RIGHTS TALK

The Impoverishment of Political Discourse

Mary Ann Glendon

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The Land of Rights

> And where freedom is, the individual is clearly able to order for himself his own life as he pleases?
> Clearly.
> Then in this kind of state there will be the greatest variety of human natures?
> There will.
> This, then, seems likely to be the fairest of states, being like an embroidered robe which is spangled with every sort of flower.
>
> —Plato, *The Republic*[1]

Our own ways of thinking and speaking seem so natural to us that very often it is only an empathetic outsider who can enter into our view of the world, and spot a peculiarity in it. Thus it took an aristocratic Frenchman, resolved to make the best of living in a democratic age, to notice that the everyday speech of the Americans he encountered on his travels here in 1831 and 1832 was shot through with legalisms. Tocqueville's ten-month journey took him all over what was then the United States, from Massachusetts to Georgia, from New Orleans to the territory that is now Wisconsin. Wherever he went, he found that lawyers' habits of mind, as well as their modes of discourse, "infiltrate through society right down to the lowest ranks."[2] Foreign observers today are still struck by the degree to which law and lawyers have influenced American ways of life.[3]

Tocqueville attributed the legal cast of common parlance to the fact that in America, unlike in Continental Europe, most public men were lawyers.[4] Though skeptical about the power of the law as such to exert much direct influence on human behavior, he regarded this American penchant as a social phenomenon of the utmost importance. For he believed that legal ideas could, under certain circum-

stances, help to shape the interior world of beliefs, attitudes, dreams, and yearnings that are the hidden springs of individual and social action. To be sure, he was in general accord with his great predecessor Rousseau that "the real constitution of the State" is composed "of morality, of custom, above all of public opinion." Rousseau had likened a nation's laws to the arc of an arch, with "manners and morals, slower to arise, form[ing] in the end its immovable keystone."[6] But neither Rousseau nor Tocqueville was inclined to underrate the arc's supporting role. As he listened to the speech of Americans in all walks of life, Tocqueville became convinced that law and lawyers had left an unusually strong imprint on the "manners and morals" of the new nation, and therefore on its unwritten constitution. Not only was legal language "pretty well adopted into common speech," but a legalistic spirit seemed to pervade "the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has molded it to its desire."[7]

Tocqueville's observations are even more pertinent to contemporary American culture than they were to the small democratic republic of our forebears. Americans today, for better or worse, live in what is undoubtedly one of the most law-ridden societies that has ever existed on the face of the earth. The reach of government and law have extended to a degree that Tocqueville and his contemporaries would have found hard to imagine. The proportion of legally trained individuals among our government officials, and in the population at large, moreover, is higher than ever. A great communications and entertainment industry now reports on and dramatizes their doings. We are surrounded by images of law and lawyers.

In addition, middle-class Americans are apt to have many more firsthand contacts with the legal system than did their ancestors. In an earlier day, anyone who was not wealthy, and was able to abstain from violence, had a good chance of living his or her whole life without seeing the inside of a law office or a courtroom. By the middle of the twentieth century, however, Americans commonly had brief dealings with lawyers as they purchased or sold homes, made wills, or settled estates. At the same time, eligibility expanded for jury service, an experience which rarely fails to leave a deep impression even on those who initially view it as a nuisance. When divorce became a mass phenomenon, multitudes of men and women had their own "day in court" of sorts, either as parties or witnesses.

In the phrase of legal historian Lawrence Friedman, life in modern America has become "a vast, diffuse school of law."[8]

This "legalization" of popular culture is both cause and consequence of our increasing tendency to look to law as an expression and carrier of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law. With increasing heterogeneity, it has become quite difficult to convincingly articulate common values by reference to a shared history, religion, or cultural tradition. The language we have developed for public use in our large, multicultural society is thus even more legalistic than the one Tocqueville heard, and it draws to a lesser degree on other cultural resources. Few American statesmen today are—as Abraham Lincoln was—equally at home with the Bible and Blackstone. Political figures now resort primarily to legal ideas and traditions when they seek to persuade, inspire, explain, or justify in public settings. Legality, to a great extent, has become a touchstone for legitimacy. As a result, certain areas of law, especially constitutional, criminal, and family law, have become the terrain on which Americans are struggling to define what kind of people they are, and what kind of society they wish to bring into being. Legal discourse has not only become the single most important tributary to political discourse, but it has crept into the languages that Americans employ around the kitchen table, in the neighborhood, and in their diverse communities of memory and mutual aid.

The law talk that percolates through American society today, however, is far removed from nineteenth-century versions. For one thing, it has been through the fiery furnace of critical theory, from Oliver Wendell Holmes Jr.'s insistence on strict analytical separation between law and morality, to the "realist" fact-skeptics and rule-skeptics of the 1930s, to their latter-day epigones of the right and left. Secondly, though the legal profession still contains many more planners and preventers than litigators, it is the assertiveness of the latter rather than the reserve of the former that migrates most readily through the media into the broader culture. Finally, law-talk in Tocqueville's day was not nearly so saturated with rights talk as it has been since the end of World War II. In short, legal speech today is a good deal more morally neutral, adversarial, and rights-oriented than it was in 1831.

There is no more telling indicator of the extent to which legal notions have penetrated both popular and political discourse than our

increasing tendency to speak of what is most important to us in terms of rights, and to frame nearly every social controversy as a clash of rights. Yet, for most of our history, political discourse was not so liberally salted with rights talk as it is today, nor was rights discourse so legalistic. The high season of rights came upon the land only rather recently, propelled by, and itself promoting, a gradual evolution in the role of the courts.

The marked increase in the assertion of rights-based claims, beginning with the civil rights movement of the 1950s and 1960s, and the parallel increase in recognition of those claims in the courts, are sometimes described as a rights revolution. If there is any justification for using the overworked word "revolution" in connection with these developments, it is not that they have eliminated the ills at which they were aimed. Indeed, the progress that has been made, substantial as it is, serves also to heighten our awareness of how deep, stubborn, and complex are the nation's problems of social justice. What do seem revolutionary about the rights-related developments of the past three decades are the transformations they have produced in the roles of courts and judges, and in the way we now think and speak about major public issues.

At least until the 1950s, the principal focus of constitutional law was not on personal liberty as such, but on the division of authority between the states and the federal government, and the allocation of powers among the branches of the central government. In keeping with Hamilton's observation in *Federalist* No. 84 that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS," the theory was that individual freedom was protected mainly through these structural features of our political regime. The Supreme Court saw far fewer cases involving free speech, association, religion, and the rights of criminal defendants than it does now, not only because such issues were less frequently litigated, but because, until relatively recent times, many important provisions of the Bill of Rights were thought to apply only to the federal government. Gradually, however, the Supreme Court developed its "incorporation" doctrine, through which more and more of the rights guaranteed by the first eight amendments to the Federal Constitution were declared to have been made binding on the states (incorporated) by the Fourteenth Amendment. This process accelerated in the 1960s when the Warren Court vigorously began to exercise the power of judicial review as a means of protecting individual rights from interference by state as well as federal governments.[9] Today the bulk of the Court's constitutional work involves claims that individual rights have been violated.[10] In the 1980s, even though a majority of justices on the United States Supreme Court began to adopt a slightly more deferential attitude toward the elected branches of government, the rights revolution continued, as many state supreme courts began interpreting state constitutions to confer more rights on individuals.[11]

The trendsetters of the legal academic world were quick to recognize the burgeoning of individual rights as the central legal drama of the times. The top legal minds of the New Deal era had been virtuosos of legislation and administrative law; specialists in taxation, antitrust, and labor; architects and engineers of the regulatory state and the new federalism. With the civil rights generation, however, legal attention shifted to the courts. The study and teaching of constitutional law gained in excitement and prestige. Older constitutional law professors who had given pride of place to federal-state relations and the commerce clause were succeeded by men and a few women who focussed on advancing equality and personal liberty by means of rights. To a great extent, the intellectual framework and the professional ethos of the entire current population of American lawyers have been infused with the romance of rights. In legal education, an intense preoccupation with the Bill of Rights and the courts tends to obscure the important roles that federalism, legislation, and the separation of powers still can and must play in safeguarding rights and freedom. The rights revolution has contributed in its own way to the atrophy of vital local governments and political parties, and to the disdain for politics that is now so prevalent in the American scene.

Unlike the New Dealers (who resembled the Founders in their attention to the overall design of government and to the functions and relations among its specialized organs), many bright, ambitious public lawyers of the 1960s had a narrower and less organic view of law, government, and society. They saw the judiciary as the first line of defense against all injustice, and came to regard the test case as preferable to ordinary politics. To no small degree, this shift of the energy and interests of public-law lawyers from legislation and regulation to adjudication reflected growing sensitivity to the obvious and persistent racism of many local laws, institutions, and practices. Encounters with corrupt and prejudiced officials had soured many activists and intellectuals of the civil rights era on legislatures and local governments, while their faith in the judiciary was strength-

ened by a series of bold Supreme Court rulings that seemed to wipe out ancient wrongs with a stroke of the pen. Landmark cases in the criminal-law area, and above all, the Court's celebrated 1954 desegregation decision in *Brown v. Board of Education*,[12] shone like beacons, lighting the way toward an America whose ideals of equal justice and opportunity for all would at last be realized. Many hopeful men and women came to believe that the high road to a better society would be paved with court decisions—federal court decisions. At the elbow, so to speak, of wise Supreme Court justices, would be renowned social scientists, lawyers armed with theories generated in the best law schools, and teams of young law clerks, fresh from the classroom and bearing the very latest word on constitutional law. The civil rights movement thus did not exploit as fully as it might have the opportunities opened up by its voter registration drives and by the historic one-person, one-vote decisions of the Supreme Court.[13]

Our justifiable pride and excitement at the great boost given to racial justice by the moral authority of the unanimous Supreme Court decision in *Brown* seems, in retrospect, to have led us to expect too much from the Court where a wide variety of other social ills were concerned. Correspondingly, it seems to have induced us to undervalue the kind of progress represented by an equally momentous social achievement: the Civil Rights Act of 1964. The time-honored understanding that difficult and controversial issues should be decided by the people through their elected representatives, except where constitutional text and tradition clearly indicated otherwise, began to fray at the edges. A text, it became fashionable to say in the 1970s, has no determinate meaning, and tradition is as likely to be oppressive as nourishing. To many activists, it seemed more efficient, as well as more rewarding, to devote one's time and efforts to litigation that could yield total victory, than to put in long hours at political organizing, where the most one can hope to gain is, typically, a compromise. As the party system gradually fell prey to large, highly organized, and well-financed interest groups, regular politics came to seem futile as well as boring, socially unproductive as well as personally unfulfilling.

Gradually, the courts removed a variety of issues from legislative and local control and accorded broad new scope to many constitutional rights related to personal liberty. Most dramatic of all, perhaps, from the average citizen's point of view, was the active role that lower federal court judges assumed in many parts of the country, using their remedial powers to oversee the everyday operations of prisons, hospitals, and school systems. Court majorities with an expansive view of the judicial role, and their academic admirers, propelled each other, like railwaymen on a handcar, along the line that led to the land of rights. The example of the civil rights movement inspired many other victims of injustice to get on board. In the 1970s, the concerns of women crystallized around the idea of equal rights. Soon, persons and organizations devoted to social and related causes—such as preventing the abuse and neglect of children, improving the treatment of the mentally and physically disabled, eliminating discrimination based on life-style, protecting consumers from sharp practices, preventing cruelty to animals, and safeguarding the environment—began to articulate their concerns in terms of rights.

As we have reconceptualized increasing numbers and types of issues in terms of entitlements, a new form of rights talk has gradually come into being. This change in our habits of thought and speech is a social phenomenon of equal importance to the legal developments whose course it has paralleled. The significance of this aspect of the rights revolution comes into even sharper focus when one takes a comparative perspective.

In the years since the end of World War II, rights discourse has spread throughout the world. At the transnational level, human rights were enshrined in a variety of covenants and declarations, notably the United Nations' Universal Declaration of Human Rights of 1948.[14] At the same time, enumerated rights, backed up by some form of judicial review, were added to several national constitutions. (Great Britain, with neither judicial review nor a single-document constitution, became something of an anomaly in this respect.) Nor was the rush to rights confined to "liberal" or "democratic" societies. American rights talk is now but one dialect in a universal language of rights. The American version of rights talk, however, displays several unusual features. Intriguing differences have emerged between the formulations of rights in American contexts and the ways in which rights are proclaimed and discussed in many other liberal democracies.

We do not, of course, normally think of our own way of speaking as a dialect. But American rights talk does possess certain distinctive characteristics that appear both in our official declarations and in our ordinary speech. As an initial example of the latter, consider the lively discussions that took place in the wake of the Supreme Court's first controversial flag-burning decision in June

1989.[15] On the day after the Court ruled that burning the American flag was a form of expression protected by the First Amendment to the Constitution, the *Today* show invited a spokesman for the American Legion to explain his organization's discontent with that decision. Jane Pauley asked her guest what the flag meant to the nation's veterans. He gave a standard reply: "The flag is the symbol of our country, the land of the free and the home of the brave." Jane was not satisfied. "What exactly does it symbolize?" she wanted to know. The legionnaire seemed exasperated in the way people sometimes get when they feel there are certain things that should not have to be explained. The answer he came up with was, "It stands for the fact that this is a country where we have the right to do what we want." Of course he could not really have meant to espouse a principle that would have sanctioned the very act he despised. Given time for thought, he almost certainly would not have expressed himself in that way. His spontaneous response, however, illustrates our tendency, when we grope in public settings for the words to express strong feelings about political issues, to resort to the language of rights.

Later that same day, a man interviewed on National Public Radio offered a defense of flag-burning. He said, "The way I see it, I buy a flag. It's my property. So I have a right to do anything I want with it." Let us put aside the fact that the flag involved in the case happened to be a stolen one. What is striking about this man's rights talk is that, like the outburst of the legionnaire, it was couched in absolute terms. In neither case was the choice of words idiosyncratic. How often, in daily speech, do all of us make and hear claims that whatever right is under discussion at the moment trumps every other consideration?

When roused to speak out about issues of great importance, we often find ourselves repeating the experience of the righteously indignant legionnaire. We are apt to begin, as he did, by speaking from the heart, choosing some formula that carries a rich train of associations for us personally and for like-minded people. When our spontaneous efforts are challenged, or meet with real or feigned incomprehension on the part of a listener, we often find that words temporarily fail us. Like the legionnaire when ordered to "unpack" the symbol by a television interviewer, we may be temporarily tongue-tied. On such occasions, we often begin to speak about rights, and to do so in a distinctive manner that I have called the American rights dialect. This dialect, whose features are illustrated in more detail in the chapters that follow, is pervasive. When People for the American Way asked a thousand young Americans what makes America special, most of them quite properly mentioned our famous rights and freedoms.[16] One after another, however, the young men and women expressed themselves in the same language that came so easily to the legionnaire. One said that America's uniqueness lay in "individualism, and the fact that it is a democracy and you can do whatever you want." Another said: "Our freedom to do as we please, when we please." Another: "That we really don't have any limits." And so on.[17]

Yet a moment's reflection tells us that these extravagant beliefs and claims cannot possibly be true. We have criminal laws that put rather decisive limits on our ability to do anything we want. Thus the Supreme Court in the flag case was careful to point out that the First Amendment does not protect verbal incitement to immediate breach of the public peace. As for property, our ownership rights are limited by the rights of our neighbors, by zoning laws, by environmental protection measures, and by countless other administrative rules and regulations. The property-rights enthusiast on public radio probably does not even have the right to burn dead leaves in his own back yard. To speak in this careless fashion is not without consequences; in fact, it sets us up to fail twice over—first, by cheapening or betraying our own meaning (The flag "stands for the fact that this is a country where we have the right to do what we want"), and second, by foreclosing further communication with those whose points of view differ from our own. For, in its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.

Plato in *The Republic* made the idea of a state where everyone is free to say and do what he wants sound highly attractive—a "city full of freedom and frankness," with an amazing profusion of lifestyles.[18] But as Socrates disingenuously extols the delights of absolute freedom, his interlocutor, Adeimantus, grows uneasy. In such a city, one would not have to participate in government, or even to be subject to government—unless one wished. One would not need to go to war when others did, or even to keep the peace—unless one was so disposed. The "humanity" of such cities, Socrates continues, is "quite charming"—just look at all the persons sentenced to death or exile who are permitted to walk about the streets. And see how indulgent the citizens are toward the character defects of public men—so long as such men profess to be friends of the people.

Plato's image of the city where license reigns supreme makes a strong initial appeal to that part of us that delights in freedom and variety. "Just as women and children think an assortment of colors to be of all things most charming, so there are many men to whom this state, which is spangled with the manners and characters of mankind, will appear to be the fairest of states," Socrates observes. But as its implications unfold, we and Adeimantus begin to suspect that this sort of freedom may lead straight to the eclipse of anything we would recognize as meaningful liberty.

Some listeners to American rights talk might reach the conclusion that Americans have nothing in common with those ancient Greeks who claimed that moderation, balance, and limits were what distinguished their civilization from the peoples they called barbarians. Others, noting that the Greeks are reputed to have honored their own ideals quite frequently in the breach, might say that we are simply less hypocritical. Much that passes for normative in the media, the universities, and the entertainment industry suggests that modern Americans have rejected many traditional social constraints in principle and thrown them off in fact. But the total picture is a good deal more complex. Most American parents, to cite an obvious instance, remain deeply concerned with setting limits and helping their children achieve self-control. To some extent, families are aided in these efforts by the various communities in which they participate. It seems likely, too, that most Americans agree in principle that our regime is an experiment in "*ordered* liberty" (in Justice Cardozo's locution)[19]—though they may not agree on the relative scope to be given to the two components of that ambiguous concept. Why then does our public rhetoric so regularly gloss over the essential interplay between rights and responsibilities, independence and self-discipline, freedom and order?

The distinctive traits of our American rights dialect can be discerned at both of the great "moments" in the history of human rights. The first of these moments was marked by the late eighteenth-century American and French revolutionary declarations, and the second by the wave of constitution-making and the international human rights movement that emerged in the wake of World War II. The language that evolved to promote and implement the rights proclaimed at those crucial junctures partakes everywhere of certain common characteristics, but everywhere has its own local accent. The common features are well-known. From the treatises of seventeenth- and eighteenth-century philosophers, the ideas of natural right and equality gave shape, momentum, and a definite direction to scattered and diffuse social forces. They spoke to as yet unnamed longings; they awakened sleeping hopes, fired imaginations, and changed the world.[20] The eighteenth-century "rights of man," like modern "human rights," all mark a stand against the abuse and arbitrary exercise of power. They are landmarks in the recognition of the dignity of the individual human person and of our potential to be free and self-determining. These common characteristics, together with the contemporary thrust toward the internationalization and "universalization" of human rights, give to rights discourse everywhere a superficial appearance of unity. The path of the United States diverged somewhat from those of most other Atlantic-European nations, however, at each of these great watersheds in the history of rights.[21] The parting of the ways was already evident in 1789 when the French *Declaration of the Rights of Man and the Citizen,* in contrast to the *Declaration of Independence,* emphasized that individuals have duties as well as rights.[22]

In the years since the end of World War II, "rights" have entered importantly into the cultural schemes of meaning of peoples everywhere. But rights were imagined differently from one place to another. And even slight divergences in such matters are of potentially great interest, for the world of meanings is where we human beings spend most of our lives, "suspended in webs of significance" that we ourselves have spun.[23] The way we name things and discuss them shapes our feelings, judgments, choices, and actions, including political actions. History has repeatedly driven home the lesson that it is unwise to dismiss political language as "mere rhetoric." When Vaclav Havel in 1989 gained a platform from which to address the world, he chose to deliver one of his first major speeches on "the mysterious power of words in human history."[24] The Czech president's message was a somber one, for his purpose was to remind us that while exhilarating words like "human rights" recently have electrified society "with their freedom and truthfulness," one need not look far back into the past to find words and phrases whose effects were as deadly as they were hypnotic. Most sobering of all, said Havel, the very same words that can at some times be "rays of light," may turn under other circumstances into "lethal arrows."

It thus seems worthwhile—as well as interesting—to try to identify those characteristics that make our version of rights talk a special dialect; to explore the differences in shades of meaning between our own and other forms of rights discourse; and to probe the discrep-

ancies as well as the similarities between our public rights talk and the ways we speak at home, at work, in the neighborhood, and in the church or mosque or temple. The contrast with other countries is not a dramatic one, but rather a matter of degree and emphasis. American rights talk is set apart by the way that rights, in our standard formulations, tend to be presented as absolute, individual, and independent of any necessary relation to responsibilities. The simplicity and assertiveness of our version of the discourse of rights are more noticeable when viewed in the light of the continuing dialogue about freedom and responsibility that is taking place in several other liberal democracies.

All over the world, political discourse is increasingly imbued with the language of rights, universal, inalienable, inviolable. Yet, subtle variations in the way rights ideas are presented can have broad and far-reaching implications that penetrate nearly every corner of the societies involved. Take, for example, the way a country depicts itself to new citizens in naturalization proceedings. When my adopted Korean daughter, Sarah, became an American citizen, our country's official national symbolism was on prominent display at her naturalization ceremony. That day, Sarah and several hundred other immigrants heard a solemn recital in Boston's famed Faneuil Hall of all the rights and freedoms that would henceforth be theirs. As a souvenir of the occasion, she was given a red-white-and-blue pamphlet in which the Commissioner of Immigration and Naturalization explained "The Meaning of American Citizenship:"

> This citizenship, which has been solemnly conferred on you, is a thing of the spirit—not of the flesh. When you took the oath of allegiance to the Constitution of the United States, you claimed for yourself the God-given unalienable rights which that sacred document sets forth as the natural right of all men.[25]

Rights dominate the notion of citizenship from the top to the bottom of the American system, from the literature distributed at federal buildings throughout the country to the pronouncements of the United States Supreme Court (which once referred to citizenship as "the right to have rights").[26]

Our close neighbor, Canada, presents quite a different face to its new citizens. To be sure, Canadian citizenship literature, and Citizenship Court judges, prominently mention rights, but they lay still greater stress on the importance of participation in the political life of

a multicultural society.[27] The great writer on cities, Jane Jacobs, delights in telling how, when she became a citizen of Canada, she was instructed by the judge that the most important thing about being a Canadian is learning to get along well with one's neighbors. Just talk? Perhaps. But it is the kind of talk we do not easily forget. Words spoken in a formal setting, on a day marking an important change of status, carry a special charge. Like the words of the marriage ritual, they etch themselves on our memories.

Formal proclamations of fundamental rights, too, have a different flavor from country to country. Without falling into the error of equating official statements of aspirations with representations of reality, one learns what the drafters of such documents deemed important, and what ideals have become part of the state-sponsored folklore. Try, for example, to find in the familiar language of our Declaration of Independence or Bill of Rights anything comparable to the statements in the Universal Declaration of Human Rights that "Everyone has duties to the community," and that everyone's rights and freedoms are subject to limitations "for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[28]

These differing official pronouncements do not spring from nowhere. The language of the United Nations Declaration is a melding of the Anglo-American rights tradition with the more nuanced dialect of rights and responsibility associated with the Romano-Germanic legal traditions. These traditions in turn are informed by a somewhat different amalgam of Enlightenment political philosophy from that which inspired the American founders. It made a considerable difference, for example, that natural rights theories were elaborated for us principally by Hobbes and Locke, without the glosses added within the continental tradition by Rousseau and Kant.

To be sure, ideas that are absent from the text of our foundational documents can be, and often are, supplied by interpretation in court decisions. Thus, American lawyers know that, from the very beginning, the United States Supreme Court has acknowledged implicit limits on our constitutional rights and has imposed obligations on citizens to respect each other's rights. Jurists are also well aware that ordinary private law—contracts, torts, domestic relations—is replete with reciprocal duties. Nevertheless, it is the language emblazoned on our monumental public documents, far more than the numerous limitations buried in the text of individual court decisions, that lodges

in the collective memory, permeates popular discourse, and enters into American habits of mind.

The most distinctive features of our American rights dialect are the very ones that are most conspicuously in tension with what we require in order to give a reasonably full and coherent account of what kind of society we are and what kind of polity we are trying to create: its penchant for absolute, extravagant formulations, its near-aphasia concerning responsibility, its excessive homage to individual independence and self-sufficiency, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity. Not only does each of these traits make it difficult to give voice to common sense or moral intuitions, they also impede development of the sort of rational political discourse that is appropriate to the needs of a mature, complex, liberal, pluralistic republic.

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.

For a heterogeneous country committed to an ongoing experiment in ordered liberty, these are grave matters. Obstacles to expression and communication can hobble a collective enterprise which depends heavily upon continuing public deliberation. Our rights talk is like a book of words and phrases without a grammar and syntax. Various rights are proclaimed or proposed. The catalog of individual liberties expands, without much consideration of the ends to which they are oriented, their relationship to one another, to corresponding responsibilities, or to the general welfare. Lacking a grammar of cooperative living, we are like a traveler who can say a few words to get a meal and a room in a foreign city, but cannot converse with its inhabitants.

Our communicative deficiency is more serious than a mere traveler's, however, for it seals us off from our fellow citizens. By indulging in excessively simple forms of rights talk in our pluralistic society, we needlessly multiply occasions for civil discord. We make it difficult for persons and groups with conflicting interests and views to build coalitions and achieve compromise, or even to acquire that minimal degree of mutual forbearance and understanding that promotes peaceful coexistence and keeps the door open to further communication. Our simplistic rights talk regularly promotes the short-run over the long-term, sporadic crisis intervention over systemic preventive measures, and particular interests over the common good. It is just not up to the job of dealing with the types of problems that presently confront liberal, pluralistic, modern societies. Even worse, it risks undermining the very conditions necessary for preservation of the principal value it thrusts to the foreground: personal freedom. By infiltrating the more carefully nuanced languages that many Americans still speak in their kitchens, neighborhoods, workplaces, religious communities, and union halls, it corrodes the fabric of beliefs, attitudes, and habits upon which life, liberty, property, and all other individual and social goods ultimately depend.

Yet this need not be so. There are several indications that our rights-dominated public language does not do justice to the capacity for reason or the richness and diversity of moral sentiments that exist in American society. If this is the case, we could begin to refine our rhetoric of rights by recognizing and drawing on our own indigenous resources. A refined rhetoric of rights would promote public conversation about the ends towards which our political life is directed. It would keep competing rights and responsibilities in view, helping to assure that none would achieve undue prominence and that none would be unduly obscured. It would not lend itself to the notion that freedom is being able to do anything you want.

The critique of the American rights dialect presented here rejects the radical attack on the very notion of rights that is sometimes heard on both ends of the political spectrum. It is not an assault on specific rights or on the idea of rights in general, but a plea for reevaluation of certain thoughtless, habitual ways of thinking and speaking about rights. Let us freely grant that legally enforceable rights can assist citizens in a large heterogeneous country to live together in a reasonably peaceful way. They have given minorities a way to articulate claims that majorities often respect, and have assisted the weakest members of society in making their voices heard. The paradigms of civil rights at home and universal human rights around the world

undoubtedly have helped to bring to light, and to marshal opinion against, oppression and atrocities. We Americans justifiably take a great sense of pride in our particular tradition of political liberty. Many of us harbor, too, a patriotic conviction that, where freedom is concerned, the United States was there first with the best and the most. From there, however, it is but a step to the more dubious proposition that our current strong, simple version of rights is the fulfillment of our destiny toward freedom, or to the still more questionable notions that, if rights are good, more rights must be even better, and the more emphatically they are stated, the less likely it is that they will be watered down or taken away.

In a reflective mood, even the most ardent rights enthusiast must concede some substance to the persistent critiques from right and left[29] that trace their origins, respectively, to Edmund Burke's concern about the social costs of rights,[30] and Karl Marx's dismissal of rights as mostly smoke and mirrors.[31] The prevailing consensus about the goodness of rights, widespread though it may be, is thin and brittle. In truth, there is very little agreement regarding *which* needs, goods, interests, or values should be characterized as "rights," or concerning what should be done when, as is usually the case, various rights are in tension or collision with one another. Occasions for conflict among rights multiply as catalogs of rights grow longer. If some rights are more important than others, and if a rather small group of rights is of especially high importance, then an ever-expanding list of rights may well trivialize this essential core without materially advancing the proliferating causes that have been reconceptualized as involving rights. Can it really be the case, as an article in *The New Republic* suggested in 1990, that "so long as I eat tuna fish and support the use of primates in AIDS research," my endorsement of the idea of human rights is rendered problematic?[32] At some point one must ask whether an undifferentiated language of rights is really the best way to address the astonishing variety of injustices and forms of suffering that exist in the world.

On the bicentennial of our Bill of Rights, Americans are struggling to order their lives together in a multicultural society whose population has grown from fewer than four million in 1791 to over 250 million men, women, and children. No longer "kindly separated" (as Jefferson put it) "by nature and a wide ocean" from much of the world,[33] we are now acutely conscious that we spin through time and space on a fragile planet where friend and foe alike are locked in ever-tighter webs of interdependence. Creative, timely,

and effective responses to the social and environmental challenges presently facing us will not easily emerge from habits of thought and discourse that are as individualistic, rights-centered, and insular as those now current in the United States. Until recently, we have stood in this respect at the opposite pole from the Soviet Union and the countries that were within its political sphere of influence. In those nations, political discourse was long characterized by excessively strong and simple duty talk. Civic responsibilities and the general welfare were officially exalted at the expense of rights, the individual, and particular communities. Now, however, in one of the most remarkable political upheavals in history, public discourse in those countries has begun to correct for exaggerated and impoverished notions of duty and community. The discourse of rights and the idea of civil society have become important elements of experiments in democratic socialism and social democracy. The doors and windows of the East are opening to winds bearing seeds of change from all directions.

No one knows how these processes will play out in the new Europe. One thing is certain, however. As Paul wrote to the Corinthians, the world as we know it is continually passing away. The question for Americans therefore is not whether our own rights tradition will change, but what it will become. Like Moses, who never entered the promised land, but glimpsed it from afar, our Founding Fathers had a vision of an America where all citizens were endowed with certain inalienable rights, but they lived in a country where this vision was only partially realized. In recent years, we have made great progress in making the promise of rights a reality, but in doing so we have neglected another part of our inheritance—the vision of a republic where citizens actively take responsibility for maintaining a vital political life. The rights tradition we have constructed on the foundation laid by those who have gone before us has served the nation well in many ways. From what springs of meaning can it be nourished and renewed?