvenile court, which in turn have contributed to changes in the social imagination of childhood).

35. GEERTZ, *supra* note 33, at 233.

36. The importance of the semiotic aspect of rights invocation is emphasized in the scholarship of Critical Race Theorists such as Patricia Williams, who wrote:

[F]or the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being. For blacks, then, the attainment of rights signifies the respectful behavior, the collective responsibility, properly owed by a society to one of its own.

PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 153 (1991). For a law review issue dedicated to discussing the symbolic and practical aspects of rights discourse for minority group members, see generally *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) [hereinafter *Minority Critiques*].

37. Of course, this process is hardly unproblematic for subordinate groups whose identity will be assessed by standards established by the dominant culture. For instance, when the Mashpee tribe went to court to establish its legal tribal entitlements, their status as a tribe became the pivotal issue. The Mashpees ultimately lost their case because their identity was defined in terms of categories and assumptions not of their choosing. JAMES CLIFFORD, *Identity in Mashpee*, in *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY OF LITERATURE AND ART* 277, 277-346 (1988).

conferred and an assertion that the claimant has the cultural standing to bring this demand to our attention for adjudication. Even if the claimant ultimately is unsuccessful in her substantive claim of entitlement, she has been vindicated in her assertion that she qualifies as a potential bearer of rights. Invocation of rights on the basis of group identity serves an analogous symbolic function for groups that have been traditionally excluded from the body politic.³⁸ Given the centrality of rights discourse within our cultural context, marginalized groups must partake in the legal discourse of the dominant group to be acknowledged. In doing so, the marginalized group establishes its claim to unconditional membership status in the community at large.³⁹

At the same time, invocation of rights by subordinated groups links their struggle to the historical struggles of other rights-claiming groups. As a result, the symbolic aspects of rights discourse actively enhance its instrumental value by providing a sense of solidarity, which can be parlayed into more effective political organization.⁴⁰ Unfortunately, Professor Glendon addresses none of these symbolic attributes of rights discourse as she urges us to abandon our culturally established dialect of rights talk.

Perhaps the best way to appreciate the shortcomings of Professor Glendon's cultural analysis of rights discourse is to examine her lengthy discussion of abortion law, one of the primary examples she uses to demonstrate that American rights discourse has a deleterious impact on our political life by preventing us from reaching a satisfactory compromise on critical issues.⁴¹ Glendon characterizes the decision in *Roe v. Wade*⁴² as interrupting what had been a developing trend among the various states

38. See Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (criticizing Critical Legal Studies' rejection of the importance of rights assertion to blacks, other minorities, and the poor).

39. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 337-41 (1987) (discussing the use and transformation of mainstream consciousness by non-white Americans to their societal advantage).

40. Elizabeth Schneider contends that rights discourse and politics thus exist in dialectical interrelationship: "[T]he assertion or experience of rights can express a political vision, affirm a group's humanity, contribute to an individual's development as a whole person, and assist in the collective political development of a social or political movement, particularly in its early stages." Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 589 (1986).

41. See GLENDON, *supra* note 1, at 58-65.

42. 410 U.S. 113 (1973).

toward fairly liberal abortion statutes that, nevertheless, contained restrictions reflecting the interests of the State in protecting fetal life.⁴³ She dismisses *Roe*'s attempt to balance the interests of the State against the interests of the woman in bodily integrity and autonomy,⁴⁴ calling Justice Blackmun's trimester formulation "disingenuous."⁴⁵ The current state of American abortion law, which Glendon sees as extreme and unbalanced, is the result, she argues, of the absolutist and highly individualistic character of the rights discourse concerning reproduction of which *Roe* was merely the latest installment.⁴⁶

Glendon contrasts American abortion law with that of the Federal Republic of Germany, a nation whose rights discourse she considers more balanced and nuanced than our own.⁴⁷ She argues that West Germany's legal response to the abortion issue exemplifies a rights discourse better able to achieve political compromise between competing interests.⁴⁸ In West Germany, legislation permitting first trimester abortions was declared invalid by the German high court, which declared that the German legislature was constitutionally required to enact an abortion law expressing legal censure of abortion.⁴⁹ Although the ruling stopped short of requiring criminal sanctions in every instance of abortion, the result of the German court's decision was to make abortion a criminal offense unless two doctors give official medical certification that the abortion is necessary because: the pregnancy presents the danger of great physical or emotional injury to the mother; the fetus will be seriously deformed; or the pregnancy resulted from rape.⁵⁰ As a practical matter, access to abortion services in West Germany has been uneven, with abortion almost

43. See GLENDON, *supra* note 1, at 58.

44. The compelling state interest in maternal health constitutionally justified state health regulations over abortion procedures performed in the first and second trimesters of pregnancy, and the compelling state interest in preserving fetal life allowed a State to proscribe post-viability abortions in the third trimester. See *Roe*, 410 U.S. at 163-64.

45. GLENDON, *supra* note 1, at 59.

46. *Id.* at 58-65.

47. *Id.* at 70-74.

48. *Id.* at 62-65.

49. See Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255 (1977) (comparing the United States Supreme Court's decision in *Roe* to the West German Federal Constitutional Court's ruling on the constitutionality of abortion in West Germany).

50. See K.C. Horton, *Abortion Law Reform in the German Federal Republic*, 28 INT'L & COMP. L.Q. 288 (1979) (discussing West Germany's abortion statute in light of the West German Federal Constitutional Court's decision on the constitutionality of abortion in West Germany).

impossible to obtain in the southern part of the country.⁵¹ Glendon approvingly characterizes the German Supreme Court's position on abortion as "less rigid" than that of its United States counterpart.⁵² Implicit in her discussion of the West German experience is her approval of their abortion policy as a compromise solution, which we in the United States would do well to emulate. A closer look at the German abortion experience raises questions about the desirability of the German solution to the abortion issue. In their efforts to prosecute abortion violators, German police have raided doctors' offices and seized confidential doctor-patient records, resulting in conviction and imprisonment of offending doctors.⁵³ Even those women who have successfully qualified for legal abortions are subject to post-abortion legal harassment, as when nearly 200 women were forced to testify in open court about their personal reasons for abortion because a tax auditor was investigating their gynecologist.⁵⁴

Recent events in Germany graphically prove that the German legal treatment of the abortion question is far from being as successful an instance of political compromise as Glendon suggests. East German women, accustomed to a more liberal abortion law similar to that in place in most other European nations, were so horrified at the prospect of living under what they saw as the draconian abortion laws of West Germany that German reunification nearly foundered on the issue.⁵⁵ In a last-hour negotiation to break the impasse, which had become a major stumbling block in the reunification effort, it was agreed that the East German law would continue to apply in the territory of the former German Democratic Republic for two years after reunification, after which a new law for the entire country would be drafted.⁵⁶

If more evidence is needed that the German abortion law, far from a balanced compromise worthy of our emulation, has engendered intense controversy and conflict within the German social order, consider the experience of Kathrin K., whose case sparked a public outcry in Germany

51. See Marc Fisher, *Germany's Abortion Ordeal: In West, "Suspects" Face Forced Medical Exams*, WASH. POST, Mar. 7, 1991, at D1; Marlise Simons, *A Divisive Issue of German Unity: How to Reconcile Abortion Laws*, N.Y. TIMES, July 19, 1990, at A1.

52. GLENDON, *supra* note 1, at 62-65.

53. Nomi Morris, *Tough Challenge for Germany—A Unified Abortion Law*, S.F. CHRON., Feb. 11, 1992, at A10.

54. *Id.*

55. Ferdinand Protzman, *Abortion Shifting German Alliances*, N.Y. TIMES, Aug. 25, 1990, at A9.

56. Tyler Marshall, *Accord Reached on German Unity Treaty*, L.A. TIMES, Aug. 31, 1990, at A10.

and throughout the European community.⁵⁷ Kathrin K. and her husband were returning by car to Germany from a short stay in Holland when a search of their car by border police turned up incriminating evidence: a nightgown, sanitary napkins, and some towels. Kathrin K. was interrogated about whether she had recently had an abortion, and she was taken first to a prosecutor's office and then to a local hospital for a forcible internal pelvic examination to obtain evidence to prosecute her for a suspected abortion. Although one doctor at the hospital refused to be a party to a forced examination, the authorities found a second doctor who agreed to perform the compelled examination. Upon finding evidence that she had recently had an abortion, Kathrin K. was criminally charged with having an abortion outside the country. It is a painfully ironic footnote to her nightmarish ordeal that Kathrin K. had only recently become a resident of the Federal Republic of Germany, having fled her East German homeland three years earlier in search of freedom in the West.⁵⁸

The point of this discussion is not that the German legal response to the abortion issue is an unsatisfactory one, although I believe that to be true. Rather, the point is that if we accept Glendon's characterization of Germany as a culture with a more balanced rights discourse than our own, then her own chosen example amply demonstrates that a more symmetrical discourse of rights and duties does not, and probably cannot, ensure social consensus and successful political compromise of difficult issues.⁵⁹ Regardless of how balanced and finely nuanced European rights discourse may be, abortion is no less volatile and emotional an issue for Europeans than it is for Americans.⁶⁰ What makes issues intractable to political solution is not an absolutist rights discourse, but the existence of competing interests of overwhelming importance to the political protagonists. Such issues cannot be magically tamed by banishing, or even "refining" our dialect of rights talk.⁶¹

Still less convincing is Glendon's claim that American rights discourse is to blame for the dearth of social services available to pregnant women and to mothers, with neither the government nor the private sector

57. Kathrin K.'s case should not be considered an isolated abuse. In the aftermath of the publicity given her case, public-health physician Gerhard Ettlinger reported that he knew of at least three hospitals used by police for forcible pelvic examinations of women suspected of having undergone abortions outside the country. Fisher, *supra* note 51, at D1.

58. *Id.*

59. See GLENDON, *supra* note 1, at 32-40, 61-65, 145-62.

60. See, e.g., Anthony J. Blinken, *Womb for Debate: Europe's Abortion Laws*, NEW REPUBLIC, July 8, 1991, at 12 (discussing the various European abortion policies and conflicts arising between pro-choice and right-to-life groups).

61. See GLENDON, *supra* note 1, at 171-83.

assuming any responsibility for financial, institutional, medical, or emotional support for childbearing women.⁶² Again, she contrasts the American situation, in which individual women are abandoned by the state and the community to fend for themselves in bearing children, with the services available in Germany—and in most of Europe as well—including counseling, medical care during and after pregnancy, and generous financial assistance after childbirth. The blame for this contrast in pregnancy and maternity policies, however, can hardly be laid at the door of American rights discourse. As Glendon herself points out, rights discourse was not applied to reproductive issues until the 1965 Supreme Court case of *Griswold v. Connecticut*⁶³ established the constitutional right for married persons to use contraceptives, and it was not extended to abortion until 1973 with *Roe v. Wade*.⁶⁴ Why, then, did the United States government lag behind the other industrialized democracies in providing social services for childbearing and child rearing, even before rights discourse could have affected government policies in this area? American hostility toward government social services in this context can be better understood as symptomatic of a more generalized reluctance to provide governmental assistance for any of the social needs of its citizens, just as European benefits to mothers and mothers-to-be can be viewed as just one small part of the cradle-to-grave social welfare systems of post-war Western Europe. Nothing about our history suggests that abandoning rights discourse would encourage the development of a social welfare state in contemporary America.

Glendon does supply a more convincing explanation for the American resistance to European-style social welfare democracy when she indicts our rights discourse for its extreme “hyperindividualistic” nature.⁶⁵ She characterizes the paradigmatic actor in the American legal world as the “lone rights bearer,”⁶⁶ imagined as an independent, autonomous self who stands on his own two feet if he can, and has no claim against the government or the community if he cannot. His most exalted value is self-

62. See *id.* at 65. In one of her characteristic off-hand generalizations, Glendon suggests that conceptualizing the childbearing decision as a woman's personal right has allowed men to claim that childbearing, and by extension child rearing, is likewise a woman's personal problem. This, explains Glendon, gives men an excuse to evade assuming any responsibility for the children they father. *Id.* at 66. I assume that this assertion could only have been made tongue-in-cheek, given the abundant historical evidence that the phenomenon of certain men shirking paternal responsibility considerably antedates the Supreme Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973).

63. 381 U.S. 479 (1965).

64. *Roe*, 410 U.S. at 113; see GLENDON, *supra* note 1, at 56-61.

65. GLENDON, *supra* note 1, at 75.

66. *Id.* at 48.

reliance, and his most cherished right is the right to be left alone. Glendon asserts that the celebration in our legal culture of the "lone rights bearer" has had two disastrous consequences.⁶⁷ First, because laws are enacted and interpreted with the autonomous, self-sufficient individual in mind, the law inadequately provides for those persons unable to fit the model—such as children, the disabled, and the elderly. Moreover, Glendon astutely notes that laws incorporating the implicit assumption of the autonomous, atomistic self have the effect of "perpetuat[ing] that way of being" by creating legal incentives to adopt that mode of being.⁶⁸

Glendon suggests that there is a second negative consequence of privileging the autonomous individual in our legal imagination. Because we understand rights as belonging to individuals, our legal system is peculiarly hostile to the possibility of communal rights and remedies. As a result, we lack the conceptual vocabulary to articulate harms suffered collectively by the community as opposed to harms suffered by individual community members. In effect, these communal harms are invisible to a legal order premised on individual rights and remedies. When a neighborhood is destroyed by a highway project, or a plant closing devastates a local community, the harm is simply not legally cognizable. Glendon is surely correct to accuse individualistic rights talk of obscuring the nature of collective and communal harms, thereby rendering these harms unseen and unredressable.⁶⁹

As I read her thoughtful consideration of the deleterious consequences of American individualism, I could not help but wish that Glendon had concentrated more on her critique of the ideology of individualism and less on her attempt to tie it to her overarching meta-critique of rights discourse. In the final analysis, her focus on rights discourse as the source of so many contemporary social ills is unconvincing.

Perhaps one reason why her critique is unconvincing is that she fails to situate her critique within its intellectual context. Although the reader would hardly be aware of this from Glendon's book,⁷⁰ there has been a

67. *Id.*

68. *Id.* at 47-48, 74-75. Feminist legal scholars have pointed out the ways in which the law privileges the world-view and experiences of the autonomous individual, and the extent to which this vision distorts legal doctrine. *See, e.g.,* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987) (analyzing the influence of assumptions about autonomy and independence in search-and-seizure law and suggesting that these norms represent male values and experiences).

69. *See* GLENDON, *supra* note 1, at 109-11.

70. She makes one or two oblique references to what she terms the radical critiques of rights of the left and right, without specifying in what ways her own analysis parallels and diverges with this other work. *See id.* at 7, 16.

robust debate on the left of the normative value, intellectual coherence, and political utility of rights discourse.⁷¹ It is disappointing, and frankly puzzling, that her book fails to grapple with the substance of this rich intellectual resource. If she had engaged with the scholarship of Critical Race Theory,⁷² it is unlikely that she would have paid so little attention to the positive cultural symbolism of rights discourse for historically marginalized groups. Similarly, her critique of the effect of hyperindividualism on law would have benefited from comparison with recent work in feminist jurisprudence pointing out the distortion in legal doctrine and practice resulting from the law's incorporation of androcentric values, including privileging the autonomous individual self over the socially connected self—embedded in a web of relationships.⁷³ In the final analysis, Glendon's book is unsatisfying because it is too "thin" a description of our legal culture,⁷⁴ ignoring many dimensions of

71. Critical Legal Studies (CLS) scholarship attacked rights discourse for its conceptual incoherence, its indeterminacy, its political inutility, and its ideological mystification. *See generally* Symposium, *A Critique of Rights*, 62 TEX. L. REV. 1363, 1363 (1984) (discussing why ordering society in accordance with traditional notions of individual rights retards progress on social-justice issues and suggesting ways in which the terms of the debate may be redefined). In response, Critical Race Theorists criticized the CLS position as insufficiently attentive to the instrumental usefulness and the symbolic importance of rights discourse, particularly for minority group members. *See, e.g.,* *Minority Critiques*, *supra* note 36, at 301-447. For a Critical Legal rejoinder to the Critical Race critique, see Horwitz, *supra* note 20, at 393 (defining the controversy between the groups and discussing how the theories of rights have both helped and hurt the struggle for a more just society).

72. *See generally* Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990) (describing Critical Race Scholarship).

73. *See generally* The 1984 James McCormick Mitchell Lecture: *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985) (discussing, particularly in the contributions of Carol Gilligan and Carrie Menkel-Meadow, the incorporation of masculine values of independence and self-sufficiency into legal doctrine). For an application of feminist and critical theory to the issue of individual rights, see Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984) (discussing the relevance of statutory rape laws and a concrete critique of rights to the feminist struggle). More skeptical assessments of the utility of rights discourse for achieving feminist goals include ELIZABETH A. KINGDOM, *WHAT'S WRONG WITH RIGHTS?: PROBLEMS FOR FEMINIST POLITICS OF LAW* 46-84, 150-51 (1991), and CAROL SMART, *FEMINISM AND THE POWER OF LAW* 138-59 (1989).

74. I am contrasting Glendon's methodology with the "thick description" advocated by Clifford Geertz. *See* CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3, 3-30 (1973). By "thick description," I mean an interpretive methodology based on multi-layered, contextualized narrative, rather than on supposedly objective analysis. A thick description is multi-vocal,

the cultural significance of rights and rights discourse in the context of our pluralistic society. In her single-minded concentration on making her cultural observations serve her meta-critique of rights, Glendon misses the opportunity to make a more worthy contribution to our understanding of multi-cultural legal reality.

accommodating multiple points of view. *Id.* at 5-10.

BOOK REVIEW

CARDOZO: A STUDY IN REPUTATION. By Richard A. Posner. University of Chicago Press, 1990. Pp. 156. \$18.95

*Reviewed by Allen D. Boyer**

Ironically, in Richard Posner's book on Benjamin Cardozo,¹ the most perceptive observation is one made thirty-years ago by Karl Llewellyn. More than any other judge, Llewellyn wrote, Cardozo left an opinion "in clean harmony with the authorities—duly explained; in such harmony that on the point in hand it supersedes them."²

Llewellyn speaks about the apparent paradox of Cardozo's judicial career—the way in which a shy, self-effacing judge helped forge modern American law, twisting the last century's precedents inside out while gently insisting that no change at all was under way.³ To speak of harmony carries a musical connotation. When opinion varies within the common-law tradition, this suggests different voices should be heard as elements of a common consort. The respect this expresses for judicial harmony and counterpoint—its insistence that the law is both a steady progression and a living tradition embodying different views—reflects an understanding that this book never quite attains.

Posner opens with a concise biography, segueing from dates and relationships into a survey of critical opinion. This is followed by a review of *The Nature of the Judicial Process*,⁴ of which Posner writes: "Speaking as a judge, I can say with some confidence that as a handbook of the judicial craft the book is indeed pretty useless [although] it has real merit as an exposition of a jurisprudential position"⁵—namely, Cardozo's belief in a "jurisprudence of pragmatism."⁶ Next come discussions of *Palsgraf v. Long Island Railroad Co.*⁷ and *Hynes v. New York Central Railroad*,⁸ forming Chapter Three, "Cardozo's Judicial Technique."⁹

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1. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).
2. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 443 (1960).
3. *See id.* at 430-45.
4. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).
5. POSNER, *supra* note 1, at 19 n.38.
6. *Id.* at 28.
7. 162 N.E. 99 (N.Y. 1928).
8. 131 N.E. 898 (N.Y. 1921).
9. *See* POSNER, *supra* note 1, at 33-57.

By Chapter Three, it is clear that Posner's deepest interest concerns Cardozo's rhetoric. Throughout the book, Posner repeatedly emphasizes this aspect of Cardozo's opinions. The following are some excerpts exemplifying this point:

I emphasize Cardozo's rhetorical distinction and argue—what is likely to prove, along with the proposition that reputation can fruitfully be studied quantitatively, my most controversial claim—that rhetorical power may be a more important attribute of judicial excellence than analytical power.¹⁰

The power of Cardozo as of Holmes is to a great extent that of a rhetorician—a poet—rather than that of an analyst, or of an advocate or practitioner of pragmatic jurisprudence.¹¹

Influential or not, Cardozo certainly was and is eminent Probably the most important factor is the *rhetoric* of Cardozo's opinions. I include in this term not only his writing style narrowly conceived but also the architecture of his opinions. The best of them are memorable for the drama and clarity of their statements of fact, the brevity and verve of their legal discussion, the sparkle of their epigrams, the air of culture, the panache with which precedents are marshaled and dispatched, the idiosyncratic but effective departures from standard English prose style.¹²

In stressing the rhetorical side of Cardozo's opinions, I may seem to be belittling him. That is not my intention. . . . Just as production is useless without distribution, so analytical power is useless without the power to communicate the results of its exercise.¹³

If I am correct that judicial eminence is—and rightly so—a function in major part of judicial eloquence, we need more studies of the literary dimension of opinion writing, and we need to begin thinking about whether the decline in humanities education, which both reflects and is reflected in the decline in the ability of Americans, including judges, to write lucid and elegant prose,

10. *Id.* at x.

11. *Id.* at 56-57.

12. *Id.* at 126-27.

13. *Id.* at 136.

requires changes in the way in which we organize our legal system.¹⁴

Even where Cardozo goes astray, Posner finds rhetoric at the heart of the issue: "Although Cardozo's judicial prose is occasionally plummy, there are many more analytic than stylistic flaws in his opinions. The characteristic analytic flaw . . . is the substitution of words for thought."¹⁵ In short, when Cardozo fails as a judge, it is because rhetoric has pushed him where reasoning would not have led.

If rhetoric is effective, it should be capable of measurement. In Chapter Four, "Reputation in General,"¹⁶ Posner entertains various speculations on fame. Reputation may be enhanced, he suggests, by "the generality, variety, and ambiguity of the repute's work, or in short by its adaptability to social, political, and cultural change."¹⁷ Reputation also depends upon blind luck and upon politics.¹⁸ Character is also very important.

Cardozo had an attractive persona because he was a nice man who worked hard, soldiered on uncomplainingly in the face of poor health, treated other people decently whether or not they could help his career, and died young (for a judge!). He is valued as a figure of the law and not just for his isolated professional attainments and contributions.¹⁹

Living long can help, as it did for Justice Holmes; but so can dying young, a factor which has helped George Orwell. Ultimately, Posner concludes, reputation varies unfairly.²⁰

There is a sing-song, yes-but-and tenor to this discussion, and the reason soon appears: these observations are offered only as qualitative preludes to a quantitative analysis. "Even to discuss coherently, let alone to explain, differences in reputation requires some means of measuring it,"²¹ Posner explains. "Citation studies may be the means."²²

14. *Id.* at 148-49.

15. *Id.* at 119.

16. *See id.* at 59-73.

17. *Id.* at 60-61.

18. *Id.* at 62.

19. *Id.* at 65.

20. *See id.* at 62-66.

21. *Id.* at 69.

22. *Id.* While admitting that such studies are an "imperfect proxy for reputation," Posner states: "[M]ost empirical studies of the use of citation counts to estimate the

Accordingly, the text in Chapter Five, "Cardozo's Reputation: Measures of Magnitude,"²³ turns statistical. A series of tables rank Cardozo in terms of citations in law review articles. Consistently, he ranks behind present-day figures such as William Brennan and William Rehnquist and above such important state-court justices as Roger Traynor and Walter Schaefer. Among other things, Posner presents the following statistical chart:

Articles Mentioning Judges and Scholars²⁴

Brennan	2,716	Hand	679
Rehnquist	2,407	Jackson	660
Powell	2,257	Calabresi	656
Blackmun	1,985	Rawls	618
Burger	1,974	Wigmore	597
Holmes	1,820	Michelman	577
Frankfurter	1,553	Friendly	551
Tribe	1,456	Cardozo	499
Black	1,336	Bentham	499
Prosser	1,189	Coase	438
Harlan	1,154	Kant	365
Brandeis	1,120	Aristotle	356
Ely	1,110	Warren	320
Dworkin	1,031	Traynor	312
Blackstone	857	Nozick	279
Marshall	773	Schaefer	59

Bar graphs show that Cardozo continues to be cited more often than his fellow judges on the New York Court of Appeals²⁵ and that he has gradually gained on and finally outstripped his fellow Supreme Court Justices Louis Brandeis and Harlan Fiske Stone.²⁶ Posner writes that

if we compare Cardozo's performance on the Supreme Court with that of the average justice in terms not of citations by federal courts but of number of citations by state courts, he clearly dominates: 34.75 opinions to 20.16. And it is readily inferable

quality of sciences confirm the reliability of citations as an index of quality and rebut the principal criticisms." *Id.* at 71.

23. *See id.* at 74-91.

24. *Id.* at 78.

25. *See id.* at 80, 82-83, 86.

26. *See id.* at 87-88.

. . . that Cardozo dominates the average justice if federal court citations are added to state court citations. The exact totals are 106.7 federal and state citations to the average Cardozo opinion versus 97.91 federal and state citations to the average opinion of the other justices.²⁷

One senses a rough equation here: the more effective the rhetoric, the more frequent the citation, the greater the reputation, the more admirable the rhetoric. Even on this level, the book is a craftsman's analysis of an older master's work. That is both its value and its single greatest failure.²⁸ This statistical analysis serves as the central trope of Posner's analysis. He relies heavily upon it, even devoting an afterward to quantitative "Vistas of Research."²⁹ This suggests that Posner views quantitative analysis of precedent as the solution to lawyers' declining ability to read and write.

Another problem must be noted. In assembling his lists of judges and academics, Posner has omitted many names, saying only: "the lists of frequently mentioned judges and scholars . . . are illustrative, not exhaustive; some omitted persons are mentioned more frequently than some included ones."³⁰ This means that the tables which at first appear so definitive and precise cannot be trusted any more than the facts Cardozo recited in *Palsgraf v. Long Island Railroad Co.*³¹ To the extent names are omitted and rankings changed, such quantitative analysis cannot give an accurate estimate of reputation. If certain unknown judges turn out to be cited and discussed more often than the well-known ones who have made it onto the lists, the law is moving in ways Posner prefers not to mention—and in ways Llewellyn would have rightly told us are ones we need to study.³²

27. *Id.* at 89. Opinions are for the period 1932-1938, the dates of Cardozo's service on the Supreme Court.

28. For an in-depth analysis of Cardozo's rhetoric, see Richard Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283 (1979); see also RICHARD A. POSNER, *LAW AND LITERATURE* 293-96 (1988) (describing and critiquing Cardozo's "ingenious use of metaphor"); Anon Y. Mous [pseudonym of Jerome Frank], *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625 (1943) (stating that Mr. Justice Cardozo's "singularly facile and lucid English" "has been praised without published dissent").

29. POSNER, *supra* note 1, at 144.

30. *Id.* at 74.

31. 162 N.E. 99 (N.Y. 1928).

32. See LLEWELLYN, *supra* note 2, at 45-51 (discussing the personal and professional qualities of appellate judges).

In focusing on the language of Cardozo's opinions, Posner gives little thought to the institutional structures within which they were written, approved, and issued. This is a serious shortcoming. No matter how persuasive an individual judicial decision may be, its ultimate impact will inextricably depend upon the character of the court from which it issues. In writing *Marbury v. Madison*,³³ John Marshall gave the Supreme Court the ability to overrule the other branches of the federal government. But even though the Court held this power, judicial review would have meant much less were it not for institutional changes, which Marshall also wrought. First, by requiring that the Court issue a majority ruling in each case brought before it (instead of having justices deliver personal opinions seriatim), Marshall gave his Court a powerful, unified voice.³⁴ Second, by not resigning at the end of the administration that had appointed him, Marshall severed a crucial link between the Court and the political process, dissolving any overt political alliance between Chief Justiceship and Presidency.

Whatever the rhetoric in *Marbury*, these structural changes were essential to the effectuation and legitimation of judicial review—yet any purely linguistic analysis would have missed them. And although Posner surveys cultural and social factors which may have contributed to Cardozo's reputation, like his cultivation of academics, his saintly mannerisms, and his prestigious position in the New York Court of Appeals, the emphasis on rhetoric overshadows these matters.³⁵

Moreover, a greater defect is that this book often seems less interested in the rightness of Cardozo's decisions than in how Cardozo persuades a reader to accept his judgments—a characterization which follows Posner's suggestion that judicial rhetoric may matter more than judicial analysis. Its criticism of *Palsgraf* is couched in terms of bad rhetoric rather than substantive injustice: "Cardozo goes beyond omissions, even misleading ones, and makes up facts."³⁶ This lets Posner defend Cardozo against charges of harshness: "whether the factual inaccuracies in *Palsgraf* or any other opinion were conscious or not is impossible to say."³⁷

33. 5 U.S. (1 Cranch) 137 (1803).

34. See ALBERT MELONE & GEORGE MACE, *JUDICIAL REVIEW AND AMERICAN DEMOCRACY* 10 (1988) (discussing Marshall's efforts to make the Court a more unified institution).

35. See POSNER, *supra* note 1, at 7-8, 129, 132.

36. *Id.* at 43.

37. *Id.* These charges have been damningly made out elsewhere. See JOHN NOONAN, *PERSONS AND MASKS OF THE LAW* 111-51 (1976). Nonetheless, Posner ultimately praises Cardozo for "his knack for broadening the applicability of his decisions by selective presentations of the facts." POSNER, *supra* note 1, at 92.

By addressing justice in terms of technique, Posner begs the question of whether Cardozo succeeded in the judge's basic function. Bad decisions are analyzed only in terms of deceptive rhetoric, not in terms of judicial error or conscious malfeasance. This mistaken emphasis, ultimately, deprecates both the methods of the judge and the result that he or she seeks to achieve. Rhetoric is to be valued because it persuades and establishes consensus. To treat rhetoric on a purely instrumental level treats it as high-pressure salesmanship. And this sort of analysis, in debasing rhetoric, denigrates the importance of consensus.

