
*Commentary***Inequality and Rights: Commentary on Michael McCann's "The Unbearable Lightness of Rights"**

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In his masterful analysis of the place of rights in sociolegal scholarship over the past five decades, Michael McCann rightly identifies rights as a core focus of law and society work. He describes both the potential of rights mobilization and a broad sense of disappointment with what rights movements have accomplished. The essay seeks to explain both the potential and the failure of rights: their promises of freedom, recognition, and social justice along with their limitations, exclusions, and burdens on the rights holder. The language of rights is creative and compelling, but rights movements require legal and political resources and support networks. Thus, McCann's essay offers a nuanced view of rights talk and its disappointments. I think another source of disappointment with rights is overly ambitious expectations for what they can achieve. As sociolegal scholars, I think it is important to examine the conditions under which rights discourse works and when it does not. My own research suggests that some issues are amenable to rights approaches while others are not. Rights offer individuals new discursive resources, including social and economic rights, but do not target economic inequality itself. They can be effective in changing individuals' ideas of their entitlements but do not deal as well with violations that are systemic and require structural change. Instead, they reinforce the centrality of the state, the autonomy of the person, and the responsibility of each person to claim his or her rights. They deal well with discrimination but not with structural violence. Rights will inevitably disappoint both activists and scholars unless their possibilities and limitations are recognized.

The history of sociolegal scholarship on rights reveals shifting views about the possibilities of rights in comparison to alternative justice ideologies. Founded in the early 1960s, the Law and Society

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Association grew during a time of great promise for rights-oriented social movements. For many, rights have creative, ground up, jurisgenerative qualities that foster the hope that promoting rights will enhance social justice (Cover 1986). During the U.S. civil rights movement in the 1950s and 1960s, for example, rights contributed in significant ways to the dismantling of Jim Crow laws and discriminatory voting laws. However, over time, it became clear that this framework was far less effective in eliminating political and economic inequality between whites and African Americans than legal discrimination. By the 1980s, some sociolegal scholars turned to Marxism and critical legal studies, rejecting rights as a mode of social critique, while others argued that rights still offered benefits to excluded groups such as women and racial minorities, despite their weaknesses in practice. Social movements for women, children, indigenous people, and racial minorities, to name a few, saw rights as a pragmatic strategy that might be effective under conditions of ongoing discrimination, even though these ideas confronted critical legal studies' skepticism about law itself as a mode of social change.

In the late 1980s and 1990s, neoliberalism took hold as the dominant political and economic strategy, while communist economies and polities faltered and collapsed. The Marxist critique of capitalism and law gave way to an interest in democracy, human rights, and the rule of law. The apparent failure of communism as a political and economic system and the authoritarian nature of communist states generated a new enthusiasm for rights. Although this shift incorporated both civil rights and human rights, international human rights were particularly important. International human rights took a broader view of human welfare than did civil rights, incorporating systemic dimensions of well-being focused on adequate food, housing, and health care as well as protection from arbitrary state power. However, this revived rights thinking focused largely on civil and political rights rather than social and economic rights or collective rights.

As McCann points out, the turn to international visions of rights fostered internationalism in the Law and Society Association. The field of sociolegal studies in the 1970s and 1980s was deeply U.S. focused; during the 1990s, there was a significant turn to international concerns, not the least of which was studying the global spread of rights thinking through the human rights system. In contrast to the earlier U.S.-focused rights movement, the human rights movement was clearly international in scope and aspiration. In fact, it was primarily directed outward as a mode of reforming other countries rather than inward as a way of dealing with domestic problems among the wealthy nations that promoted it. There is now a small and progressive U.S. human rights movement applying the human rights framework to a variety of situations such as

the racially discriminatory treatment of victims of Hurricane Katrina and the ongoing lack of rights of prisoners held in Guantanamo Bay. Activists have also used the Alien Tort Claims Act to hold U.S.-based corporations accountable for their human rights violations outside the United States (Dale 2007). Despite the leading role the U.S. government and U.S. organizations have played in promoting human rights, however, the country has refused to ratify and therefore apply to itself many important human rights conventions.

The turn to human rights marked a major shift in ways of thinking about how to achieve social justice. During the late nineteenth to mid-twentieth century, socialism in various forms represented a widely accepted ideal of social justice, alongside democracy and liberalism. In practice, achieving a communist state, a decolonized state, or even a democratic state typically required some level of violence. While Marx and Fanon thought that violence was necessary for change, human rights theory did not generally assert that violence was required. A violent revolution might be required to transform the basic relations of production which were the source of social and economic inequality in Marxist theory, but achieving human rights was imagined as the product of the pressure of civil society and the international community. The human rights path to a just society was improved law and governance: democracy, the rule of law, and the protection of individual rights. The human rights approach sought to use pressure on states by civil society and the international community to improve human rights compliance. It did not directly attack economic and political inequality but focused on forms of discrimination and exclusion. Even the system of social and economic rights sought to build a floor of adequacy for all rather than to reduce disparities among the rich and the poor.

As economic inequality increased at the local, national, and global levels, activists found that the human rights system was more amenable to promoting better governance than reducing inequality. Civil society and the international community demanded that states treat their vulnerable populations better but had to do so within existing economic and legal systems. Demands were cabined within the sphere of law. Thus, the potential for violence and chaos was minimized and conflict was managed under the authority of the state or a coalition of nations. After the experience of violent Marxist and Maoist revolutions and the rise of new forms of international terrorism, both civil society activists and states found the less violent human rights approach appealing. Instead of overturning the social order, human rights sought to retain the overarching control of law and the state but make it more accountable, less discriminatory, and a better protector of the vulnerable. In doing so, this approach reinforced rather than challenged the state.

Despite the appeal of peaceful change, there is still disappointment with what the human rights system has achieved. Human rights are the dominant global social justice ideology, the set of tools available to social justice activists. Yet, inequality is growing by leaps and bounds, environmental degradation is rampant, and many states, despite ratifying a number of high-sounding human rights conventions, continue to illegally imprison and torture their citizens and fail to provide basic social and economic rights to their populations. Some sociolegal scholarship suggests that, despite their strong ideological appeal, human rights also fail to deliver much of what they promise, paralleling the experience with civil rights. Faced with these mounting problems, it is easy to conclude that the rights framework has not worked well. But perhaps it appears to fail because it can do certain things well but not others. It has areas of strength and effectiveness but cannot accomplish all that is asked of it, in part, because the framework of rights has been stretched beyond its capabilities. I think the recurring sense that rights fail to deliver, suggested by a rich body of scholarship on both domestic and international rights struggles, is partly because activists, faced with a lack of alternatives, pragmatically try to use rights in places where the framework is not compatible with the problem. In this neoliberal era, rights are virtually the only technique for change at the global level. However, in some areas, collective approaches based on sharing and cooperation have developed, as well as movements inspired by Maoism and religious doctrines that advocate violence and social purification.

Human rights face other challenges in achieving social justice as well. As McCann points out, rights are indeterminate, polyvalent, and flexible, thus reducing their power to enforce change. They target state action, so have less clout against transnational businesses that escape state control. In the context of efforts to shrink states and privatize services, states are less willing to see providing human rights as their responsibility. Human rights conventions usefully challenge laws that discriminate, but are less effective in changing embedded social practices. They are more readily adapted to protecting individuals from state violations such as lack of a fair trial or torture than to guaranteeing access to adequate food, housing, and health care by ensuring the conditions for producing these social goods. Most seriously, despite the articulation of social and economic rights, they do not address economic inequality. Under the pressures of neoliberalism and the legacy of the Cold War, rights themselves have been narrowed. For example, while human rights law includes considerable collective thinking, collective rights are typically treated as a secondary and less important dimension of human rights. Social and economic rights are subject to “progressive realization,” while civil and political rights

are to be implemented without delay. Human rights have been captured by neoliberal ideas that claim that it is up to the individual to assert rights and that the state should retreat from intruding on his or her liberty. This conception of rights limits their capacity to imagine collective responses to injustice focused on care and the common good and renders them far less capacious than the original conception of human rights. There are some situations in which this mode of promoting social justice is highly effective, but many others where it is not. This is particularly problematic when states lack the power or resources to regulate the production and distribution of food, housing, and health care.

The disappointment with rights reflects its over-ambitious goals and its lonely status as the sole global ideology of social justice now in play. As a framework for justice, rights are effective only under some circumstances, yet they are typically extended into wider domains. While such stretching occurs with civil rights, it is even more characteristic of human rights. By using human rights to address a wide variety of problems such as a lack of food and housing, practices that harm women's bodies but are supported by their cultures, lack of development, environmental degradation, resistance to trade unionism, failure to provide children adequate opportunities for play and political expression, and many other forms of violation, activists mobilize the mechanisms available to them, but may find themselves having to stretch the system in problematic ways. Are all these problems best defined and resolved as rights? Do rights claims in all of these cases produce appropriate responses from the range of actors and organizations that are responsible for fulfilling the rights? Rights are typically claims that the individual makes against the state, but in many of these examples, the state is only one of the many players producing the disadvantage. Furthermore, the responsible party may well be a system rather than an individual or a single organization. It can range from a capitalist economic system organized around profit to a system of governance that rewards corruption and individual aggrandizement rather than the promotion of the public good. And finally, the provision of adequate food, clothing, housing, and health care—core socioeconomic rights—is not simply the outcome of government efforts but requires a vast array of arrangements by states, corporations, and civil society. They depend on collective action and a consciousness that the well-being of a society means the well-being of all its members. This consciousness has been lost under the sway of neoliberalism and ideas of responsabilization; rights frameworks do not bring it back. Despite activists' awareness of the limitations of the rights framework, under current conditions of neoliberalism and privatized government in much of the developed world, they have few alternatives. Rights themselves have been circumscribed.

It is instructive to consider situations in which rights appear to be effective and those in which they do not. Rights tend to be effective when individuals come to think about themselves and their relationships in terms of rights and institutions or states respond to their rights consciousness. It is more likely that there will be a response when rights claimants are part of a social movement that can mobilize political and economic support and when rights claimants feel that their claims are shared within a community. For example, in McCann's (1994) study of the pay equity movement, legal consciousness about rights was critical to social movement mobilization but so were political and economic resources such as money, experts, allies, and lawyers. Similarly, Engel and Munger (2003) found a general reluctance to assert rights among Americans with disabilities, but those who had experience in a community that fostered their consciousness of themselves as possessing rights were more willing to do so while the existence of the Americans with Disabilities Act also supported their efforts. Milner (1989) and Milner and Goldberg Hiller (2003) also describe movements that have called on rights rhetoric to promote individual and group interests, but success is mixed depending on the degree of social movement and community support.

Rights were particularly successful in changing individuals' consciousness of their entitlement to better treatment in the battered women's movement. In my ethnographic research on domestic violence in a small town in Hawai'i as well as in other parts of the world (Merry 2003, 2006, 2009), I found that thinking of the self as having a right not to be hit was transformative for many battered women. In many societies, women as well as men say that certain forms of violence are acceptable modes of discipline. Often, men feel entitled to discipline their wives or partners when they fail to perform domestic duties or when they behave in ways considered sexually immodest or that provoke jealousy. Women rarely have comparable rights to discipline men. Thus, there is a gendered expectation that violence is an acceptable mode of discipline in many societies, including in the United States (see Merry 2009). This expectation is challenged by the argument that violence against women is a violation of her human rights. The argument that a person has the right not to be hit, no matter what she does, is powerful in shifting consciousness. It often encourages a person to challenge the arguments that are used to justify violence and to seek help. However, claiming this right does not mean that it will be recognized or that there will be state intervention to protect that right. Eliciting state support for rights often requires passage of laws and changing institutions such as courts and police.

In my research on a domestic violence program in Hawai'i, I found that battered women often developed a new understanding

of domestic violence and themselves over time. As they participated in a support group and battered women's community, they were increasingly willing to prosecute their batterers (Merry 2003). However, this change was neither easy nor quick. Many women who turned to the courts for help faced hostility from their batterer, his family members, and even their own family members. In a small community, the cost of such rights assertion can be high. This transition to thinking of the self in terms of rights, both in this small U.S. town and around the world, depends on an extensive mobilization of activists, battered women's organizations, shelters, lawyers, judges, state resources, and legal reforms. Victims are more likely to adopt a rights consciousness if the institutions they appeal to to protect these rights respond effectively. Thus, the cooperation of the legal system was essential, but winning this cooperation often required ongoing pressure on legal institutions. Both the U.S. movement and the global violence against women movement depend on the support by civil society organizations and states.

There are limits to using rights even in this context, however. Those who see their relationships with kin largely in terms of duty and responsibility find shifting to a framework of rights and entitlement difficult and disruptive. In fact, it requires a major reformulation of conceptions of the self in relation to the family. Sometimes, a woman would endure years of abuse without filing legal charges, but after attending support groups and hearing ideas about the right not to be hit, would become far more willing to prosecute her batterer. Thus, she experienced a shift in consciousness of rights. Those who take problems to court risk community opprobrium for their assertion of rights. Women in small-town Hawai'i faced this hostility, as did working class New Englanders who used the courts in battles with neighbors, spouses, children, and their children's partners (Merry 1990). A person who routinely took such problems to court was labeled "court happy" and tended to lose community support. In small communities, such opposition can be devastating. The right not to be hit is a far narrower one than the right to live in safety. Neoliberal states may well argue that the latter is beyond their capacities and responsibilities.¹

Moreover, in these cases as in rights cases more generally, if the institutions empowered to protect these rights fail to respond, the individual is much less likely to adopt a rights consciousness. Indeed, the courts I studied in New England viewed such interpersonal cases as "garbage" cases and were reluctant to act. Until the pressure exerted by the women's movement succeeded in changing general practice in the United States, cases of domestic

¹ I am grateful to Justin Richland for this point.

violence were similarly viewed as not worth serious consideration or intervention. Thus, there is a critical institutional dimension to adopting a rights consciousness. If institutions ignore rights claims, plaintiffs are not likely to see themselves as possessing these rights. And even if victims of rights violations do achieve success through the law, they may not benefit, as I found in researching the mobilization of rights claims by rural women in Hong Kong (2006). When people receive no institutional response or benefit from making human rights claims, it is difficult to persuade them that they have these rights. As Harri Englund describes in Malawi, training in human rights has little impact if there is no institutional support for these new perspectives (Englund 2006).

Acquiring a rights consciousness also depends on the resonance of this conception of the person with existing modes of thinking about the self, social relationships, and the state. Those for whom the concept of rights already makes sense—for whom this idea resonates—can more readily adopt rights as a way of thinking about a new situation than those who do not. For those who see such relationships in terms of duty, responsibility, or even religious faith, recalibrating the relationship in terms of rights will appear strange and difficult. For those more accustomed to rights talk, the transition is easier. In other words, adopting a rights framework as an approach to rectifying a social problem is more effective if the concept already resonates with a population. Moreover, those who see the state as a source of support and assistance are more likely to turn to the court than those for whom it is a site of corruption and unpredictable forms of appropriation. As McCann notes, sociolegal studies such as Massoud's (2013) show that rights claims have little effect where states lack institutional capacity and individuals lack money and political connections. As Simmons (2009) shows, states differ significantly in their acceptance of human rights depending on their political system and the actions of civil society. If a state ratifies human rights conventions, it can increase the resonance of human rights for its population.

But this raises a dilemma. If rights are already a familiar idea, the introduction of rights consciousness is less likely to lead to dramatic social change than if the idea is a less familiar one, one that does not fit as neatly into existing modes of thinking. This is the resonance dilemma: if the idea and approach are more familiar, they will be more readily adopted but will be less transformative of the way a person sees her situation. If they are more alien, they will be less frequently adopted but more radical in their effects. Those that do take on this idea will experience a bigger transformation of consciousness, which may lead to changes in legal mobilization and rights assertions. But these same people will be harder to persuade that they have rights. For example,

persuading people who think about family relations purely in terms of duty and affect that they have rights with relation to other family members will clearly be difficult. On the other hand, adopting such a radical approach may destabilize existing relations of power and control. The resonance dilemma is important in understanding rights circulation as well. To have global impact, rights concepts must travel. Those that do not resonate well with local communities will have difficulty traveling and being accepted. Rights are likely to be most effective where they are resonant, where there are institutions that will respond to rights claims, and where complainants can mobilize resources and allies to prosecute their claims. As McCann notes, sociolegal research shows that there are situations in which rights are adopted and made local, merging in a variety of ways with other conceptions of justice (Levitt & Merry 2009; Merry 2006; Osanloo 2009).

Thus, rights mobilization encounters difficulties when violations are carried out by people with whom relationships are defined in terms of duties and responsibilities rather than entitlements and when state institutions are unreliable, ineffective, or predatory (Zigon 2013). Another area where rights are less effective is in confronting violations carried out by large, powerful organizations engaged in capitalist economic activity that states are unable to control. For example, Kirsch (2014) describes this history of the OK Tedi mine in Papua New Guinea, where the failure of the mining company to build a tailings containment system led to a massive environmental damage along the river into which the tailings were dumped. Despite considerable domestic and international efforts, the mine continued to dump tailings in the nearby river. As Kirsch points out, the government of Papua New Guinea was unable and unwilling to control the mine because it was dependent on the revenues the mining company paid.

Rights frameworks are less successful in situations where there is no clear perpetrator but where certain groups are vulnerable because of an unequal economic and political system. Farmer (2004) calls this situation structural violence in his analysis of why the poor are sicker than the rich in Haiti and around the world. The disproportionate disease and suffering of the poor are caused not by the actions of any particular person but because of the fundamental unequal allocation of resources and political power both within a state and among states. To tell these victims that they have rights does them little good. It simply places responsibility on them to mobilize and seek to improve their lot but does not articulate a collective responsibility. Social and economic rights ideas in the human rights system do emphasize these needs, but states are asked only to progressively provide social and economic benefits and not to allocate them equally.

What would it mean for activists to refocus civil and human rights on situations in which they are likely to be effective and to use other justice approaches in other domains? Sociolegal scholarship could help to understand these variations. It could also address the question of the effects of reform efforts on global inequality. Human rights are clearly one of these efforts but hardly the only one. In addition to rights, sociolegal scholars have examined law-based social justice practices such as lawyering, dispute resolution systems, lay judges, and public interest litigation as well as bottom-up social justice movements (Santos and Rodriguez-Garavito 2005). Understanding how a range of legal and social reform efforts, including but not limited to rights, tackle a range of different kinds of problems is a critical project for sociolegal scholars and one that will enhance our understanding of how law works and how it travels.

This analysis raises the further question of why rights remain a central ideology of social justice despite their limitations in practice. Perhaps they are appealing to states and powerful actors who see their claims as more manageable and tractable than alternative social justice ideologies that challenge economic inequality and the centrality of the state. By focusing on rights and restricting them to a narrow sphere of social action, justice ideologies can co-exist with contemporary state structures. A reform ideology that asks for better treatment for the vulnerable but does not question a system in which a small fraction of the population controls a vastly disproportionate amount of the wealth of a society holds an appeal for the wealthy. From an activist point of view, the rights framework may receive greater institutional and societal support both at the national and the international level than other approaches and have a stronger resonance with a local population than alternatives. Pragmatically, it may be the best choice under current conditions. However, I think sociolegal scholarship needs to be alert to alternative justice initiatives and the limitations of the rights framework in reducing global inequality.

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