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Laura Beth Nielsen

Theoretical and Empirical Studies of Rights

Edited by

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Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT
William Nelson Cromwell Professor of Jurisprudence and Political Science
Amherst College

This book honours the Legal Studies Program at the University of California, Santa Cruz and those who were kind enough to teach me about the law, including Jeremy Elkins, Robert Meister, Richard Wasserstrom, Craig Reinerman and, especially, my dear friend Brad Bugdanowitz.

Introduction

The central premise of this volume is that comprehending the most basic functions of rights requires the empirical study of rights consciousness and claiming behaviour (Bumiller, 1988; Burke, 2002; McCann, 1994; McCann and March 1996; Nielsen, 2004). This perspective, which is squarely within the law and society tradition,[1] places the study of ordinary citizens' understandings of rights, and what actions they take based on that knowledge, at the forefront of an empirical research agenda. Empirically grounded, theoretically informed theories of rights consciousness and claiming have important implications for law's capacity to achieve social change and can lead to a better understanding of how rights can and should operate in a social and legal system.

Political theorists occupy much of the field of rights scholarship and there is much to be learned from the work in this area. As such, the volume includes selected essays about rights by political theorists and historians, but it is important to realize that different disciplines have their own canons of rights literature. The task of this volume is to provide the law and society perspective on the literature of rights, which is necessarily an interdisciplinary approach. There is a strong tradition of empirical scholarship on rights in law and society, which centrally focuses on the social movements and political processes that give rise to rights (Kostiner, 2003; McCann, 1994; Meyer and Staggenborg, 1996), the processes by which people come to understand they enjoy a right (Albiston, Chapter 13, this volume; Bumiller, 1988; Felstiner, Abel and Sarat, Chapter 9, this volume; Galanter, 1983), the decision to invoke the right either formally or informally (Macaulay, 1963; Mnookin and Kornhauser, 1979) and the organizational and institutional constraints and opportunities for exercising rights (Albiston, Chapter 13, this volume; Edelman, 1992; Edelman, 2002; Edelman, Erlanger and Abraham, 1992; Edelman, Erlanger and Lande, 1993; Edelman, Fuller and Mara-Drieta, 2001; Edelman and Suchman, 1997).

The content of rights varies widely and can include things like the right to be free from government interference on certain matters (like the right to free speech), the right to enjoy employment opportunity without invidious bias based on race, gender or sexual orientation (to name just a few), the right to attain, control and protect privately-held property and capital, the right to full political participation (like voting) and so on. Although substantively varied, rights share some interesting commonalities. The liberal legal understanding of rights posits that they are inviolable and absolute. This understanding, while idealized, is a source of the power of rights. If a right cannot be infringed in the way in which other interests may be, then protectors of various interests will benefit if their interest can be transformed into a 'right'.

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[1] By law and society tradition, I mean the field of law and society, of which the central intellectual organization is the Law and Society Association and the central journal is the *Law & Society Review*. There are, however, other intellectual organizations and publications including Law, Culture, and Humanities (including the journal of the same name), and *Law and Social Inquiry: Journal of the American Bar Foundation*.

This Introduction and the volume in which it appears begin with a discussion of historical and philosophical perspectives on rights and the fundamental questions asked by rights theorists. Arguing that both political theorists and social reformers will benefit from an empirical understanding of how rights work, I identify some important empirical questions that remain unanswered by political theory. Although there have been efforts to bring together rights theorists with other academic disciplines, my purpose is to demonstrate that empirical social scientists have made great strides towards understanding how rights operate in the social world. The following sections of this introduction is to focus not only on understanding rights as socially constructed categories rather than as political absolutes, but also, highlighting what we know about how rights are used on empirical research on how individuals come to understand that they have a right and what they choose to do about it within organizational and institutional constraints.

Historical and Philosophical Perspectives on Theories of Rights

Where do rights come from? What kind of claims do individuals have to particular rights? How have scholars thought about what rights are? What substantive areas are protected by rights? Who enjoys rights? The essays in tPart I of this volume were selected to demonstrate a few of the different perspectives about the origins of rights.

Part I of the volume begins with the Universal Declaration of Human Rights, adopted on 10 December 1948 by the General Assembly of the United Nations (Chapter 1). The Declaration of Human Rights is an historical artefact and an enumeration of an idealized set of rights to which people, at least in theory, are entitled. It also provides a clear statement of the idea that rights inhere in individuals by virtue of birth, stating, 'All human beings are born free and equal in dignity and rights' (Article 1). The Declaration of Human Rights asserts that the enumerated rights belong to individuals by virtue of their being human.

John Locke, the classic Enlightenment theorist, articulates a theory of legitimate government and the rights that the government should be established to protect in 'Of Property' from the *Second Treatise of Government* (Chapter 2). Unlike the UN Declaration, Locke's essay questions the origin of rights themselves. Locke asserts that the earth is shared equally by all men by virtue of God granting all men the earth equally. For Locke, then, natural rights are endowed by God. Prior to civil government men exist in a state of nature in which they will unequally acquire capital; this in turn leads to violations of natural law (including what we would think of as crimes), requiring men to unite to form a civil society for the purpose of protecting property. As property is something that Locke believes should be protected, governments should be formed to protect property rights. When government forms to perform this task, rights initially conferred by God are protected by the state. Aside from the functions necessary to facilitate order and protect property, Locke believes that men still possess the natural right to be free from government interference. Humans should enjoy freedoms subject to the limitations of government only to protect 'life, liberty, and property'.

In the UN Declaration, and for political theorists like Locke and others, rights are something that we are born with (see Langdell, 1900; Locke, Chapter 2). In contrast the essay by Jürgen Habermas (Chapter 3) represents a fundamental departure because, for Habermas, rights emerge as part of, and at the same time as, democratic political processes. Habermas is just one of the political theorists who argue that rights arise from the political and governmental

processes in which they are embedded, but is perhaps the scholar most closely identified with this perspective. Notwithstanding a more socially constructed notion of rights, Habermas argues that rights are a particular type of claim to legitimate authority and that they still occupy an elevated position among claims of entitlement.

In his critique of positivism, 'The Model of Rules' (Chapter 4), Ronald Dworkin breaks this trend by arguing that a positivist conception of law and rights is stilted. The positivists' position (he mentions H.L.A. Hart and John Austin as exemplars) is that 'to say he has a legal right, or has a legal power of some sort . . . is to assert, in a shorthand way, that others have actual or hypothetical legal obligations to act or not to act in certain ways touching him' (pp. 48–49). As such, Dworkin opens a new line of inquiry into rights as constructed social processes – an idea taken up by the next set of essays in the volume.

Conflicts of and about Rights

Contrary to the idea of rights as fixed objects, the authors of the essays that make up Part II conceive of rights as socially constructed. The extent of the social construction and the factors that influence it are the subject of this section of the Introduction and volume. Whatever the origin of rights – be it God, politics or something else – rights occupy a special position among different types of legitimate claim. As such, the content of rights categories is significant and contested.

The essay that opens Part II of the volume is not a radical reconception of the category of rights, although at first glance it may seem to be. In 'The New Property', Charles Reich makes the seemingly radical argument that government largesse should be considered property rather than a gift or charity. Doing so would be to give those entitled to those benefits a very strong (perhaps the strongest) claim against government that an individual can have. So, the argument is a radical reconception of the category of what constitutes a right, but Reich makes it *because* of the special status of property rights in American culture and legal tradition.[2]

Although the arguments put forth by Reich and also by David Stone seem radical, the premise of their arguments is, by its very nature, conservative. The authors do not seek to challenge rights as legal categories or social institutions, preferring instead to expand the categories of rights. The power of these arguments comes from the notion that, if included, these new rights-holders (trees and welfare recipients in these cases) would enjoy almost absolute protection. These authors thus recognize that rights are social constructions and that, while the limits of the category of 'rights holder' are fluid, the liberal legal construct of rights is important (and indeed, perhaps unquestionable),

A more destabilizing conception of the entire concept of rights comes from the political theorist Jeremy Waldron and others who recognize not only that rights are socially constructed, but that they inevitably are also in conflict and that these conflicts must be resolved. In 'Rights in Conflict' (Chapter 6), Waldron explores what it means to have conflicting rights and ultimately concludes that how we resolve these conflicts will differ depending on what rights are said to be and where their power lies. In other words, he reminds us that the Part I of this

[2] A similar argument is made by David Stone (1972). The essay is a radically reconceives of the concept of rights-bearer, but is fundamentally traditional in that the author looks to rights to protect the interest he seeks to promote.

volume is important. Rights can be in conflict, and our shared social understanding of what rights fundamentally *are* will determine how we resolve these conflicts.

The final two essays in Part II share an interesting idea that there is something important about rights that lies well outside their capacity to create legal order, legal relationships and legal duties. The essays share the idea that rights can sometimes do harm, either to the individuals asserting them or to the larger community in which those individuals are embedded. In Chapter 7 Martha Minow argues that, despite the harms that can come from asserting a right, this act also has a community-enhancing function whereby the assertion of rights (or of a rights-violation) works to reinforce community norms and obligations, and acts essentially as a catalyst for people to consider such matters.

Mark Tushnet (Chapter 8) finds virtually no redemption in the idea of rights, however. At a time when scholars associated with critical legal studies challenged the standard perception that rights serve to protect rights-holders, scholars associated with the critical legal studies movement argued that rights are socially constructed (Scheingold, 1974), vacuous (Tushnet, Chapter 8), reified (Aron, 1989; Gabel 1981) and overutilized (Glendon, 1991). Some feminists argued that rights embody male norms and therefore will not ultimately aid women (Olsen, 1984) or at least will do so only problematically (MacKinnon 1989). Like their political theory counterparts, critical legal studies scholars criticized the notion of rights as appearing formally neutral but being unequally enjoyed by individuals. Tushnet is but one example of what was then a growing body of scholarship critiquing the concept of rights as inherently useful.

These debates among legal and political theorists are interesting but are not, for the most part, informed by empirical data. Given the conflicting assertions of the importance of rights, the conflicts about rights and the empty promise of rights, an empirical understanding of the way rights work in various situations seems a natural next step.

Rights in Empirical Relief

Part III begins with an essay that provides a comprehensive overview of the stages of rights claiming. The essays in each subsection go on to illuminate each stage in turn.

The opening essay by William Felstiner, Richard Abel and Austin Sarat begin (Chapter 9) with the conception that shows how disputes (including those about rights) 'emerge' (p. 257) rather than exist outside the dynamic process by which individuals construct them. Rights, therefore, are not self-enforcing but rather must be realized by individuals. As such, rights are constructs, and the processes by which individuals come to understand themselves as suffering a harm to which some right may provide remedy is important to empirically understand. This understanding of disputes provides what later becomes much of the framework for the study of disputes and rights mobilization (explicitly and implicitly) in law and society.

The authors demonstrate that disputes 'emerge' as individuals transform 'unperceived injurious experiences' into 'perceived injurious experiences' into 'grievances' (p. 259), a transformation from the broad mass of injuries unrecognized by those who suffer them to the harms that people recognize. Some proportion of these experiences then become 'grievances' (p. 257) – injuries that involve a violation of a right or entitlement. Only some grievances become 'claims' (p. 259–60) – when an individual contacts the party responsible for the grievance – and fewer still are fully-fledged 'disputes' – when the party allegedly responsible

for an individual's claim denies their responsibility. A certain number of disputes result in 'filings', a formal complaint (in a litigation model, a court filing) and the smallest category of all is made up of 'trials' – cases that are adjudicated.

The significance of 'naming, blaming and claiming' comes from the theoretical focus on the process of disputing, which emphasizes a part of the process of rights claiming that had, heretofore, been largely unexamined in favour of emphasis on legal institutions (such as courts) and legal professionals (like lawyers and judges) and had provided a framework on which the analysis could rest. The authors invite empirical research on each of the moments that make up 'dispute emergence'. What are the factors that affect whether or not an individual will claim legal protection when it is afforded her?

Rights and Individuals

The 'naming, blaming and claiming' framework makes clear that rights must be understood from a social–psychological standpoint because each phase of dispute transformation involves individuals. Empirical research demonstrates that a number of factors may make individuals less likely to want to assert rights. They may fear (rightly, it turns out) that they will be stigmatized for doing so (Bobo and Suh, 2000; Fiske, 1998; Kaiser and Miller, 2001; Major and Kaiser, 2003; Marshall, 2003), there may be other competing notions about law that interfere with rights claiming (Albiston, Chapter 13), or individuals may be able to handle their conflicts by appealing to other systems of social support rather than turning to law (Engel and Munger, 2003).

Recognizing that when legal rights are invoked because they have arguably been violated puts the rights claimer in the role of 'victim' in some way, Kristin Bumiller's classic work, *The Civil Rights Society: The Social Construction of Victims* (1987) encourages a socially situated understanding of what it means to invoke rights in a legal system that offers 'protections' for those who may already be in the role of subordinate in employment situations and society generally by virtue of their race and gender (see also Bumiller, 1988). Laura Beth Nielsen's essay, 'Situating Legal Consciouness', (Chapter 11) work builds on Bumiller, demonstrating the importance of understanding the social location of individuals in order to understand when they will want to enforce rights. As part of a large body of research which examines how individuals' race, class and gender mediates how people understand rights (Comaroff, 1985; Ewick and Silbey, 1992, 1998; Fleury-Steiner, 2004; Sarat, 1990; Sarat and Kearns, 1995), Nielsen's essay demonstrates that legal consciousness and attitudes about law are shaped, in part, by past experiences with law and legal actors, which are affected by social status, including race and gender. Although still primarily a social–psychological account of rights consciousness, 'situating' legal consciousness is an argument for continued attention to the structural environments in which individuals are located and how those affect rights claiming.

In 'Rights, Remembrance, and the Reconciliation of Difference' (Chapter 10), David Engel and Frank Munger demonstrate the importance of identity in determining whether individuals are likely to make rights claims. In their multi-year study of the Americans with Disabilities Act, Engel and Munger show that rights consciousness can vary over time as individuals go through their lives, as the law itself changes and as individuals make attempts to claim rights. Moreover, one's perceived identity plays a role in the process of conceiving that one

has a right, moreover, one's perceived identity plays a role not only in deciding to enforce a legal right, but also in the process of merely conceiving that one is a right-holder. Engel and Munger show how the identity category of 'disabled' (for the purposes of protection under the Americans with Disabilities Act) is constructed by individuals who have disabilities in relation to work, school and other social institutions and its important implications for rights-claiming processes.[3]

Rights in Organizations

Individuals often engage in rights claiming within organizational settings. Because organizations have their own imperatives and authority structures, organizations themselves can have important effects on rights consciousness as well as on rights activation. As such, empirical research on rights consciousness and claiming within organizations has begun to proliferate, exploring the tensions between rights claims and other, competing claims to the institutions, norms, organizations and social systems that may also be implicated. Although organizations were once thought to be moving towards substantive justice as due process protections were increasingly being implemented (Selznick, 1969), current scholars of organizations are less optimistic about the success of law and law-like structures in organizations (Edelman and Chambliss, 1999; Edelman, Erlanger and Abraham, 1992; Edelman and Suchman, 1997). Empirical study has demonstrated that organizational structures can obscure responsibility, making it difficult for those who suffer a deprivation of some right to identify the deprivation or know who or what is responsible for it (Nelson and Bridges, 1999). Finally, organizations have their own set of actors responding to the organization's imperatives, which can be in competition with rights.

Two essays in this volume examine rights claiming in organizations and show how organizational culture and imperatives can affect rights-claiming behaviour. In 'Internal Dispute Resolution' (Chapter 12), Lauren Edelman and her colleagues demonstrate that civil rights offices designed to guarantee employee civil rights in the workplace transform the law such that these offices become more like mediation departments designed to 'resolve problems' rather than ensure rights protections for employees. The authors demonstrate that organizational imperatives – in this case, to minimize the corporation's exposure to legal risk – affect how people understand and pursue their rights claims.

Catherine Albiston's work on the Family and Medical Leave Act (Chapter 13) studies what happens when rights are asserted in the workplace but are in opposition to different, powerful social and institutional norms, including the idea of being a 'good worker' and a 'good mother'. Albiston finds that rights can be of little importance when the rights claim is up against these other powerful ideas, but she also finds that workers sometimes successfully employ the norms embodied in the new law to contest institutionalized ideas about work in their negotiations over leave.

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[3] For a detailed critique of the more psychological approach to the study of rights consciousness and claiming, see Silbey (2005).

Rights in Social Movements

One of the reasons why scholars are so concerned with rights is that they traditionally have been a prominent strategy for social change. Using quite different empirical approaches, books by two political scientists in the 1990s asked the fundamental question: can courts bring about social change? Gerald Rosenberg's *The Hollow Hope* (1991) and Michael McCann's *Rights at Work* (1994) take up this question directly although they ultimately arrive at very different conclusions about the role of rights in America. The essays that make up this section of Part III interrogate this debate from different perspectives.

In Chapter 15, Rosenberg uses three case studies of rights-oriented political strategies in the litigation system to examine the United States Supreme Court's ability to produce social change and ultimately concludes that courts do not have the requisite institutional capacity to produce social change. Rosenberg's thesis drew heavy criticism from other social scientists, who criticized him for using questionable data (see McCann, Chapter 14) and for developing an instrumental model of rights and their relationship to social change. Several scholars developed new empirical evidence demonstrating the utility of law and rights, especially in the struggle for civil rights in the United States (Donohue and Heckman, 1997; McCann, 1994; Smith and Welch, 1997).

McCann's review of Rosenberg's book (which previews his then forthcoming book on pay equity reform in the workplace) critiques Rosenberg's thesis asking a slightly different question than Rosenberg's (see Chapter 14). Rather than enquiring if rights work to bring about social change McCann examines *how* rights work at multiple phases of a reform movement. This difference allows him to be attentive to the subtle and unintended consequences of rights, not just for social change, but also for people's consciousness; the role rights discourses play in arguments; and the role of rights in mobilizing individual actors who are or become actors in a social movement. He examines the influence of rights and law generally in four phases of legal mobilization-movement building, the struggle to compel formal changes in official policy, the struggle for control over actual policy reform and the transformative legacy of legal action. In each phase and for each player in the movement, legal rights hold different promises, pitfalls and power. McCann concludes that rights are very important for social movements not just for legal successes, but also for individual actors in those movements. The McCann–Rosenberg debate over the question of the utility of rights for social change raises a broader question about the role of rights in a social movement.

Rights in Global Contexts

As law itself has become more 'global', the question of whether rights developed/constructed in one country are useful or even understandable in other countries has become an important area of empirical research. Many international governing bodies (for example, the UN) and non-governmental organizations (for example, the World Bank, International Monetary Fund, Ford Foundation) work to export rights from one country to another, as well as to study the process by which rights are transformed as they traverse the globe. Debates about the role of rights on the global stage surround questions about whether rights are used to export domination and hegemony from the United States abroad or are tools of liberation for those living in different parts of the world. The focus of rights scholarship on the United States

obscures the fact that rights themselves and legally-oriented rights-based strategies for legal reform are not uniquely American phenomena; legal rights are used to advance social causes in many countries (Epp, 1998; Feldman, 2000; Heyer, 2000, 2001; Sarat and Scheingold, 2001), even in countries in which cultural and legal norms are less adversarial than in the United States (Epp, 1998; Feldman, 2000; Ginsburg, 2001).

Globalization theorists disagree on the promise for influencing conditions within nation-states when pressure is brought to bear by the global community. Some argue that global cultural forces constitute state action and form (Meyer and Staggenborg, 1996; Meyer, 1977; Meyer and Hannan, 1979) and can quite significantly affect domestic politics. Other globalization scholars see transnational civil society as 'an arena of struggle, a fragmented and contested area' (Keck and Sikkink, 1998, p. 33).

The final section of Part III and this volume presents two essays that exemplify two approaches to the study of rights in global contexts. The first, by Katharina Heyer (Chapter 16) studies the cultural, social and political barriers to American-style rights-oriented strategies in other countries. Heyer studies how social movement activists understand rights and advocate them in their countries. The other, by Sally Merry (Chapter 17), is a study of rights from the top down. That is to say she begins with a rights-based movement against domestic violence which adopted a human rights advocacy approach and enters countries to form a global movement to explore on-the-ground adaptations of the movement's goals. Both essays demonstrate the elasticity of the concept of rights when advanced in local contexts with different social and legal norms.

Of course, rights are transformed when they are exported from one legal context to another. In 'Rights on the Road' (2001) and in 'The ADA on the Road' (Chapter 16), Katharina Heyer shows that the social movements for people living with disabilities originated in the United States where it takes a uniquely rights-orientated form. Although the social movement advocating for people with disabilities is imported by activists in Germany and Japan, the movement is shaped by the culture of the countries into which it is imported. When exported to Japan, where norms of caring are based on a familial model – that is to say, if a family has a disabled member, social norms dictate that the family would support that individual – adversarial legal rights are less significant.

The promise of rights for influencing conditions within nation-states when pressure is brought to bear by the global community is contested, but Merry's study provides some hope in that she demonstrates the adaptability of human rights to local contexts that are very different. In spite of similar local contexts in which these human rights are asserted, the appeal can be quite different to people with very different world-views

Conclusion

Rights are not trumps employable in all contexts and with certain outcome. Neither are rights vacuous and powerless social constructs. Rather, rights are social constructs that, based on shared social understanding and state legitimacy, are meaningful but not path-determinate. As such, the empirical study of rights in empirical relief is the only way to assess the utility of rights and how that varies for different individuals across social contexts and within different arenas.

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