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COMMENTARY

Relating to, through, and beyond rights …

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I appreciate the opportunity to comment on Laura Beth Nielsen's provocative presidential address. One reason for my keen interest is that Nielsen's topic addressing how we research and analyze rights practices intersects with my own research agendas. In fact, my own presidential talk over a decade ago (McCann 2014) was directed to the "unbearable lightness" of rights and the many paradoxes endemic to rights in practice. I would like to believe that my thinking on the subject has continued to evolve since that address, and engaging Nielsen's talk has provoked yet new ideas and insights. My aim here is to be critical and constructive, serious and fun … all in a spirit consistent with Nielsen's esteemed performative identity as a scholar, colleague, and friend.[1] I note at the outset that my remarks cite and respond to the script of the talk and associated Power Point rather than to the written text, as that is what I was provided.

Dr. Nielsen's aim is to explain and advocate for a "relational understanding of rights as a vision of the possibilities for law and society as an intellectual movement." What does she mean? Her explanation is that "relational rights" approaches signal "a way to think about the law that emphasizes, values, privileges, and protects important social *relationships.* This approach embeds discussions of what the law increasingly calls 'individual rights' in their relational context." She further exhorts scholars to combine interpretive analysis of legal consciousness *and* attention to institutions. Moreover, she urges us to pay attention to cultural "objects," their producers, and their consumers in order to highlight relationality. Nielsen offers three case studies to illustrate her argument, each quite distinct but all very interesting.

At the outset, I identify a tension between relational rights as an *analytical framework* for empirical study of rights in action among research subjects and as a *normative or prescriptive agenda* of sociolegal scholars "that examines the connections between rights and the relationships we seek to create, bolster, and preserve for all members of society." The first posits an approach by researchers that recognizes rights practices as always embedded in relationships, of all kinds, including those that "reflect, reinforce, and sometimes deconstruct dynamics of power and hierarchies based on unearned privilege." We must, Nielsen exhorts, examine rights as they are *de facto* embedded in social relationships. The second, more normative project aims to promote and protect

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certain types of "positive" and "healthy" relationships consistent with "justice and social well-being." Nielsen asks "where is law in supporting such relationships?" In my reading, advocacy of a framework for "how" we research and understand practices per se is distinct from urging that we endorse certain types of relationships through rights practices, although the first project can expose unhealthy relationships that scholars might help to transform into or protect healthy relationships. My discussion will deal with these two different if potentially "related" dimensions of relational rights in turn.

The thesis that relationships are intrinsic and essential to human meaning-making activity, including especially to practices involving rights, is inarguable, so I have no problem with the claim. As Nielsen acknowledges, my own scholarship has underlined how relationships among subjects and institutional contexts shape both what rights mean and how much they matter; rights and relationships are co-constitutive. In *Rights at Work* (1994), I argued that rights discourse, and especially egalitarian conceptions of rights, came to mean a great deal for women stuck in low-paying sex-segregated jobs and mobilized around advocacy for comparable wages at work. In the workplace context, we might say that rights were limited by inherited hierarchical patriarchal, sexist, and institutional relationships. Relationships among women at work, to each other as well as to union collectives, to lawyers, to male bosses, to husbands and partners (especially after divorces), and much more all increased the salience of rights conventions as resources to challenge hierarchy, in the process generating complex, multidimensional meanings of rights for many women. I theorized this in terms of a growing "rights consciousness" that deepened in relevance and was transformed in substance through the praxis of organizing and advocacy campaigns. Many women for the first time took seriously their subject positions as rights-bearing citizens entitled to fair treatment at and beyond work. Rights, thus, were not imagined in purely abstract or individualistic terms but rather through intersubjective understandings nurtured by relational bonds and collective interaction. My analysis portrayed unions not just as support structures for rights advocacy but as agents of intersubjective communication and politicized group identity formation. At the same time, relationships of female workers with employers, managers, and male co-workers often became adversarial and strained, at once deepening some healthy relational solidarities while rupturing other less positive connections. Rights connect and divide, activate and constrain, preserve and transform, I concluded, providing a message underlined in my speech on the unbearable lightness and paradoxes of rights.

These themes were extended and deepened in my co-authored book on Filipino American labor activists, *Union by Law* (McCann and Lovell 2020), where relationships of class, ethnicity, racial identity, familial inspiration, and peasant community experiences in the homeland (among others) animated migrant worker activists to mobilize around progressively radicalized understandings of rights and against racial capitalist hierarchies over several generations. Rights were key conventions that both built on and nurtured, or "constituted," solidaristic relationships as well as divided workers among themselves, with other working-class people, and with employers. Our analysis invokes the "radicalization" of rights to convey both deployment of mainstream liberal rights (free speech, due process, equal protection, etc.) in service of progressive political ends and reconstruction of rights discourse as conventions demanding material redistribution in terms of wages, workplace control, and ownership of capital.

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I subsequently published an essay, titled "No Separate Peace" (2023), demonstrating how the embrace of rights discourse did not individualize claims or fragment movement bonds or commitments to any great extent, as rights critics often allege, but rather radical rights claims for the most part supported intersectional solidarity across lines of race, class, and gender on a host of social issues.

Many other scholars have underlined attention to relational foundations of rights in social movements and group mobilization for justice. As Epp (2009) put it, rights are contingent in meaning and force among different contexts, often becoming "real" as relationships develop among as well as between activists from outside of state agencies and reform-minded bureaucrats within state agencies charged with addressing policing abuses, sexual harassment, and playground safety. To take another example, Katharina Heyer's classic study *Rights Enabled* (2015) shows how a rights-based model of addressing people with disabilities changed in substance and salience as relationships developed among transnational activists and local policy makers in three countries. Examples from scholarship on law, rights, and social change research are nearly endless.

At the same time, other scholars have demonstrated how relationships shape the meanings of rights and willingness of organizationally or politically unaligned *individual* subjects to claim rights. My favorite article on the relational contingency of rights claiming – one that I have taught for decades in both undergraduate and graduate courses – is Sally Engle Merry's "Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence" (Merry 2003). Building on her classic ethnographic research regarding gender violence in Hilo, Hawai'i, Merry problematized the choices that battered women must make about whether to advance rights claims against abusive partners and thus enact their potential power as rights-bearing subjects. The key factors, Merry documents, were the relationships of abused subjects to important others, including to parents, friends, religious counselors, children, and the men who abused them but on whom they are often materially and emotionally dependent. Women were less inclined to claim rights if valued others discouraged rights claiming activity or provided experiential evidence that rights claiming is ineffective or even counterproductive, and vice versa. In short, how abused women think about their purported rights status and decide to claim rights depended on their relational networks.

Many sociolegal scholars address the relational contingencies that shape rights meanings and praxis for individuals. Nielsen cites some of those scholars who explicitly endorse studying rights in relational context (some of which I earlier suggested to her): Chua and Engel (2019); feminist theorists like Nedelsky (2013); and Crenshaw's (1989) pathbreaking, highly influential theorization of "intersectional" relations among race, gender, class and more especially deserve mention (see also Hancock 2016). Some scholars confirm Merry's analysis by showing how personal relationships, especially relationships that foster dependency on rights abusers (e.g., domestic partners, employers, welfare case workers, police, etc.), can deter rights claiming and devalue rights as meaningful resources. John Gilliom's (2001) study of Appalachian welfare mothers makes the case, as does the important work by Engel and Munger (2003) on people with disabilities following the passage of the Americans with Disabilities Act. In short, relationships can both support and constrain rights claiming, but in any case, relational understandings of rights are important.

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So far, then, I am in heated agreement with Nielsen about the importance, even necessity, of studying the substantive meanings and salience of rights in their relational contexts. But widespread agreement on this point raises the question of what is new in Nielsen's argument. She acknowledges this point herself. "You might be thinking to yourself, how is this anything new? Aren't all rights defined by relationships of power?" I, thus, am surprised in this regard, after posing the question, that Nielsen did not underline how her analytical angle clashes with a significant body of critical scholarship that insists that rights conventions promote individuation, separation, and division of subjects from one another; these approaches presumptively dissolve the relational context of rights practice and designate rights claiming as an "autonomous" activity (Gabel 1984). Nielsen's focus on relationality, thus, could help us see how some critical approaches misunderstand or distort rights in practice. I and others (Bartholomew and Hunt 1991; Herman 1993; Hunt 1990; McCann 1994; Polletta 2000; Silverstein 1996; Williams 1991) have challenged at length this approach, which confuses rights claims demanding respect for selfhood with existentially individuated, even socially isolated and isolating activity.

One of the most powerful challenges to this critical view is by the Critical Race Scholar Patricia Williams. I cannot do justice here to her complex, nuanced, historically grounded analysis in the essay "The Pain of Word Bondage" (Williams 1991), but a few quick references are telling. Most of the essay is dedicated to linking the denial of rights to Black people to the contingencies and arbitrariness of dominant White group control over the meanings and subjects of rights. After an excoriating distillation of how enslaved Black people were condemned to a status of being either "owned or unowned" as property, thus denied "the protective distance that rights provide" (Williams 1991: 156, 148), Williams dismisses critical legal scholars' trivialization of rights as another casual exercise of white male privilege. The problem is not that rights discourse is inherently constricted, she argues, but rather the "constricted referential universe" and inherited institutional inequalities that limit rights construction and enforcement. Nielsen (at my urging) cites some of these lines from Williams, but I think the former's argument for studying rights in relational context would be stronger if she highlighted in detail (rather than implied) the flaws in the reified, individualistic portrayals of rights by many critics. In short, Nielsen's argument is already more or less agreeable to many of us, but it would be more potent if it helped to remind us of what is lost in extant critical frameworks that excise rights practices from their relational contexts.

Promoting "healthy" relationships. What's rights got to do with it?

Williams's essay, which Nielsen briefly cites, bridges the analytical argument regarding how we understand rights as practices to the prescriptive normative argument about promoting rights that support healthy relationships and "connection" as well as distance and respect. The task is not "to discard rights," Williams argues, but to understand them in a larger context of practice and of possibility, to continue the "alchemical" transformation of a proprietarian legacy of rights into "a larger definition of privacy and property: so that privacy is turned from exclusion based on self-regard into regard for another's fragile, mysterious autonomy … into a conception of civil rights" for all those persons and features of life on which we are interdependent.

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"Unlock them from reification by giving them to slaves. Give them to trees. Give them to cows … history … river and rocks …" (Williams 1991: 165). I am not sure that this is what Nielsen has in mind regarding supporting "healthy" relational rights and challenging "unhealthy divisive relationships that populism, coloniality, racism, and misogyny have produced." Does she agree that relational interdependence is a firm basis for granting respect for rights? In any case, it is a plausible point of engagement that I would like to know more about what Nielsen thinks.

While I once again am generally supportive of the normative advocacy that Nielsen seems to be endorsing, I offer a set of specific questions and perhaps reservations, beginning with her lack of clarity and engagement with others, both friends and foes. *First*, again, why not address the scholars who criticize rights normatively and argue why they are shortsighted regarding how rights sometimes can support communal relationships and support? An engagement with the critics would provide an opportunity both to explain and defend *how* rights can, in some contexts, contribute to supporting healthy relationships. This is relevant because a notable moral and political backlash has developed against rights talk and rights claiming in the last fifty years (Crenshaw 1989). The political right began by trashing "liberal" rights and then shifted toward appropriating and reconstructing rights to fit conservative and even reactionary hierarchical visions. I doubt that Nielsen agrees with the latter trends, but it would be helpful to see her stake out a normative position on such trends in this complicated period. This is important because much of the political left has relaxed, if not turned on, its long commitment to rights, in part because rights allegedly undercut community support, care, and solidarity (Spade 2015; Tushnet 1984).

This distancing from rights traditions has been evident not just among scholars but among left activists and social movements in the US and beyond. For example, the Occupy movement in and beyond the US loudly protested economic inequality and demanded fairness for the 99%, but it displayed little commitment to rights discourse, much less to lawyers and adjudication. At least as notable is the contemporary Movement for Black Lives (M4BL), which builds on longstanding traditions of civil rights and legal advocacy but backgrounds those commitments in its current campaigns for change. As Deva Woodly (2022) has argued, the Radical Black Feminist "pragmatism" of M4BL makes central the ethos of healing, caring relationships, mutual support, and community engagement outside of the judicial system rather than rights and legal action. "What makes the political philosophy of M4BL unique and radical is that it goes after this ordering the world, displacing the debates about rights, natural or otherwise, and citizenship in its literal legal or looser polity-dwelling signification, and puts people and their lived experience at the center" (Woodly 2022: 123; see also Akbar 2018; West 2006). Nielsen may not agree with these trends disparaging rights and setting them in opposition to caring relationships, but her argument would benefit from recognizing them, confronting the alleged contradictions or tradeoffs on care and rights, and elaborating on how rights can underline commitments to care.

Second, Nielsen's argument does not identify which types of rights claims might best promote various types "healthy" relationships as well as the conditions under which that is possible or likely. After all, rights rarely thrive as isolated social conventions, but rather they often are most meaningful and empowering when joined to other social norms, moral values, and religious traditions. Again, Merry's (2003)

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analysis of how rights both compete with other norms and find their most positive manifestations when fused to other norms in hybrid normative forms is instructive. These relationships between rights discourse and other normative traditions deserve greater attention.

The above points further raise questions about which types of relationships should be supported and what is meant by references specifically to desirable "healthy" relationships. Nielsen uses lots of other descriptors ("fair, just, and equitable," equal access, equal opportunities to thrive, etc.), but more is needed for compelling normative argument. In this regard, I am again surprised that Nielsen's commitment to rights that support healthy relationships and social justice does not embrace the tradition of human rights to socioeconomic justice and material equity that thrive in some parts of the world, mostly outside the US. What better way to put rights to work in serving healthy relationships than to advocate for substantive rights to basic income, jobs, housing, health care, and the like? Rights claiming is not a sure path to realizing these goals by any means, but empirical study illustrates that rights aspirations *can* be very significant forces for egalitarian change. To the extent that Nielsen is advancing an aspirational argument, I would urge her to add these elements so largely discounted in the American experience to her argument. Again, I expect that Nielsen, who persistently conducts research on struggles for equity, would be supportive of these commitments, but it would be good to see them at least mentioned in her address.

Finally, following the above points, I am perplexed why Nielsen pinpoints rights as key resources for advancing healthy relationships and caring communities. Her examples are interesting and revealing, but they do not really explain how rights can or do advance healthy relationships. For example, the early reference to William Seward in Hoffer's (2023: 153) excellent book states that "Seward envisioned rights existing in an ideal community …." But Nielsen follows by arguing that "the law must promote mutual obligation, community and relationships," obscuring the slippage among themes of rights, law, and community relationships that she finds important. Indeed, as the talk proceeds, Nielsen mentions rights less often and focuses more on "law" and on "sociolegal scholars" as agents of relationship building. As such, I wonder (with apologies to songwriters Graham Lyle and Terry Britten along with singer Tina Turner 1984): "What's rights got to do with it?" Nielsen's best illustration, in my view, is the discussion of gun rights politics, which conventionally tends to focus on individual rights, while scholars should "consider various relationships of community we value and which law should rightly facilitate and protect." "Law itself is the problem," she insists, but the optimal place of rights in such scenarios is vague, and might involve sidestepping rights talk altogether. Again, this critique of how rights are constructed in politics could be developed easily in relation to points I made above. Regarding Nielsen's third example, on mass incarceration, the analytical and normative dimensions of relationality are more successfully merged, and I agree with the critical posture, but the normative work done specifically by rights again remains elusive to this reader.

I fully acknowledge that it is unfair to ask an author to address the above puzzles and gaps in an already densely packed, far-ranging thirty-minute talk. My intent has been not to critique the talk but to open lines of further thought, research, and discussion. Nielsen has given us a lot to think about, some provocative challenges and some

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directions for expanding sociolegal research traditions. That strikes me as a lot, and it is quite enough for one professional intellectual performance.

Notes

1 It seems relevant for me to acknowledge that I am a long-time professional friend of Laura Beth who submitted commentary on an early version of the address. I am quite gratified by that fact that she accepted much of my advice and added various points, references, and citations, some of which I will address in coming paragraphs.

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