IS THERE AN EMPIRICAL LITERATURE ON RIGHTS?

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ABSTRACT

The empirical literature that attempts to study rights is at an impasse. It can demonstrate that big claims about how some rights structure politics are overblown, but it has struggled to go beyond this step. This is in large part because studying rights is much more difficult than is commonly appreciated. A study of rights promises implicitly to be a study of how rights politics differs from other kinds of politics. But rights are so ubiquitous and so diverse in form that it is often unclear what the excluded other is. We examine three books on rights that we admire: two by political scientists, Gerald Rosenberg's The Hollow Hope *and Michael McCann's* Rights at Work, *and one by an anthropologist, Sally Merry's* Human Rights and Gender Violence. *These books conceptualize rights in diverse ways, in diverse settings, using diverse methodologies; yet they run up against similar difficulties in trying to think beyond the cases they study. At the conclusion, we make some humble suggestions for how researchers might try to overcome these problems.*

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INTRODUCTION

Rights are a central subject of sociolegal studies. Many books and articles use "rights" in their titles and thus seem to promise an understanding of this topic. We are avid readers of these books and articles, and we often find them provocative and useful in our own thinking about law and politics. Nevertheless, we are not at all sure that there is an empirical literature on rights.

This is because studying rights and their effects turns out to be much more difficult than is often appreciated. Like all concepts, a "right" is defined in large part by what it excludes. A study of rights politics promises implicitly to be a study of how rights politics differs from other kinds of politics. But rights are so ubiquitous, and so diverse in form, that it is often unclear what the excluded other is. The opposition between rights and non-rights is often left shadowy and unexplored. Rights studies are haunted by this other.

As a result, the empirical literature that attempts to study rights is at an impasse. It can demonstrate that big claims about how some rights structure politics – that they unilaterally deliver social goods or demobilize citizens – are overblown. But it has struggled to go beyond this step, to say anything more general about rights. In fact, we detect great ambivalence among sociolegal scholars in even attempting to cumulate knowledge about rights, developing general frameworks about rights consciousness and rights mobilization. Yet, without this, it is not at all clear what service empirical researchers can provide, other than to remind us (against some overstated theories) that rights politics is more complex, varied and fluid than is sometimes supposed. As currently composed, the sociolegal literature can give us wonderful portraits of particular instances of rights at work (or not at work), but little to link these studies other than the word "rights." They are merely studies of politics.

The struggles of rights researchers in part reflect developments in sociolegal studies that have radically decentered and so complicated our understanding of law. If law is conceived as a force that arises out of formal institutions – courts, agencies and legislatures – then the effects of law can be studied straightforwardly as top-down (or "center-out") implementation. One measures the effect of law by comparing legal commands, "law on the books" with the implementation process, "law on the streets," and the behavior that results. But as sociolegal researchers have long understood, people interpret legal commands in strikingly varied ways, and their interpretations have social effects that are just as significant as those of judges and legislators. Once this is recognized, and the formal

institutions are decertified as the authoritative custodians of law, complications ensue, and sites of research far away from courts and legislatures gain prominence. There is, for example, added weight to studying how individuals think about law, "legal consciousness," because individuals, drawing on social understandings, are the first movers of the disputing process, and through their decisions help make the law. There is interest in how organizations that are the target of the law translate and construct it, because they too "make" law, both within the organization and sometimes in the larger society. In the newly decentered perspective of sociolegal research, the law is "all around" (Sarat, 1990) and so becomes hard to pin down; "cause" and "effect" models seem overly simplistic and difficult to specify. Studying the effect of law becomes a bewildering exercise, like trying to spot a friend in a hall of mirrors.[1]

In the study of rights, these developments in sociolegal studies were presaged by the publication of Stuart Scheingold's classic, *The Politics of Rights*. The first part of Scheingold's book takes aim at the "myth of rights," the view that the recognition of rights by courts can authoritatively resolve all political and ethical conflicts (Scheingold, 2004, p. 5). Scheingold, drawing on the work of Clifford Geertz and Murray Edelman, analyzed how rights function as symbols in American politics (Scheingold, 2004, pp. 14–17, 205–207). In the second part of his book, Scheingold urged a study "the politics of rights," in which activists, taking advantage of the symbolic power of rights, use that power to advance their goals. As Scheingold (2004) notes in his more recent preface to the book, *The Politics of Rights* reflected the decentering of law within sociolegal studies because it urged attention to the ways in which individuals, social movements, and intermediate organizations constructed rights claims. More subtly, *The Politics of Right* pointed the way to a less unified and more specialized study of rights. Rights, Scheingold suggested, had different functions and different mechanisms in different settings – as resources for social movement, as weapons of cause lawyers, as mechanisms of policy implementation, and as part of the everyday life of individuals. Rights were "all around" but not necessarily all one thing, an observation that should make researchers be wary of grand unified statements about rights.

Scheingold's call to study the politics of rights has been answered by a bevy of researchers in the past three decades, prominent among them his own students.[2] They have produced a body of work that has been influential within the Law and Society Association and that occasionally gains notice within anthropology, sociology, and political science. Yet, for all its successes, this field is still struggling with the challenges posed by a

decentered, more highly contextualized conception of law, raising questions about the whole enterprise of rights research. The rest of this chapter is an attempt to explain what we mean when we wonder if there is an empirical literature on rights. We will focus particularly on three books on rights that we admire, two by political scientists, Gerald Rosenberg's *The Hollow Hope* and Michael McCann's *Rights at Work*, and one by an anthropologist, Sally Merry's *Human Rights and Gender Violence*. These books consider diverse forms of rights in diverse settings, using diverse methodologies; yet they run up against similar difficulties in trying to think beyond the cases they study. We certainly make no claim that these books can represent all works in the sociolegal literature – our selection is biased, for one thing, toward political science – but we do think they reflect divergent (and recurring) approaches to studying rights and thus illustrate some of the central difficulties that rights researchers find themselves in. Rights research as currently constituted is a field in which the whole is much less than the sum of its often wonderful parts.

At the conclusion, we make some humble suggestions for researchers as to how they could address these problems. In particular, we argue for more attention to concept formation, and more explicit comparisons between rights and non-rights forms of politics, or at least between different types of rights claims.

ROSENBERG'S *THE HOLLOW HOPE*

Gerald Rosenberg's *The Hollow Hope* is a classic in the field of rights studies. Whether one agrees or disagrees with its conclusions, *The Hollow Hope* synthesized an impressive array of literature, amassed reams of data, and in so doing helped to re-energize studies of rights-based litigation in political science. Soon after *The Hollow Hope* appeared, there was a flurry of scholarship on rights by leading sociolegal scholars such as McCann (1993) and Feeley (1993) and an entire volume devoted to assessing Rosenberg's conclusions (Schultz, 1998).

For our purposes, *The Hollow Hope* is particularly interesting because, at first blush, it makes very strong and controversial claims about rights. With characteristic punch, Rosenberg contends that rights-based litigation is almost always unable to produce significant social reform and thus offers a "hollow hope" for change. Rosenberg adds that the "fault lies not merely with the message but the messenger itself" (Rosenberg, 1991, p. 213), suggesting that courts are intrinsically weak agents of change.

Rosenberg argues that pursuing rights is a waste of scarce resources, diverting activists from more productive actions such as grassroots organizing and lobbying. Rosenberg concludes that courts "act as 'fly-paper' for reformers who succumb to the 'lure of litigation'" (p. 341).

Rosenberg's study uses a top-down approach to the politics of rights. He locates law straightforwardly within the courts – there is no "decentering" here, no sense of competing conceptions of law. In that respect, *The Hollow Hope* is a very traditional study of judicial implementation. Rosenberg's goal is to understand the conditions under which courts produce "significant" social change at the national level (p. 4). According to his "Constrained Court Model," Rosenberg hypothesizes that judicial decisions will be most effective when there is (1) ample precedent for judicial decisions; (2) congressional and executive support for change; (3) some public support (or at least low opposition); and (4) one of the following: (a) positive incentives for compliance; (b) costs for non-compliance; (c) market incentives for compliance; or (d) extra-judicial actors who seek to use judicial rulings as cover for implementing their own reform agendas.

Rosenberg examines his model through an analysis of some of the most celebrated social change decisions of the Warren and Burger courts, starting with *Brown v. Board of Education* and *Roe v. Wade*. He culls through primary and secondary sources looking for signs of direct or indirect influence. He finds time and again that these famous decisions generally had limited effects on policy, public opinion, and social behavior.

Rosenberg's conclusions are forcefully stated, but are not as sweeping, or as controversial, as they first appear. Part of the reason is that a significant portion of the analysis is geared toward debunking very strong – or, less charitably, very naïve – claims about the power of rights-based litigation and judicial policymaking. In discussing *Brown v. Board*, for example, Rosenberg begins with various quotes from leading civil rights advocates and law professors, who see *Brown* as "a revolutionary statement of race relations law," "nothing short of a reconsecration of American ideals," and the "most important political, social, and legal event in America's twentieth-century history." As Rosenberg argues, these views are not plucked from thin air; they were articulated by leading activists. Using the stated goals of activists is a standard strategy for avoiding observer bias in policy studies. Yet, by relying on these types of statements as his analytic baseline, Rosenberg tested an extreme set of beliefs about the efficacy of rights, one that few sociolegal scholars believed even at the time (Schuck, 1993; McCann, 1993; Feeley, 1993). From this vantage,

Rosenberg's findings are not surprising; they simply confirm Scheingold's analysis of the myth of rights.

Of course, Rosenberg does not merely seek to challenge the most extreme statements about the influence of courts; he also uses the cases to examine his contingent model of judicial influence. Here too, the sheer bulk of the analysis is impressive, but its scope is limited. From the outset, Rosenberg focuses on whether courts acting by themselves foster significant change at the national level. This is a high bar. It is hard to imagine any institution in the American system of shared powers that can be expected to produce unilateral national change. Thus, what seems at first to be a sweeping indictment of rights litigation can instead be seen as a restatement of the status quo orientation of the fragmented American policymaking process.

Moreover, *The Hollow Hope* does not provide much insight into how rights politics differ from alternative routes to social change. Rosenberg concludes that judicial decisions will be implemented when they receive support from the other branches and from the public and when they create incentives for others to implement them. These conditions, however, would likely apply to any mode of implementation, whether supervised by courts or other bodies. Presumably congressional initiatives too would flourish when they are supported by the other branches and by the public, when they create positive incentives for others to go along (and costs for them to ignore), and when local officials are happy to implement them. Rosenberg cites only one condition, ample legal precedent, that seems specific to rights, and even this has analogs, since precedent implies incrementalism, a mode that political scientists have long studied in legislatures and agencies. Because he does not fully consider rights against (implicit) counterfactuals of legislative or executive action, Rosenberg fails to identify the distinctive characteristics of rights politics.

Do Rosenberg's case studies support the claim that courts and rights serve as "fly-paper" for activists? Again, it depends on how one interprets the claim. If Rosenberg is merely arguing that activists should not focus all their efforts on one branch, in a polity in which power is shared among branches, his contention is clearly sound, but hardly controversial. The more provocative underlying claim, wrapped up in the metaphor of a "fly-paper" court, is that work that activists do through courts should be channeled toward other modes of politics. To justify this claim, the analysis must grapple with the counterfactual of what would happen in the absence of rights, or if the demands of activists had been framed outside the language of rights.

The Hollow Hope never does this in a systematic way. In a crucial passage in the analysis of the desegregation cases, which is the most well-developed of all the book's case studies, Rosenberg laments: "we can never know what would have happened if the Court had not acted as it did (if *Brown* had never been decided or had come out the other way)" (p. 157). Instead of grappling with this counterfactual, the book points to a whole host of factors that could have accounted for desegregation that are said to be independent of the court's decisions, especially actions of Congress and the executive branch that seem more proximately related to progress on the ground. This approach convincingly underscores that many factors potentially contributed to desegregation, but offers little purchase on their relative significance, the subtle ways in which these factors interact or, more importantly for our purposes, how rights-based strategies fundamentally differ from other reform strategies.

There are a whole host of methods for assessing counterfactual claims. One can use statistical controls to model the independent impact of formal rights. One can draw on comparative methods and contrast rights-based campaigns with those that do not rely on rights or rely less on rights. One can assess cases involving different types of rights, especially more or less qualified ones. As McCann (1993) notes in his insightful review of *The Hollow Hope*, by focusing on institutional constraints on the courts, the book leaves open the question of what would have happened if the Supreme Court had ruled more forcefully, especially at the implementation stages. As a result, it is not clear from the analysis whether the lack of results stems from some deep-seated limitations of rights politics or simply a lack of judicial follow-through in the particular cases at hand (McCann, 1993, p. 726).

In the end, *The Hollow Hope* is perhaps best understood as a salutary brush-clearing exercise. It helps dispose of the myth Scheingold identified, that rights are all-powerful, self-executing agents of national level change. It normalizes judicial implementation, suggesting that judicial effectiveness should vary depending on many of the same factors that affect the chances of successful implementation of legislation and agency rules. Yet, these insights leave many important issues unresolved. What would have happened if the courts had ruled more forcefully? What would have happened if activists had eschewed rights-based politics and turned to other means of pursuing their ambitious agendas? It is not difficult to imagine studies designed to take on these issues. However, by focusing on national level change involving prominent rights-based litigation, *The Hollow Hope* leaves them to others.

MCCANN ON *RIGHTS AT WORK*

Michael McCann's *Rights at Work* is among the most influential sociolegal studies of rights, particularly among political scientists. It is sometimes cast as a foil to Rosenberg's book, a "pro-rights" book to Rosenberg's more negative conclusions, and a "bottom-up" book to Rosenberg's "top-down" approach. Rather than focusing on judicial outcomes and the failure of courts to implement them, the typical stuff of "gap" research, McCann concentrates on the ways in which activists and everyday actors caught up in a rights movement think about politics and secondarily on the degree to which their material fortunes were improved during a period of rights activism.

McCann's case, the comparable worth movement, gives the book its pun: In seeking to understand how rights work, he analyzes a struggle – really a series of connected struggles – over equal employment wages. The comparable worth movement contends that job categories overwhelmingly filled by women are systematically underpaid as compared to "male" jobs and that this systematic pattern is a form of sex discrimination. An administrative assistant who handles complex documents and supervises employees, for example, receives less pay than a painter or a carpenter. These systematic differences in compensation at the level of job category explain much of the wage gap between men and women. Beginning in the 1970s, unions and individual plaintiffs sued under federal civil rights laws, contending that wage differentials across comparable job categories constituted sex discrimination. The logic of their argument did not fit the conventional formula of sex discrimination, in which differential pay is provided for the same job. But in a few celebrated cases, including a narrow 5-4 Supreme Court decision (*County of Washington, Oregon v. Gunther* 452 U.S. 161 (1982)), some judges accepted arguments consistent with the comparable worth framework, and states, local governments, and some private employers implemented some wage restructuring. Victory in the courts, however, was short-lived, as the judicial tide turned, most famously in a 1985 decision, *AFCSME v. Washington* (770 F.2d 1401), authored by 9th Circuit Appeals Court Judge Anthony Kennedy, himself on the verge of a major job promotion. No court beyond the trial level, McCann notes, ever fully accepted the comparable worth argument.

At first glance, then, comparable worth seems to be a good example of the perils of a rights strategy. Even where they won in court, comparable worth advocates had difficulty implementing their decisions. Moreover, the judicial victories of the movement proved ephemeral, and by the time

McCann was writing, many considered the movement stalled (p. 85). Thus, McCann sets up comparable worth a kind of "least likely" case, in which one would be least likely to observe rights working effectively. (This is the converse of Rosenberg's handling of *Brown*: Rosenberg argues that though *Brown* at first glance looks like a powerful example of rights at work, a closer inspection of the aftermath of the decision vindicates critics of rights.)

The strongest claim McCann rebuts is that rights demobilize grassroots movements. McCann shows that rights claims in fact seemed to attract and energize supporters. Media coverage of the initial judicial victories, McCann shows, was widespread and was used by savvy activists as part of organizing campaigns, who employed slogans like "Raises, Rights and Respect" and "Help Defend Working Women's Rights" (p. 67). The victories raised expectations among rank-and-file women workers and gave them a familiar vocabulary for naming their discontents about work. Moreover, the judicial victories transformed public discourse about wage equity and struck fear into the hearts of employers, providing leverage at the bargaining table and in legislatures that far outweighed the heft of the judicial victories themselves.

McCann's study knocks out the strongest claims of rights critics. Clearly, rights do not always destroy grassroots movements, and they do not necessarily block more radical consciousness about hierarchy and oppression. His comparable worth activists are not taken in by the "myth of rights" as all-powerful commands; they understand that rights are indeterminate and subject to the whims of judges. Nonetheless, McCann's interviewees also realize that rights can be useful political resource, both for mobilizing support and for bargaining with employers. Similarly, at the individual level, consciousness about rights does not seem to squash other kinds of thinking about employment justice. McCann finds that everyday people are perfectly capable of thinking about comparable worth as right, but also as an issue of distributive justice, of family need, even of efficiency.

Rights claims thus emerge as just one of many strategies that activists use, another arrow in the quiver, another way to think about social justice, complementary rather than hegemonic. Similar to Rosenberg's analysis, the effect of McCann's book is to normalize rights claims and legal strategies. This is a useful corrective to super-strong claims about the limits of rights and to the isolation of law within political science, a segregation that has impoverished both fields. But this normalization has a strange effect, because it comes close to abolishing its subject. By the end of McCann's book, we must ask: Are rights in any way different from other forms of

politics? How are rights at work different from other kinds of strategies at work? These are questions *Rights at Work* is not configured to answer.

The normalization of rights is apparent when McCann attempts to explain the success of the comparable worth movement. He provides a long list of factors that will be familiar to students of social movement literature. On the political structure side, he links the movement's successes to earlier movements that had established its institutional and conceptual foundations, politicians' concern about the gender gap and the female vote, openness to reform within state and local bureaucracies, and supportive state political cultures. On the organizational resources side, he notes solidarity among women workers, union organization, feminist groups, and strong, savvy leadership. As with Rosenberg's book, the identified factors are convincingly grounded in McCann's data, but also generic: they could apply just as easily to any social movement, whether rights-based or not. Indeed, McCann sums up his findings with a "process-based Path Model" of legal mobilization that builds on the "political process" model of Douglas McAdam simply by adding legal action and rights consciousness to McAdam's framework (p. 136). McCann concludes that rights are "neither just a resource nor just a constraint for political movement building, but rather vary in utility with the specific situations in which they are deployed" (p. 137).

McCann's emphasis on complexity and contingency does not stop him from considering aspects of the comparable worth struggle that might reflect the distinctive characteristics of rights politics. He observes, for example, that the logic of antidiscrimination law generally pushed disputants in his cases toward more formal, more systematic approaches to wage setting that were separated from traditional wage negotiations. More formalized processes such as these, he observes, can benefit "traditionally marginalized interests" who are disfavored by more discretionary, informal processes typically managed by those on top of traditional hierarchies (p. 182). Does that mean that rights have a formalizing tilt that, *on average*, aids "outsiders" in their struggles with insiders? McCann avoids making such a strong claim, concluding that only his study reveals "the creative potential" of mobilizing legal norms and so demonstrates the "ambiguous and shifting role of law as a constitutive force." In fact, McCann agrees with radical scholars that "legal conventions do generally tend to sustain status quo relations"(p. 193). Yet, at the same time, McCann maintains that rights are a useful weapon for those on the bottom, one that has distinctive properties and advantages in political conflicts. By linking the local and personal with the abstract and universal, rights seem to call those in power to attention in a way that claims of needs or proclamations of interest do not. Rights, McCann says, "Provide at least some grounds for winning what Minow calls an 'equality of attention' in public debate."[3]

These are intriguing hypotheses about the politics of rights, generalizations whose adequacy we hope other researchers will pursue. McCann, however, is limited in his ability to probe them because of his research design, which limits his ability to compare rights mobilization with other forms of politics: He does not have a fully developed "other" to which he could compare rights politics. One might imagine a comparable worth movement, or at least a "pay increase for women" movement that did not invoke rights claims or have a legal strategy. At points, McCann seems to be considering this counterfactual, particularly in his discussion of the more technical job evaluation side of the movement. But a social movement based solely on such a technical discourse seems so implausible that McCann never fully considers it as a counterfactual. Similarly, while McCann observes a range of discourses around wage equity – family need, distributional justice, and workplace efficiency – he does not attempt to imagine a movement shorn of the discourse of rights.

McCann does has some variation across the 28 comparable worth struggles he analyses, and at points, he draws on this, again to upset overstated generalizations about rights. For example, in his discussion of mobilization, he compares more grassroots comparable worth struggles to more elite, less participatory campaigns. Across the 28 cases, he concludes, there seems to be no difference between the cases in which proponents brought a legal complaint and those in which they used other strategies exclusively. (Indeed, four of the five cases without legal action were among the least participatory – Fig. 3.4, pp. 79, 82.) But McCann undermines his comparison by noting that the cases are not independent of each other; activists in them all used the discourse of rights, and the threat of legal action, even where not taken up, loomed in the background (pp. 162–163). All of his cases, then, are treated as examples of rights at work, albeit in different formations. This makes it difficult for him to say what exactly is distinctive about rights politics.

An equally fundamental problem is that the scope of McCann's study is unclear. Are his conclusions limited to employment rights, antidiscrimination rights, or rights more generally? Even McCann's title is slyly ambiguous on this point: Is it merely *Rights at Work* – rights in the employment field – he is studying, or is he more generally concerned with how all rights "work"? Throughout the book, McCann sticks closely to fairly narrow conclusions drawn from the data in his study, which are confined entirely to

comparable worth struggles. Yet, in his encounters with critics of rights, he does not similarly narrow the scope of his argument; he does not say that the critics are wrong *in the case of employment antidiscrimination rights*, he says they are wrong about rights. But what are "rights"? The only thing approaching a formal definition of "rights" appears at the outset of the book, when McCann says that rights "designate the proper distribution of social burdens and benefits among citizens," a very broad statement (p. 7). It would seem a prerequisite to any body of scholarship to have some common sense of what one is studying; yet, it is unclear whether McCann's conclusions are about rights in the broadest sense (concepts of the "proper distribution of social burdens and benefits"), antidiscrimination rights, or more narrowly, antidiscrimination rights at work.

This is not an immediate problem for *Rights at Work* because its aims are negative: it does a wonderful job of showing that rights, however defined, are not inevitably any of the things theorists sometimes claim – hegemonic, deradicalizing, or demobilizing. McCann and Rosenberg's analyses can be seen as mirror images. Where Rosenberg clears away overstated claims about the transformative value of rights, McCann clears out overstated claims about the demobilizing effects of rights politics. The problem for rights researchers lies in the next step.

The strange result of Rosenberg's and McCann's books is that by normalizing rights, they make them much less interesting as a subject. On their account, mobilization and implementation using rights looks a lot like mobilizing and implementing using other tactics, and theories about social movements and policy implementation generally work well for rights movements too. There is no body of scholarship about the role of pens in politics because we assume that pens can be used in so many ways, in so many contexts, that there is nothing that would unite their various uses, and thus, there would be nothing interesting to say about them. No social scientist would write *Pens at Work*, or *Pens in Politics*. If rights are like pens, then perhaps, there is an empirical literature on rights, but Rosenberg's and McCann's books are the beginning and end of it.

Are rights like pens? Marshall McLuhan famously argued that seemingly neutral media have effects, have tilt. Social context and contingency affect how media are employed – Soviet television programs were different from the CBS evening news – but McLuhan still argued that there were similarities across context. One could use a television simply to light up a room, but most people watched the screen, and McLuhan claimed, in similar ways across radically different societies. The strongest formulation was that "the medium is the message," a radical assertion that the

technology itself had a meaning over and above the particular content of the medium (McLuhan, 1962, 2003). With rights, as with television, it is hard to escape the notion that the medium has a message, that a politics of rights looks different from another kind of politics, that *Rights at Work* are different in some way from *Non-Rights at Work*.

One could imagine an empirical literature on rights that tries to tease this out, but the emphasis in sociolegal scholarship on complexity and contingency can make one despair at the project. If even the subject of the study is decentered and fluid, difficult to pin down, what hope is there for comparing across cases? Empirical rights scholarship sometimes seems a chorus of Babel, with researchers condemned to talk past one another, and no larger goal then to pile up the number of myriad formations in which rights claims are invoked. At least scholars of pens in politics could be assured they were roughly talking about the same thing.

MERRY'S *HUMAN RIGHTS AND GENDER VIOLENCE*

Sally Merry's *Human Rights and Gender Violence* provides a useful contrast to the ways in which McCann and Rosenberg study rights. Merry's study is at the transnational rather than American level, and there is little in her book about courts or formal law. Instead, the main institutions she studies are the United Nations (UN) and its associated organizations, conferences, and committees, entities that argue over human rights norms and attempt to diffuse them. Perhaps, most importantly, unlike Rosenberg or McCann, Merry is not out to debunk inflated claims (positive or negative) about rights. Indeed, though rights appear in her title, Merry spends much of her book on another target, "culture," and the way this term is deployed in controversies over human rights. Finally, though Merry comes to the study of rights from anthropology, a discipline seemingly more steeped in context and contingency than political science, she is much more willing than McCann to generalize from her cases about how the rights she studies work.

This may be because Merry does not struggle as much as McCann and Rosenberg with the problem of "the other," the thing to which rights are being compared. For Rosenberg, the other is the spectral counterfactual of a civil rights politics without *Brown* and an abortion politics without *Roe*; for McCann, it is either a comparable worth movement that never filed a legal action or a pay equity movement uninfected by the language of rights. These are all rather shadowy apparitions. For Merry, by contrast, the other is at the center of her book. It is the local practices and institutions against which

human rights covenants are aimed – rules and laws governing marriage, family, and sexuality that treat women as second-class citizens. These practices and institutions are both criticized and defended as vital components of "traditional culture," and one of Merry's primary ambitions is to show how that common framing gets culture wrong.

Through interviews, documents, and observation, Merry analyzes the process by which international organizations reach consensus on the language of conventions relating to gender equality, most prominently CEDAW, the Convention for the Elimination of All Forms of Discrimination Against Women. Merry and her assistants then document the processes by which the norms generated at the international level filter down to national and local settings – the transnational version of "rights at work." The fieldwork for the book is unusually, and admirably, wide-ranging, including India, Fiji, Hong Kong, China more generally, and the United States. Within these diverse locations, Merry analyzes the role of "translators," those who take the international discourse of human rights back to their countries and apply it to local conditions. She interviews local activists and service workers about the diffusion of programmatic innovations such as domestic violence centers. She analyzes controversies involving gender to see the extent to which human rights language and concepts play a role. Like McCann, Merry finds that human rights discourse, even where it takes root, is far from hegemonic: Her actors are perfectly able to talk the language of human rights, yet also locate themselves within other moral orderings such as kinship obligations. But Merry also finds that human rights concepts, though fitted by national actors to local contexts, are not fundamentally altered in the journey from global to local. Although they may be packaged to appeal to local sensibilities, they remain "part of a distinctive modernist vision of the good and just society that emphasizes autonomy, choice, equality, secularism and protection of the body" (Merry, 2006, p. 120). Thus, for Merry, human rights do have a tilt; they are not merely creatures of context and contingency, whose meaning and effect depend on the circumstances in which they are deployed.

Merry argues that to frame human rights as disrupting "traditional cultures" is misleading, not because rights are not disruptive but because the idea of a "traditional culture" is more confused than commonly supposed. She documents this claim through her observations of how human rights work in UN forums. UN conventions are said to be binding on the nations that sign them, but the UN has no enforcement power against countries that fail to live up to their commitments. UN committees attempt to monitor implementation of covenants by asking nations to report on their progress.

Merry observes the delivery of these country reports at UN committee meetings and notes that "traditional culture" is often used as an excuse for not living up to human rights norms. Culture, Merry shows, is often treated in these international forums as an unchanging, irrational set of practices sealed off from outside influence and generally associated with the rural "backwards" sectors of a developing nation. As any anthropologist knows, and Merry demonstrates, this way of talking conceals the dynamism, hybridity, and complexity of cultures. Practices advertised as ancient and endemic are often much more recent and partial – and claims to "tradition" are often politically strategic.

For example, when a Fijian national report noted that punishment of rape is sometimes diverted through the practice of "bulubulu," in which the offender offers a gift in apology to the victim's family, the UN committee harshly criticized the practice as a human rights violation – and Fijian officials angrily defended what they described as a practice central to their culture. But Merry concludes, based on several months of fieldwork in Fiji and research by other anthropologists, that bulubulu is a much more fluid tradition than the UN committee understood. Once used to smooth over tensions in village life, the tradition morphed as Fiji became urbanized. Indeed, the "tradition" of using bulubulu to divert punishment for rape seems to have arisen in just the past few years, as a response to increasing sentences for sex crimes (p. 118). Moreover, the valorization of bulubulu is one small part of a cultural conflict within Fiji, in which claims about the peacefulness and communalism of village life are used by ethnic Fijians in their struggle against Indo-Fijians, who are portrayed as greedy individualists. All of this, Merry notes, was missed by the UN committee, which instead of criticizing a particular (and apparently new) manifestation of bulubulu, bumbled into a "rights versus culture" conflict by criticizing the entire practice.

Merry argues that culture should be seen not as a "barrier to human rights mobilization but as a context that defines relationships and meanings and constructs the possibilities of action" (p. 9). Merry notes that more savvy human rights advocates have this dynamic view of culture and look for resources within their own nations' institutions and practices with which to overcome the oppression of women. Yet, Merry observes that international organizations strongly favor human rights norms over other approaches for improving the status of women. When, for example, an Egyptian national report argued for drawing on the progressive elements within Islam to promote gender equality, Merry notes that the UN committee reviewing the report was unimpressed, and reinforced the

importance of human rights concepts (p. 97). Although Merry expresses ambivalence about some aspects of human rights discourse, she seems to agree that, in the end, it is "the best we have" for challenging the oppression of women (p. 231). She reaches this conclusion, it seems, simply from the logic of "rights at work" than from a formal comparison between different modes of cultural change: Human rights draw their strength, she argues, from their resistance to local context, to their universalism. If they were more adaptable to context, more pliable, they would also be less effective in challenging patriarchy.

Strangely enough, *Human Rights and Gender Violence* is much more careful and self-conscious about "culture" than it is about "human rights." Merry complains that "Although culture is a term on everyone's lips, people rarely talk about what they mean by it" (p. 10). The same, however, could be said just as accurately about rights. Like Rosenberg and McCann (and Stuart Scheingold before them), Merry in this book does not offer a formal definition of what she means by rights generally, or human rights in particular. It is not so clear, as a result, whether her claims are limited to CEDAW rights, to internationally created rights, or rights more broadly. Moreover, while Merry is careful in unearthing the many ways in which her subjects talk about culture and the puzzles this produces, she is not interested in analyzing the ways in which they talk about rights. Of course, this may be because, as she suggests at several points, human rights tend not to get pushed around the way culture does – on her account, rights travel undamaged, and are understood pretty much within Fiji, China, India, and Hong Kong the way they are at UN meetings. But even if human rights concepts are relatively unproblematic in the case of gender violence, conflicts about human rights are likely in other cases, and to the extent Merry wants to say something more general about the transmission of rights from the global to the national and local scenes, it would useful for her to be more explicit in conceptualizing rights in general and human rights in particular.

This leads to a second puzzle about Merry. She notes that culture is often identified as something that goes on "out there" amongst the primitives. But all places have cultures, even the UN, and one of Merry's tasks is to describe the culture that produces international human rights documents. Merry does not, however, consider the converse: Do the places "out there" have rights, or competing conceptions of human rights? The answer depends, of course, on how one conceptualizes "rights" and "human rights." At points, it almost seems as if Merry is holding off this question by considering "human rights" positively, as those rights that the international

organizations declare as rights, or even more narrowly, as the particular rights in CEDAW. There are scattered passages in which Merry briefly raises the possibility of conflicts among rights claims. For example, in the struggle over Muslim personal laws in India, which have several discriminatory features, Merry notes that some Indian feminists defend the laws as part of a right against the "homogenization of communities" (Merry, p. 109). More humbly, Merry's examination of the conflict over female inheritance in Hong Kong contrasts the initial claim of women as part of a system of kinship rights, with their shift toward equality rights (pp. 195–204). Merry notes that the other side in the Hong Kong struggle also adopted the language of human rights (pp. 214–215). But these scattered acknowledgments do not lead her to open up the category "rights" and consider its various deployments; she instead keeps her category of "human rights" restricted to the rights she considers that are enshrined in international documents.

The upside of this is that Merry is willing to make much more strong claims than McCann about the tilt of rights. Rights on her account strengthen the state (because the state becomes the locus of their enforcement) and individualize, strengthening autonomy and equality at the expense of community and patriarchy (p. 137). She concludes that "human rights are ... based on a neoliberal privileging of choice rather than alternatives that could be more community-based or focused on socialist or religious conceptions of justice" (p. 102).[4] The downside of Merry's treatment of rights is that the reader cannot be sure exactly what she counts as part of the category. Moreover, it is not at all clear that her conclusions extend to fields other than gender, where there is likely to be much more conflict among competing conceptions of rights, even human rights.

More attention to conceptualizing rights would help with another puzzle: To what extent are Merry's claims about (human) rights at work rather than the process of applying international (and thus necessarily abstract and universal norms) to local circumstances? Merry seems to conflate the two (see, e.g., p. 104), and it is true that in the gender violence realm they are closely linked, so that it may be problematic to try to disentangle them. But one can imagine other realms (the environment, social welfare, labor, and education) in which international organizations attempt to impose norms that are not necessarily "human rights." Do these also individualize and empower the state? Conversely, would human rights have a different flavor if they were diffused in a less hierarchical, top-down manner? Because Merry does not explicitly conceptualize the features of human rights, she is not in a position to think about how much of her story is about the diffusion

specifically of rights and how much about the particular structure of norm diffusion she observes. For example, one of her conclusions is that rights norms take root where institutions and the state recognize them (p. 223). But it is not clear why this is a feature of human rights, or just of norm diffusion more generally – presumably all norms are more likely to find a place in popular consciousness when they are institutionalized and state recognized. As with Rosenberg and McCann, the reader cannot be sure that Merry has identified anything specific about rights.

SOME RECOMMENDATIONS

All the three books are ostensibly about rights, and yet, all three fail to make clear how they bound their central concepts. As a result, it is hard to put them together because it is not at clear what they share. What, if anything, would be lost if we relabeled Rosenberg's book as study of judicial implementation, McCann's as a study of social movement mobilization, and Merry's as a study of conflict over transnational norms in national contexts?

The easy answer is to hold that these books illustrate the many different manifestations of "rights," that they show how context and contingency shape rights consciousness and claiming, and so offer a correction to simple, rigidified understandings of rights. Imposing sharper boundaries on the concepts of rights, from this perspective, creates significant drawbacks. In a recent review of the legal consciousness literature, McCann (2006) argues the boundlessness of the concept of law in that field of research is a necessary cost, the flip side of the virtues of a decentered approach to law. The research began, he notes, with a sense that "ostensibly more parsimonious, precise, positive conceptions of law" were oversimplified and misleading and that much could be gained "by recognizing the complex, expansive, dynamic and significant – if indeterminate – dimensions of legality" in studying legal consciousness (McCann, 2006, p. xix).

Nonetheless, McCann also concludes that boundlessness is only worthwhile if it generates new understandings of legality. He worries that focusing on the "plurality of legal meanings that citizens can construct" can obscure the important ways in which legal consciousness is tied to the acts and words of official institutions (p. xx) – arguably what makes legal consciousness "legal." In rights research, we are not convinced that boundlessness is a virtue or that greater conceptual clarity would come at a significant cost. We remain puzzled by the problems posed to rights researchers by a

decentered understanding of law and are not sure yet how to resolve them. But based on our review of three very admirable and influential books, we suggest some tentative and humble recommendations for those who seek to contribute to a field of empirical rights scholarship.

First, we believe that whatever the virtues of boundlessness at an earlier stage, at this point, rights researchers need to be more self-conscious about the boundaries of their work. Once we move beyond debunking ("rights aren't always x"), empirical rights scholarship necessarily becomes concerned with tendencies and tilts, the stuff between 0% and 100% that characterizes most phenomena in social life. In that context, it is particularly important to create linkages between studies. But to link, say, McCann with Merry, one has to have a keen sense of the categories they are using. It is unclear to us how to integrate McCann's conclusions about the relative malleability and flexibility of rights with Merry's insistence that human rights are resistant to transformation and have certain characteristics that do not change with national or local context. Indeed, it is not clear that there *are* any connections between the studies. Are scholars in this field united only by the use of the word "rights"?

Doctrinal research on rights tends to emphasize typologies – to distinguish negative from positive rights, or social from political, or liberties from duties (Hohlfeld, 1923). Sociolegal scholarship, even where it is closely attentive to the connections among "law on the books," "law on the streets," and legal consciousness, tends to eschew typologies. Nevertheless, it is useful to make explicit distinctions within the broad category of "rights." It may be, for example, that studies of anti-discrimination rights at work are more about the particular logic of discrimination than about "rights."[5] The logic of privacy rights may share more with property rights than with discrimination. Merry's approach may reflect a particular focus on CEDAW or on international discourse about "human rights" that does not necessarily track with American conceptions of rights. Some of the problems of generalizing across the enormous category "rights" could be avoided if scholars were willing to create subcategories and be more explicit about the research that links most closely to them. In other words, we would urge scholars of rights to be more outward looking, more willing to link their works to similar studies, if only to distinguish the realm they study from the larger field. Sociolegal scholars might also distinguish more sharply across different spheres in which rights do their work. Studies of rights in social movements, for example, are likely to have more in common with each other than they will with studies that focus on everyday legal consciousness.

Second, given that so many rights studies make implicit claims about the distinctive (albeit diverse) nature of rights, we urge rights scholars to consider comparative research designs, particularly designs that match "non-rights" with rights. Many studies of rights are single-case studies that track changes over time in a particular field. Others, including the three studies reviewed here, examine how rights politics emerges in different settings. But there are few examples of studies that compare rights politics with non-rights politics or different types of rights politics. Because claims about the power or impotence of rights are implicitly comparative claims, it is very useful to think about what we have called "the other," the baseline to which rights are being compared. In the three studies reviewed here, "the other" is usually a counterfactual, a world that has not existed but must be conjured based on the author's imagination. Rights scholars who employ counterfactuals may want to take advantage of a methodological literature that is developed on their uses and their limits (see, e.g., Fearon, 1991). But an even better solution to the problem of the "other" is to consider a parallel case – another polity that dealt with the same problem using a different conceptual framework, a parallel issue in which rights consciousness failed to emerge, a social movement that rejected rights language or the use of a legal strategy. The parallel could be within the author's research or could be drawn from previous work by others. Silbey and Sarat (1989), for example, in their study of the conflict over alternative dispute resolution, assess the relationship between "rights" in judicial disputes and "interests" in mediation. Similarly, Burke (2001), in his analysis of the "rights revolution," compares rights-based to interest-based politics. Maynard-Moody and Musheno (2004) consider the differing ways in which social workers, teachers, and cops conceptualize social problems. Scholars could, following their example, compare how legal and non-legal (or at least, "less legal") professionals construct social issues.

None of these recommendations are to suggest that researchers in this field should give up their preference for in-depth, highly contextualized studies of (particular) rights at work. Our recommendations instead go to how the research is framed and how it is positioned within a larger body of work. Academic research gives scholars working on a common set of problems a chance to communicate and so learn from one another. Anyone who reads Rosenberg, McCann, or Merry, or many of the other wonderful books on rights politics, will see perceptive and fascinating accounts of particular cases and, more generally, of the interaction of law and politics. What they will not see – in these three books, and, we believe in the sociolegal literature as a whole – is a conversation about rights in which

scholars consistently build on each other's efforts. Thus, we are not sure there is yet an empirical literature on rights, but we remain hopeful that such a literature is possible.

NOTES

1. Ewick and Silbey (1998) use the term "legality" to refer to the ways in which people construct legal meaning, thus distinguishing "legality" from "law."
2. See, for example, Bumiller (1988), Melnick (1994), McCann (1994), Greenhouse, Yngvesson, and Engel (1994), Silverstein (1996, 2007), Epp (1998), Gilliom (2001), Reed (2001), Engel and Munger (2003), Albiston (2005), and two collections of articles: Nielsen (2007) and Fleury-Steiner and Nielsen (2006).
3. McCann, p. 298, quoting Minow, M. (1990). *Making all the difference: Inclusion, exclusion and American Law* (p. 297). Ithaca: Cornell University Press.
4. This is fascinating because it suggests that Merry, like McCann, also confronts a spectral "other," alternative conceptions of justice that might more effectively raise the status of women.
5. See, for example, Anna Kirkland's study of "fat rights" (Kirkland, 2008) and David Engel and Frank Munger's related study of disability antidiscrimination rights (Engel & Munger, 2003).

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