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UNDERSTANDING "RIGHTS" IN CONTEMPORARY AMERICAN DISCOURSE

LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES, edited
by AUSTIN SARAT AND THOMAS R. KEARNS. Ann Arbor:
University of Michigan Press, 1996. 304 pp.

*Reviewed by David Ray Papke**

INTRODUCTION

In 1996 my wife and I attended a Mary-Chapin Carpenter concert in Indianapolis' Market Square Arena. The large basketball venue is hardly blessed with ideal acoustics, but the audience nevertheless responded enthusiastically to Carpenter's songs and performance. In particular, the song *Passionate Kisses*¹ brought people to their feet and even led some to pump their fists in the air with apparent political commitment. In the song, Carpenter insisted that she wanted a comfortable bed, food to fill her up, pens that won't run out of ink, and much more.² She also insisted in each chorus of the song, that she wanted, needed, and demanded passionate kisses. "Give me what I deserve," she shouted, "because it's my right."³

I couldn't help but wonder whether Americans had truly acquired the right to passionate kisses. Is the denial of this right actionable? What are the right's parameters and extensions? Law professors perhaps should leave their occupational identities at home when they attend concerts. The point really is not to critique Mary-Chapin Carpenter's jurisprudence,⁴ but to use the episode to prompt further reflection on what Americans understand to be their "rights". How have our history and culture constructed not only various specific rights but also the whole notion of rights?

In recent years several excellent scholarly works have wrestled with this immense and complicated question. They include, but are

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1. MARY-CHAPIN CARPENTER, *Passionate Kisses*, on COME ON COME ON (Columbia Records 1992).

2. Ms. Carpenter also insists on a full house and a rock and roll band, warm clothes, and cool quiet time to think. *Id.*

3. *Id.*

4. One scholar has done just that. See Patrick F. Hubbard, *Justice, Creativity, and Popular Culture: The Jurisprudence of Mary-Chapin Carpenter*, 27 PAC. L.J. 1139 (1996).

not limited to Lawrence M. Friedman's *The Republic of Choice: Law, Authority and Culture*⁵ and Mary Ann Glendon's *Rights Talk: The Impoverishment of Political Discourse*.⁶ In the former, Friedman underscored the new individualism's insistence on a zone of choice. This emphasis on choice, Friedman argued, led to a pronounced rights-consciousness because choices are "meaningless unless a citizen can convert the choices into entitlements."⁷ For her part, Glendon pointed to the impoverishment of American politics. Virtually every controversy, she said, is framed as a clash of rights. However, this "rights talk" is hurt by "its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities."⁸

The most recent contribution to the scholarly literature is a collection of essays edited by Austin Sarat and Thomas R. Kearns entitled *Legal Rights: Historical and Philosophical Perspectives*.⁹ Both of the editors are prominent in the legal studies and law and society movements. Unfortunately, their volume suffers from the diffuseness and pronounced variation in quality that plagues most essay collections, a stone I might be excused for hurling since I myself have edited a comparably flawed collection.¹⁰ Several of the volume's contributions, notably, *Natural Law and Natural Rights* by Morton J. Horwitz,¹¹ do not represent the contributors' best work, and one contributor, Michael J. Perry, admits that he plans to develop his thought more fully in a subsequent book of his own.¹² Only one of the contributors to the half of the volume devoted to history is a historian, and the half of the book ostensibly devoted to philosophical considerations is narrower in range than one might anticipate.

These quibbles notwithstanding, *Legal Rights* is a provocative addition to the literature on rights. The introductory essay by Sarat

5. LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY AND CULTURE* (1990).

6. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

7. FRIEDMAN, *supra* note 5, at 97.

8. GLENDON, *supra* note 6, at x.

9. *LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES* (Austin Sarat & Thomas R. Kearns eds., 1996) [hereinafter *LEGAL RIGHTS*].

10. See *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (David Ray Papke ed., 1991).

¹¹ Morton J. Horwitz, *Natural Law and Natural Rights*, in *LEGAL RIGHTS*, *supra* note 9, at 39.

¹² Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, in *LEGAL RIGHTS*, *supra* note 9, at 205, 206.

and Kearns¹³ offers a valuable commentary on the language of rights in the United States, and *Rights in the Postmodern Condition*,¹⁴ the volume's concluding essay by Pierre Schlag, is by itself reason to purchase the volume.

Most importantly, the essays in *Legal Rights* highlight competing, complementary, and contradictory conceptions of rights in American culture. For that reason, the book serves well as a springboard for analyzing the meaning of "rights" in varying discourses, that is, sociocultural ranges of discussion with their own concerns and connotations. Examining "rights" in popular, legal, and academic discourses reveals how the notion's meanings differ with context, and how it suffers from a lack of consensus. Examining the various meanings across discourses helps us not only to understand the limitations and the strengths of each but also, more soberly, to recognize our contemporary condition.

I. RIGHTS IN THE POPULAR DISCOURSE

Given its immense range of images, narratives, and signifying systems, the understanding of rights in American popular discourse is undeniably elusive. Surely it is not as refined or shaped as the understanding of rights in the legal and academic discourses discussed in subsequent sections of this essay. However, the essay in *Legal Rights* entitled *Rights and Needs: The Myth of Disjunction*,¹⁵ by Jeremy Waldron points to an especially important feature of the popular understanding of rights. One can extend from Waldron's essay to consider what prompts this understanding.

Waldron is particularly concerned with preserving a more specific meaning for rights, with not letting the notion of "rights" become a vague and amorphous claim to a good life.¹⁶ "Rights," he argues, have some special fiber: "Rights are the claims one can put forward for one's own sake and on one's own behalf without the moral embarrassment usually associated with assertions of self-interest."¹⁷ They involve not only a claim to something to which one is fundamentally entitled but also an obligation by others to honor and respect the claim. "To say one has a *right* that is being abused or

13. Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in *LEGAL RIGHTS*, *supra* note 9, at 1, 1.

14. Pierre Schlag, *Rights in the Postmodern Condition*, in *LEGAL RIGHTS*, *supra* note 9, at 263.

15. Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, in *LEGAL RIGHTS*, *supra* note 9, at 87.

16. *See id.* at 88-104.

17. *Id.* at 103.

neglected is not just to heighten the pathos,”¹⁸ Waldron asserts. “[I]t is to face one’s oppressors, and bring to bear on the situation the dignity of that power of *being a person*.”¹⁹

Lurking for Waldron, indeed prowling about ready to devour us, is an alternative understanding of “rights” as merely what one wants or needs. Surely we can take wants and needs seriously, Waldron says, but we are better served by maintaining the conceptual difference between rights properly understood on the one hand and wants and needs on the other.²⁰ While both rights and needs should command respect, only rights give rise to an entitlement and empower the right-bearer. In other words, “only the language of rights conjoins in its very structure the idea of respect for persons and *self-respect*.”²¹

But alas, it is the beast that Waldron fears that is at the center of the contemporary American popular discourse. It may not be as menacing as he suggests, but it is certainly present. Recall the words from the Mary-Chapin Carpenter song, *Passionate Kisses*.²² They are about wanting and needing things, and they carry with them the additional insistence that what one wants and needs should simply be accommodated: “Give me what I deserve because it’s my right.”²³

One finds this attitude around every corner in American life. There are harried commuters screaming at one another about the last parking space. “Let me have it. It’s my right.” There are rabid sports fans literally fighting over “rightful” claims to prime seats. “I got to the seat first. It’s my right to have it.” There are Christians willing to go almost directly from midnight mass to day-after-Christmas sales at 5:30 a.m. “I want the VCR we couldn’t afford at pre-Christmas prices. I really need it. Excuse my elbow, it’s my right.”

And one should not assume that the majority of immigrants coming to America are immune to these sentiments and will somehow resuscitate the understanding of rights that might have inspired the Founding Fathers. My own sensitivity to this view of rights was heightened during 1986–87, when I spent a year as a Fulbright Professor at Tamkang University in Taiwan. In class one day, I found myself trying to capture the reasons why men and women immigrate to the United States. “In America,” one student said, “you have more rights.” “Yes,” added another, “you can live a more comfortable life.” “Surely,” said a third, “the choice among goods is

18. *Id.* at 104.

19. *Id.* at 104.

20. *See id.*

21. *Id.*

22. *See supra* note 2 and accompanying text.

23. CARPENTER, *supra* note 1.

greater and the malls are bigger and more conveniently located." Suddenly I realized why the Statue of Liberty was featured on so many of the Taiwanese advertisements. It was a symbol not of liberty or of rights in a Jeffersonian sense, but rather of marketplace options and choices.

Back on American shores, the conflation of rights with wants and needs has the added detriment of obscuring differences *between* wants and needs. In a society in which a major newsmagazine snidely reports on the assertion of a "constitutional right to breast-feed,"²⁴ more legitimate demands might be overlooked. Likewise, in an era in which the actress Mary Tyler Moore lends her name to a "lobster rights" group,²⁵ it is easy to underestimate requests for what is truly needed. In other words, when mere "wants" are considered "rights," the claim for "needs" as "rights" loses any special force.

The failure to distinguish between rights and wants is particularly troubling when one considers the potential effect on claims to welfare assistance. One might still argue that there is no constitutional right to welfare benefits, but at the same time the need for welfare is substantial and genuine. Conflating rights with wants and needs denies the public not only the option of differentiating rights from needs but also the option of carefully appraising and prioritizing needs in and of themselves.

Why are rights conflated with wants and needs in popular discourse? There is no single cause. One cannot even refine the attitude to a particularly revealing "essence" that will in turn lead us to its true source. The scholar Christopher Lasch once characterized the whole package of contemporary values and attitudes as the "culture of narcissism."²⁶ Our earlier form of competitive individualism, he said, has "in its decadence . . . carried the logic of individualism to the extreme of the war against all, the pursuit of happiness to the dead end of a narcissistic preoccupation with the self."²⁷ With many seeing the world as a mirror of themselves, it is not surprising that wants and needs are valorized as "rights."

However, in keeping with discourse theory, one can at least identify institutional bases for a narcissistic understanding of rights.²⁸ In this regard, the institution of consumer capitalism is certainly an important basis for the understanding of rights as what one

24. Mark Thompson, *A Call to Nurse*, TIME, Feb. 27, 1989, at 32.

25. David Berreby, *The Wise Apes and Their Friends*, N.Y. TIMES, Feb. 9, 1997, at E3.

26. CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1978).

27. *Id.* at xv.

28. STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 26 (1991).

wants and needs.²⁹ The promise of happiness through commodity purchase invites us all to want and to need, and to invest our wants and needs with a sense of "righteousness." What's more, the ethos of consumption, if one might call it that, is hardly limited to the tawdry success of rent-to-own outlets in poor neighborhoods.³⁰ University students routinely see their educational process in terms of purchases, and some have even gone so far as to request that that their education come with warranties. In the political arena, local, state and national candidates market themselves with images and one-liners, and voters become purchasers as much as citizens. It is little wonder that the understanding of "rights" in popular discourse seems degraded and unsatisfactory to a scholar such as Jeremy Waldron.

II. RIGHTS IN THE LEGAL DISCOURSE

If the essay in *Legal Rights* by Jeremy Waldron best alerts us to the understanding of "rights" in the popular discourse, it is the essay by Hadley Arkes³¹ that invites the greatest contemplation of legal discourse on the same subject. Arkes, the Edward Ney Professor of American Institutions at Amherst College, has particular axes to grind. He does not care for the thinking of Archibald Cox, Lawrence Tribe, and a few others in the abortion rights area. Arkes is troubled by the way lawyers and judges have come unthinkingly to understand "rights." It is not the conflation of rights with wants and needs that is the problem in this discourse, but the unreflective triumph of legal positivism.

Arkes highlights the tendency among lawyers and judges to back away from moral reasoning and, in fact, to harbor a deep suspicion of even the possibility of moral reasoning.³² To be sure, they may engage in some convoluted forms of reasoning which on the

29. Useful treatments of American consumer culture include DANIEL HOROWITZ, *THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA, 1875-1940* (1985), and *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980* (Richard Wrightman Fox & J. Jackson Lears eds., 1983). A work arguing that buying and selling have become the defining activities of contemporary America is EARL SHORRIS, *A NATION OF SALESMEN: THE TYRANNY OF THE MARKET AND THE SUBVERSION OF CULTURE* (1994).

30. For an in-depth look at a rent-to-own giant, see Alix M. Freedman, *Peddling Dreams: A Marketing Giant Uses Its Sale Prowess to Profit on Poverty*, WALL ST. J., Sept. 22, 1992, at A1.

31. Hadley Arkes, *The New Jural Mind: Rights Without Grounds, Without Truths, and Without Things That Are Truly Rightful*, in *LEGAL RIGHTS*, *supra* note 9, at 177.

32. *Id.* at 186. According to Arkes, "They are quick to disclaim that they are engaged, as lawyers, in moral reasoning, because they have become dubious about the notion of moral reasoning itself." *Id.*

surface appear to be moral reasoning, but lacking any kind of genuine commitment to moral truths, lawyers and judges are unable to truly engage in moral reasoning. "As a consequence," Arkes says shaking his head, "arguments about rights must run on some other considerations apart from the things that are truly rightful, for the commentators have lost their confidence that they can speak any longer about the things that are *truly* right."³³

This is quite different than the approach to "rights" that reigned among the Framers of the United States Constitution. The Framers, Arkes asserts, believed we should look to natural rights to determine the scope of the rights protected in the Constitution.³⁴ Natural rights were those that existed prior to the constitution and "simply sprung from our natures as human beings."³⁵ The Federalists saw the protection of natural rights as a crucial task for republican government, and their opposition to a Bill of Rights should not be understood as a denial that fundamental rights existed. To the contrary, "Their main concern was that the Bill of Rights would actually narrow or truncate the range of our rights, largely because it would misinstruct the American people about the ground of their rights."³⁶

Arkes may be too sanguine about moral reasoning in law, as the two centuries that have passed between the time of the Federalists and the present afford examples of moral reasoning of questionable quality. The *Dred Scott*³⁷ decision, for example, invoked a natural rights constitutionalism in asserting that "the Negro might justly and lawfully be reduced to slavery for [Whites'] benefit."³⁸ Later in the nineteenth century and early in the twentieth century questionable moral reasoning through law continued to invoke almost exclusively natural property rights.³⁹ The Civil War Amendments, for example, seemed to speak of human dignity and empowerment, but almost before the ink dried, the Amendments were interpreted in ways that allowed racist conduct in the private context.⁴⁰ Natural property rights—rights standing beyond literal words of the Constitution—were inviolable, a stance further articulated in *Lochner v. New York*.⁴¹ Only with the triumph of a New Deal majority did the assertion of rights begin to seem useful for the weak or underprivi-

33. *Id.*

34. *Id.* at 192.

35. *Id.* at 197.

36. *Id.* at 191. Arkes has developed further this line of thinking in his book, HADLEY ARKES, *BEYOND THE CONSTITUTION* (1990).

37. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

38. *Id.* at 407.

39. Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 396-98 (1988).

40. Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 327 (1988).

41. 198 U.S. 45 (1905).

leged. Prior to that, progressive legal opinion took moral reasoning in law and the invocation of natural rights to be "an intellectual illusion developed in an era of laissez-faire capitalism."⁴²

But if Arkes overestimates the possibility and potential of a natural law jurisprudence, he is nevertheless correct in underscoring the overwhelmingly positivist understanding of rights in the contemporary legal discourse. Almost completely lost among contemporary lawyers and judges is any appreciation of principles outside the Constitution that might explain or illuminate the meaning of various rights. Lawyers and judges routinely speak of "First Amendment rights" or "Fifth Amendment rights." We also hear the Fourteenth Amendment described as the transporter of rights to citizens of each state. One almost expects risk of loss rules from Article Two of the Uniform Commercial Code to be applied to the Fourteenth Amendment as carrier.

Lawyers and judges, to state it simply, are almost always positivists when they contemplate, discuss, and rule on rights. A phenomenon of this sort is perhaps more predictable in civil law countries where "legal codes have a veneer of certainty and also a deeper grain of ideological self-valorization."⁴³ But in common law countries such as the United States, where appellate courts have higher governmental standing, lawyers and judges also almost exclusively opt for a positivist understanding of rights. Rarely does one encounter a brief or an opinion that might consider, let alone invoke, natural law. Rights are posited, and lawyers and judges assume they are dealing with "reality" when they speak confidently of rights.⁴⁴

This deeper argument is sometimes obscured by the intensity of legal disputes over rights, their meanings, and their breadth. Arkes even suggests, à la Henry James, that liberal and conservative understandings of rights are but "different chapters of the same general subject."⁴⁵ Both camps "recoil from reason and from the prospect of identifying rights, not by stipulation or declaration, but by the discipline of deliberating in a principled way about the grounds of

42. Horwitz, *supra* note 39, at 395. Moreover, the invocation of natural property rights is not over. Conservatives argue that under the Just Compensation Clause of the Fifth Amendment, government regulation can be seen as a "taking" of property. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

43. *NARRATIVE AND THE LEGAL DISCOURSE*, *supra* note 10, at 2.

44. The criticism that legal actors assume they deal with "reality" when they speak of rights was made by the scholar Karl Llewellyn as early as 1930. See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 440 (1930).

45. Arkes, *supra* note 31, at 202.

judgment."⁴⁶ Given Arkes' fondness for James, there is another Jamesian image he might like. Genre, James thought, had too much importance for American readers, and writers of fiction could not venture outside of established modes. Readers were "more sifted and evolved than anywhere else, schools of fish rising for more delicate bait."⁴⁷ For legalists, parts of the Constitution are this more delicate bait when it comes to rights.

When once in a great while a judge is bolder and looks a bit further, he or she risks ridicule. Case in point: Justice William O. Douglas and his notorious lead opinion in *Griswold v. Connecticut*.⁴⁸ In locating a right of privacy which might include choices about contraceptives and the very choice to use a contraceptive, Douglas was so bold as to speak of penumbras of the Bill of Rights, the shadows or emanations of the various individual amendments.⁴⁹ The opinion was issued, and a right of privacy was recorded. However, none of the other Justices seconded Douglas' moral reasoning, and this reasoning was considered suspect.⁵⁰

One of the most bloodthirsty of the attacks came from Robert Bork, a law professor at the time and subsequently an appellate judge and unsuccessful Supreme Court aspirant.⁵¹ The opinion by Justice Douglas in *Griswold*, Bork thought, superbly illustrated the way a judge might insert his own values into not only a case but also the United States Constitution.⁵² Douglas' derivation of the right of privacy was "a miracle of transubstantiation" and "utterly specious" to boot.⁵³ Douglas' reasoning, in Bork's opinion, would lead to an independent right of freedom.⁵⁴ We might, through the type of moral reasoning Arkes honors get to just such a right, but Bork's limited understanding of "rights," one fully representative of the legal discourse, prevented him from even contemplating the possibility.

The fondness of lawyers and judges for "black-letter" law and for certainty is hardly new, but how striking it is that even the notion of "rights" is within the legal discourse almost totally positivist?

46. *Id.* at 203.

47. For comments on Henry James' essay, see ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* 195 (1982).

48. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

49. *Id.* at 484.

50. Two examples of scholarship on the opinion are Robert G. Dixon, Jr., *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH. L. REV. 197 (1965), and Earnest Katin, *Griswold v. Connecticut: The Justices and Connecticut's Uncommonly Silly Law*, 42 NOTRE DAME L. REV. 680 (1967).

51. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1 (1971).

52. See *id.* at 8-10.

53. *Id.* at 8, 9.

54. *Id.* at 9.

Is this an ominous step toward cynicism? If lawyers and judges do not refer to principle, to natural law or to morality, do they in the process cease to discuss things that are in Arkes' phrase "truly right-ful?" According to Arkes,

When the claim to moral substance is removed, rights would be reduced mainly to a set of conventions or the assignment of certain freedoms and franchises in a system of conventions or rules, much in the way that the rules of baseball would give us the "right" to go to first base after four balls wide of the strike zone.⁵⁵

As we trot down the first-base line, we sometimes reflect cynically on how we got a lucky call.

III. RIGHTS IN THE ACADEMY

Although law schools are less likely to be ivory towers than most other parts of the contemporary university, law schools nevertheless often lose touch with popular sentiments and even with the concerns of the bench and bar.⁵⁶ The legal academy's understanding of "rights" is distinct and easily the most rarefied of the ones considered. It frequently is of interest only within its own discourse, and for outsiders to the discourse it registers as nothing less than esoteric. No one essay in *Legal Rights* makes this point; virtually all of them do. The contributing authors, prestigious professors at prestigious universities, have serious qualms about how legal academics approach rights, and these qualms are justified.

The problem is not that rights are left undiscussed in the legal academy. Law school classrooms are full, to use Mary Ann Glendon's phrase, of "rights talk," and truckloads of books, articles and essays are available on rights. These writings address each right from every conceivable angle. But unfortunately, much of this voluminous scholarship has at least two fairly pronounced problems.

The first of these problems relates to what Morton Horwitz calls the "pathologies of abstraction and reification that have been hallmarks of Anglo-American jurisprudence."⁵⁷ Understanding rights as

55. Arkes, *supra* note 31, at 195.

56. I take much of the animus of the MacCrate Report to be a concern that law schools have lost contact with practitioners. See SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992). For one law professor's irritated response, see John Henry Schlegel, *Law and Endangered Species: Is Survival Alone Cause for Celebration?*, 28 IND. L. REV. 391 (1995).

57. Morton J. Horwitz, *Natural Law and Natural Rights*, in LEGAL RIGHTS, *supra* note 9, at 39, 39.

fundamental, inherent, and inalienable has the effect of "obscuring or distorting the reality of the social construction of rights and duties."⁵⁸ The scholarship takes us away from contemplations of actual social inequality and the pressing needs of the poor.⁵⁹ The scholarship fails to recognize, as did Abraham Lincoln, "that rights do not exist in the abstract: they exist in practice, in historical practices, contexts, conditions."⁶⁰

The second problem manifest in much of rights-related scholarship generated by legal academicians is what Pierre Schlag casts as idolatry.⁶¹ That is to say, the scholarship is prone to a blind adoration of and reverence for rights. Rights become mini-deities. This continues even in the final years of the twentieth century and helps explain the way legal thought seems, in Schlag's terms, "tinny, without resonance—a kind of self-indulgent fakery."⁶²

The limitations of the legal academy's discourse on rights are neither limited to nor most pronounced in the student notes that fill up the back sections of the nation's law reviews. Annabel Patterson, in her intriguing essay *Very Good Memories: Self-Defense and the Imagination of Legal Rights in Early Modern England*,⁶³ singles out legal luminaries Ronald Dworkin and Richard Posner for their rarefaction. In debating the question of whether there can be rights which are unenumerated in the Constitution, Dworkin and Posner take the issue as one only theory can solve.⁶⁴ They frame the question "as a dispute over whether the level of generality or abstraction in the Bill of Rights and subsequent amendments permits us to take the widest view, or requires us to take the narrowest, as to what those documents mean by such terms as *liberty* and *equality*."⁶⁵ But what about the historical context? When the Constitution and Bill of Rights were drafted, Patterson reminds us, the meaning of the documents' abstractions carried with them a particular historical imperative: "the

58. Horwitz, *supra* note 39, at 403.

59. *Id.* According to Horwitz, the most effective way to ensure that rights are used on behalf of the socially weak "is to ground rights theory in a substantive conception of the good society. The most important substantive question in our time is whether rights theories are conceived of as incorporating or as opposed to substantive ideals of equality." *Id.* at 404.

60. William E. Cain, *Lincoln, Slavery, and Rights*, in *LEGAL RIGHTS*, *supra* note 9, at 53, 86.

61. Schlag, *supra* note 14, at 263, 264.

62. *Id.* at 303.

63. Annabel Patterson, *Very Good Memories: Self-Defense and the Imagination of Legal Rights in Early Modern England*, in *LEGAL RIGHTS*, *supra* note 9, at 17, 17.

64. *Id.* at 21. The critiqued articles are Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992), and Richard Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992).

65. Patterson, *supra* note 63, at 21.

need to mark the separation from England by the construction of markedly different legal and sociopolitical norms.”⁶⁶ Abstract notions of “liberty” and “equality” had been around for a long time, but the Bill of Rights grounded the abstractions with concrete and specific provisions to promote equality before the law.⁶⁷

The legal academy’s discursive reification and idolatry of rights came clearly to the fore in the early 1980s with the vigorous critique of rights launched by the Critical Legal Studies movement. Critical Legal scholars characterized rights as empty vessels, as false fronts, as notions we had to move beyond to achieve lasting social change. In what would become a notorious dialogue between Peter Gabel and Duncan Kennedy in the *Stanford Law Review*, Gabel complained that the “essence of the problem with rights discourse” is that it leads people to reduce their existential and political feelings into potentially co-opting forms.⁶⁸ When law students are forced to take their true needs and translate them into legal arguments, the ability to realize those needs is inherently limited.⁶⁹ Gabel complains that people “start talking as if ‘we’ were rights-bearing citizens who are ‘allowed’ to do this or that by something called ‘the state,’ which is a passivizing illusion—actually a hallucination—which establishes the presumptive political legitimacy of the status quo.”⁷⁰

After briefly playing devil’s advocate and defending a rights-consciousness, Kennedy then outdistanced Gabel in his critique of the same phenomenon. Like many concepts that are taken for granted in the law, rights in Kennedy’s opinion were like “pods” which duplicate an original, kill it, and then use the duplicate for other purposes.⁷¹ “Rights,” in a comparable way, take over and reduce original concerns and expressions. Rights, like pods, can be filled up with just about anything you would like to fill them up with.

The pod analogy was hard to top in graphic effectiveness, but more sustained and measured as a “critique of rights” was a 1984 article by Mark Tushnet, another leading Critical Legal Studies figure.⁷² Tushnet argued that the reification of rights robbed them of their experiential significance:

66. *Id.*

67. *Id.*

68. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 26 (1984).

69. *Id.*

70. *Id.*

71. *Id.* at 38, 54–55. The reference to “pods” is taken from the film *Invasion of the Body Snatchers* released in 1956 and 1978. In the film, an alien civilization sent “pods” to Earth. The “pods” duplicated humans, killed them, and took over their bodies for alien use.

72. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

When I march to oppose United States intervention in Central America, I am "exercising a right" to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of whom I disagree profoundly, getting cold, feeling alone in a crowd, and so on. It is a form of alienation or reification to characterize this as an instance of "exercising my rights." The experiences become desiccated that way.

In addition, Tushnet also argued that the protection of rights is often harmful because it insulates the privileged in the name of the less privileged.⁷⁴ He claimed that protection of commercial free speech in particular interferes with legislative attempts to limit advertising's control of the social consciousness.⁷⁵

Finally, Tushnet also suggested that there are substantial pragmatic reasons for abandoning the rhetoric of rights, especially given the general belief that government is designed to protect only negative rights.⁷⁶ Since most people believe our government is not designed to provide positive rights, perhaps it is more empowering for blacks to talk about needs rather than rights. "People need food and shelter right now," Tushnet said, "and demanding that those needs be satisfied—whether or not satisfying them can today persuasively be characterized as enforcing a right—strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced."⁷⁷

To say the Critical Legal Scholars' "critique of rights" caused controversy in the legal academy is understatement of the first order. Minority scholars, in particular, were uncertain that rights talk should cease before minority communities had achieved their full panoply of rights. Patricia Williams, for example, took particular issue with Tushnet's preference for "needs" discourse. She argued that "needs" discourse would not be empowering given "the long history of legislation *against* the self-described needs of black people."⁷⁸ According to Williams, "describing needs has been a dismal failure as political activity" for blacks.⁷⁹ Moreover, "rights" confer important benefits:

73. *Id.* at 1382.

74. *Id.* at 1387.

75. *Id.* at 1386–92.

76. *Id.* at 1394.

77. *Id.*

78. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 151 (1991).

79. *Id.*

For the historically disempowered the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being. For blacks, then, the attainment of rights signifies the respectful behavior, the collective responsibility, properly owed by a society to one of its own.⁸⁰

For Williams, the power of "rights" is something which is not to be underestimated: "The concept of rights is the marker of our citizenship. . . . 'Rights' feels new in the mouths of most black people. It is still deliciously empowering to say."⁸¹

Especially noteworthy as a minority scholars' response was a special issue of the *Harvard Civil Rights-Civil Liberties Law Review*.⁸² Several of the articles in the issue veritably bristled at the Critical Legal Studies' critique of rights. Richard Delgado, to cite one example, acknowledged that a belief in rights can legitimize unfair power arrangements, "acting like pressure valves to allow only so much injustice. With much fanfare, the powerful periodically distribute rights as proof that the system is fair and just, and then quietly deny rights through narrow construction, nonenforcement, or delay."⁸³ However, Delgado went on to note that rights can give pause to the police and other public officials who might want to harm or oppress minorities.⁸⁴ "[W]ithout the law's sanction," Delgado argued, "these individuals would be more likely to express racist sentiments on the job. It is condescending and misguided to assume that the enervating effect of rights talk is experienced by the victims and not the perpetrators of racial mistreatment."⁸⁵ Moreover, Delgado pointed out, "rights serve as a rallying point and bring us closer together."⁸⁶

The reaction of Williams, Delgado, and other minority law professors was commendable and seemed to derive as much from minority identity as from professorial consciousness. Less satisfactory, meanwhile, was the reaction of the mainstream legal academy. To question rights seemed to some downright nihilistic. According to one prominent law school dean, law schools had to develop among their students a fundamental respect for the law's principles

80. *Id.* at 53.

81. *Id.* at 164.

82. Panel Discussion, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987).

83. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303-04 (1987).

84. *Id.* at 305.

85. *Id.*

86. *Id.*

and possibilities.⁸⁷ "To limit might," he argued, "the public needs lawyers who acclaim the hope and expectation that rights will be enforced."⁸⁸ Professors like Gabel, Kennedy, and Tushnet could not be counted upon to coach such acclamation. Their thought and teaching were suspect. It might be best if they departed the law school academy.⁸⁹

Both the Critical Legal Scholars' "critique of rights" and the defensive reaction to the critique illustrate the centrality and immense significance of "rights talk" in the legal academy. In their determination to shock and demystify, the Critical Legal Studies scholars were attracted to powerful notions of "rights." In their pointed reaction to the Critical Legal Studies scholars, mainstream legal academics revealed their continuing willingness to idolize and reify. They also revealed how inclined the academic discourse is to fetishize rights.

CONCLUSION

The comments in this essay on three discourses' understandings of rights do not exhaust the possibilities. One might also consider the discourse of politicians and elected officials, and there is as well an important international discourse much concerned with "human rights." Then, too, there is no shortage of more specialized groups focused to some extent on "animal rights," "grandparents' rights," "smokers' rights," and so on. Hayden White has pointed out that when we try to make sense of such things as human nature, identity, justice, and history, we never say precisely what we mean or mean precisely what we say. We rely on images, metaphors, figures of speech, and tropes.⁹⁰ In our culture "rights" are such a trope.

In their various overlapping and sometimes contradictory discourses Americans use "rights" as a trope not only to comment on reality but also to participate in it. That is, "rights talk" is actually a way to define, underscore, and even construct one's place in the world. As noted at several places in this essay, such talk in the contemporary United States is likely to be of special importance to the poor and to minorities as they struggle for more respect and for a greater slice of the pie.

87. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-28 (1984) (asserting the importance of teaching law students both courage to risk error and judgment to know the limitations of intuition).

88. *Id.* at 227.

89. *Id.*

90. HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 1-2 (1978).

Placing the popular, legal, and academic discourses' understandings of rights in juxtaposition with one another underscores the limitations and partialities of each. The popular discourse conflates rights with wants and needs. The legal discourse assumes rights reside securely in posited locales. And the academic discourse idolizes and reifies rights. Contemplating the trio as a group reminds us not to be satisfied with the understanding which reigns in any one discourse. We can draw from each, but we should not settle for simply one or the other.

The possibility of enriching our understanding of rights by moving critically from one discourse to another exists. We preserve some degree of agency. Unfortunately, movement among and scrutiny of the various discursive possibilities regarding "rights" also highlight our postmodern condition. The "true" or "correct" understanding of rights cannot be designated. Living in history and culture as we do, we must find a way to thrive in fluidity, conflict, and contradiction. Austin Sarat, Thomas R. Kearns, and the impressive contributors to *Legal Rights* seem collectively to be reminding us that this option is itself a "right" that we should consciously and aggressively exercise.