

Claiming from below: Rights, politics and social movements

Guy Aitchison Cornish

(UCL)

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I, Guy Aitchison Cornish, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

It is often said that many of the canonical rights we enjoy today are the achievement of past political struggle. While these struggles are typically invoked as a source of political inspiration, this thesis argues that they are also key to understanding the nature and significance of rights as a philosophical concept. The thesis marks a new contribution to the literature on rights, which is predominantly oriented to the formal analysis of rights in relation to the law and to their achievement and enforcement through the institutions of the constitutional state. Part I of the thesis sets out and defends an activist theory of rights that explains the special value the concept has as claims that empower agents with the moral standing to challenge and replace unjust laws, institutions and social practices according to critical moral norms. Part II uses the activist theory of rights as a framework to examine the strengths and weaknesses of four influential models of rights politics: the juridical model of Ronald Dworkin; the parliamentary model of Jeremy Waldron and Richard Bellamy; the liberal civil disobedience model of John Rawls, and the radical critique of rights from within the Marxian tradition. The evaluation of these four models generates an argument in support of the legitimacy and effectiveness of activist citizenship for the achievement and enforcement of rights on the basis of democratic inclusion, moral innovation and civic education. Part III of the thesis provides an illustration of activist citizenship taken from a contemporary squatting movement centered on the right to housing, 'Take Back the Land'. In exercising the moral right to housing, for which they demand political recognition, the group's practices reflect the adversarial dimension of rights in keeping with the concept's historical role in empowering subordinate groups to challenge unjust relations of power and inequality.

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Part I

Chapter 1: Introduction

It is often said that many of the canonical rights we enjoy today are the achievement of past political struggle. The historical record is replete with iconic examples in support of such an observation. Think here of the early modern uprisings against ‘absolute’ government and feudal hierarchy; struggles of national liberation from the American revolution onwards; the first successful slave insurrections that spread from Haiti to South America; the prolonged and often violent battles of workers for humane conditions and enfranchisement; protests against racial oppression and apartheid; successive generations of feminists demanding the equal status of women, and struggles for the rights of homosexuals, the disabled, refugees, indigenous peoples, and other excluded groups. Many of these struggles are ongoing. Frequently, they have relied upon the exercise of direct popular power outside and against the formal institutions of the constitutional state. While these struggles are typically invoked as a source of political inspiration, this thesis argues that they are also key to understanding the nature and significance of rights as a philosophical concept. The thesis sets out and defends an account of rights that explains and accounts for the distinctive role the concept plays as claims which empower agents to challenge and replace unjust laws, institutions and social practices according to critical moral ideals. This is combined with an argument in support of the legitimacy and effectiveness of contestatory political activism for the achievement and enforcement of rights on the basis of the contribution it makes to democratic inclusion, moral innovation and civic education.

The thesis marks a new and distinctive contribution to the philosophical literature on rights. As I go on to show, this literature is predominantly oriented to the formal analysis of rights in relation to the law and to their achievement and enforcement through the decision procedures and coercive mechanisms of the state. Although there is a good deal of agreement within the recent philosophical literature that theories of rights should be ‘political’ in some relevant sense, these theories have construed politics within the institutional and temporal boundaries of state institutions with little attention to the practices of social movements as a creative

domain of political action. There is an institutional bias towards national constitutions, statutory law and international treaties and conventions as the principal reference points for understanding the content and meaning of rights and towards courts, parliaments, and other official actors as the principal agents through which rights are created, achieved and enforced. Where the contribution of social movements is acknowledged, it is usually in an ancillary role in bringing violations of legal rights to official attention in court or as part of electoral coalitions that win rights through legislation by parliamentary majorities.

This is not to say that the role of rights in social criticism has been ignored. Theorists of rights generally value the role the concept plays as a tool to evaluate existing institutions and social practices with a view to their improvement and reform or else their wholesale abolition and replacement. It is principally in recognition of this critical role, I would suggest, that the mainstream of philosophical thinking has defended the integrity and coherence of the idea of moral rights that exist independently of their political enforcement against the positivist argument, most famously made by Jeremy Bentham, that all talk of the ‘existence’ of rights should be restricted to descriptive claims about rights that do exist or ought to exist in law.¹ The motivation for resisting this positivist argument for discursive purification often refers to the innovative, reforming potential of the idea of moral rights as a weapon in the ‘armoury of critical morality’, as Peter Jones puts it.² There is an intuitive sense that rights have this critical role, which draws on a familiar history of revolutions, rebellions and mass movements; yet the idea is under-developed. Specifically, it is not clear what the significance is, if anything, of social criticism being expressed in the distinctive vocabulary of moral rights, as opposed to some other independent moral ideal, such as non-discrimination or political equality. What reasons might agents have for expressing social criticism in this form? Is there any way to account for the particular role the concept plays within our practices as a weapon for critique, reform and innovation? Furthermore, how do these struggles for rights figure in relation to the official institutions of democratic law-making and enforcement and the broader

¹ Jeremy Waldron, “Nonsense Upon Stilts”: *Bentham, Burke, and Marx on the Rights of Man*, vol. 968 (Taylor & Francis, 1987), Ch. 3.

² Quoted in Tom Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* (London; Boston: Routledge & Kegan Paul, 1983), 21.

constellation of political power within society? It is to these questions that the thesis is addressed. I outline the central argument in greater depth in the next section of this chapter, before identifying the contribution of the thesis and its overall argumentative structure in Section II. I then set out the methodological approach I use in Section III.

Section I, Aims and scope

I begin with a rough and ready account of the concept of a political right. I take it that political rights are weighty moral norms that express the respect owed to individuals by placing duties on others to behave or not behave in certain ways with regards to them. I offer this preliminary account here in order to motivate the overall inquiry and identify its domain, drawing attention to certain key features of the concept that I take to be widely shared, while bracketing for now the different categories of rights and their related controversies. The motivation for giving specific consideration to rights as they are used in politics arises from what I take to be the uncontroversial fact that rights have a certain weight or significance that distinguishes them from needs, desires, wants or some other form of political preference. Theorists of rights would no doubt focus on different elements of my preliminary account in explaining why this is the case, but we would be tempted to conclude that someone who argued rights do not merit special consideration in politics is either someone who has misunderstood the concept or who does not believe in rights. How we think about the ways in which rights are claimed, debated, decided and enforced in politics, and the type of institutions and practices this requires, will depend on our prior conceptual account of what a right is. The specific contribution of this thesis lies in two areas: first, it is a contribution to our thinking about the nature and significance of rights as a political concept; second, it is a contribution to normative and practical debates about how they are realised and protected in democratic societies. I address each in turn.

a) *The value of rights*

The thesis provides an account of the political value of rights that calls attention to the active political agency of rights bearers who are morally empowered with

discretionary oversight over their rights and a moral standing to enforce them against accountable duty-bearers through an array of claim-making practices. The account is grounded on a political reconstruction of Joel Feinberg's proposal that rights are claims 'to' some good 'against' another and draws on more recent conceptual work on the directed nature of obligations that correspond to claim-rights.³ This theoretical reconstruction provides the building blocks for my own more substantive account of the place rights have in politics: the *activist theory of rights*. The picture I present is of rights politics as a dynamic practice with a democratic and egalitarian ethos in which individuals are empowered with the moral standing to press their claims against those who wield power through appeal to critical moral principles. The activist theory is distinguished by its emphasis on: i) the *discursive function* of rights as a form of speech act that empower their bearers as political subjects; identify the addressee of a claim as unjust and politicize relations of power through ongoing practices of accountability ii); the *active agency* of rights bearers who have judgment over the exercise and enforcement of their rights and the recognised capacity to author new claims as new circumstances arise iii); the *adversarial nature* of claim-making resulting from the typical conflict of interests between rights-bearer and obligation-bearer iv); the *enforcement function* of the claim as an appeal for support from third parties understood not merely as judges or political officials, but fellow citizens, campaign groups, and other agents with responsibilities to support the claimant of a justified moral right v); the *critical capacity* of the claim as an appeal to moral principles shareable by third parties independently of law and social convention.

These features identify theoretical properties of rights relevant to their use in politics for the pursuit of campaigning and reforming moral ends. They are not proposed as necessary and sufficient conditions for an object to count as a right as part of a contribution to ongoing definitional disputes between the dominant 'Will' (or 'Choice') theory or 'Interest' (or 'Benefits') theory of rights. As I explain in Chapter 2, the activist theory of rights is not in competition with these two theories or with any of the other definitions that have been proposed by way of alternative in these

³ The major essays I focus on are collected in Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press Princeton, 1980). See also Gopal Sreenivasan, "Duties and Their Direction" *Ethics* 120, no. 3 (2010); Matthew H. Kramer and Hillel Steiner, "Theories of Rights: Is There a Third Way?," *Oxford Journal of Legal Studies* 27, no. 2 (2007); Stephen L. Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press, 2006).

debates. Nor does it presuppose allegiance to any particular one of these theories. The activist theory of rights is a theory of the utility of rights in politics. It focuses on how rights are characteristically used in politics without attempting to account for every single possible instance of their appropriate usage. There is much of interest that can be said about rights that cannot be packed into a definition since we also want to know how rights are used and why this matters. The underlying aim of the thesis is to shed light on what it means for an agent to possess a right in real-world circumstances of disagreement, conflict, scarcity and imbalances of power and how this in turn affects how political agents relate to one another and to the state and other powerful institutions and structures. As I make clear in Section III below, my concern is not with the moral justification of particular rights or with their conceptual categorisation. Instead, I offer an interpretive account of our historical practice of rights that illuminates the valuable role the idea plays as a tool of social criticism. The thesis clarifies the place rights have within our political vocabulary as a tool to impose limits on power and hold it to account on the basis of critical moral norms. The elaboration of this account is a prior step to a more substantive moral argument in support of activist forms of citizenship for the concrete realisation and enforcement of rights, which I turn to next.

b) *The realisation of rights*

The central contention here is that decision-making on rights within a democratic society ought to be responsive to modes of political contestation that stretch beyond the formal institutions and procedures of constitutional citizenship. I term these forms of contestation – for want of a better term - *activist citizenship*. I provide both a theoretical account of the nature of activist citizenship and a normative and pragmatic defence of its contribution to rights politics on the basis of *democratic inclusion, moral innovation* and *civic education*. The value of democratic inclusion lies in securing the political equality of marginal groups who may face severe barriers to political participation even where formal political freedoms are secure. Moral innovation refers to the new norms and practical understandings that movements generate through their practices, which shape the overall social ethos and improve

the epistemic quality of decision-making on rights. By civic education I refer to the informal processes of instruction and experiential learning through which movements transfer the knowledge, skills and attitudes appropriate to democratic citizens. Through judgment, deliberation and action in concert with others individuals develop a sense of their own political agency and responsibility to promote justice. The overall argument does not result in a particular set of procedural and institutional recommendations for how rights are decided, along the lines of support for judicial review or parliamentary majoritarianism, and so on. Instead, it demonstrates that the enjoyment of rights cannot rest merely on law or the reassurances of political officials, but requires a preparedness to act politically, take initiative and organise. There is an important role for institutions in the implementation of rights, but it must be supplemented, enhanced - and in some cases replaced entirely - by action outside formal channels where basic individual interests are under threat.

c) Some clarifications

It is worth dispelling at the outset some potential misinterpretations of my argument, to which the focus on social movements might foreseeably give rise. First, I do not defend a strong empirical claim to the effect that social movements are the exclusive source of origin for rights or necessarily the most important. Official institutions have evidently played a significant role. Yet while this role has received substantial attention, that of social movements has not, despite the historical importance of these movements to the achievement of many of the rights we value today. Second, I do not deny the important and often vital role that institutionalisation plays in the realisation and enforcement of rights. The claim, rather, is that an exclusive preoccupation with legal avenues of redress can lead us to overlook the indispensable role of non-institutional modes of civic activism. In some cases, movement activism may even be necessary to uphold the integrity of democratic institutions against capture and subversion by elite groups. Third, I do not suggest that rights are necessarily the most appropriate concept with which to express the demands of social movements. I assume that rights occupy an important, though not necessarily

comprehensive, place in our vocabulary of justice. The thesis provides an explanation of how certain conceptual features of rights support the role they play in oppositional activism, but of course this is not the only relevant consideration. I also discuss in the thesis how the discourse of rights may be inappropriate for the articulation of some moral demands and how in certain contexts it may be undesirable and indeed counter-productive to talk of rights.

Fourth, I do not claim that social movements are necessarily ‘progressive’ by their very nature. This claim would be easy to refute since there are many social movements, both historical and contemporary, with regressive political agendas. These agendas are often framed in terms of a principled defence of the putative moral rights of racial, national, heterosexual and religious majorities, men, propertied elites and other social groups who wish to safeguard the social and economic privileges they enjoy. Some rights claims even take the form of demands for the preservation of traditional social roles – such as that of dutiful housewife - from individuals who ostensibly have the most to gain from the equalisation of freedom and opportunity.⁴ The activist theory can shed light on how these movements use rights: it does not necessarily preclude them from claiming rights by higher-level conceptual fiat. I provide a ‘thin’ moral account of how certain elemental notions, such as respect and dignity, figure within the politics of rights, which would exclude, for example, those claims that are outright racist or sexist. Ultimately, however, whether or not the rights a social movement claims are to be accorded recognition is to be settled via interpersonal political practices of claim-making. Part of the justification for a pluralistic democratic dialogue on rights is that we cannot know in advance which claims are correct and so must allow for the critical discussion and testing of alternative views. The instinctive worry about regressive movements should be balanced by an acknowledgement that other political actors and institutions,

⁴ Corey Robin provides one such example with respect to women’s rights in the US. He notes that when the conservative campaigner Phyllis Schlafly spoke out against the proposed Equal Rights Amendment, ‘she didn’t claim that it introduced a radical new language of rights. Her argument was the opposite. The Equal Rights Amendment, she told the Washington Star, “is a takeaway of women’s rights.” It will “take away the right of the wife in an ongoing marriage, the wife in the home.” Schlafly was obviously using the language of rights in a way that was opposed to the aims of the feminist movement; she was using rights talk to put women back into the home, to keep them as wives and mothers’. Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Sarah Palin* (Oxford University Press, 2011), 52.

including political parties, legislators, judges, and citizens in their capacity as voters, may likewise pursue regressive agendas. An evaluation of the ‘outcomes’ produced by social movements in terms of their impact on which rights become recognised is by its nature more difficult to arrive at than those of institutional actors, which are recorded in parliamentary legislation and judicial verdicts. Their indirect form of political influence is difficult to trace, not least because where official decision-makers are influenced by movement activism they are generally reluctant to acknowledge it. There is good reason to think however that these outcomes would stack up well given the historical record of emancipation through such movements; something I discuss in the survey of empirical scholarship below.

Section II, Existing literature

a) Philosophical theories of rights

I begin in Chapter 2 by setting out a theoretical framework for the thesis through an analysis of the concept of rights that draws on Joel Feinberg’s writings. Feinberg’s understanding of rights, as a form of speech act, orientates us to an understanding of their value in politics as claims against others that authorize an insistent, adversarial politics through appeal to moral principles. As mentioned, I remain agnostic in the long-standing debate among theorists of rights over whether the ultimate point and purpose of the concept is to protect an individual’s interests (the ‘interest’ or ‘benefit’ theory) or to empower their will over the behaviour of others in particular matters (the ‘choice’ or ‘will’ theory).⁵ More recently, there has been debate among philosophers of rights about the possibility of a ‘third’ theory of rights said to combine the virtues of these two dominant approaches.⁶ I draw on insights from this literature without attempting to settle the over-arching definitional debates. Instead, I offer a

⁵ For an overview of this debate, see Matthew H. Kramer, Nigel E. Simmonds, and Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* (Clarendon Press Oxford, 1998).

⁶ For recent proposals for a ‘third way’, see Leif Wenar, “The Nature of Rights,” *Philosophy & Public Affairs* 33, no. 3 (2005); Rowan Cruft, “Rights: Beyond Interest Theory and Will Theory?,” *Law and Philosophy* 23, no. 4 (2004); George W. Rainbolt, *The Concept of Rights*, vol. 73 (Springer, 2006); Gopal Sreenivasan, “A Hybrid Theory of Claim-Rights,” *Oxford Journal of Legal Studies* 25, no. 2 (2005). Leading proponents of the will theory and interest theory have replied to these proposals, see Kramer and Steiner, “Theories of Rights: Is There a Third Way?,”

general specification of political rights and then apply a Feinbergian approach to examining rights as an ‘activity’ in order to elucidate their role in political struggle.

I go on to address how rights function as moral critique, which involves more explicit consideration of the relationship between rights and duties. There has been a good deal of recent philosophical debate in response to Onora O’Neill’s critique of declarations of universal social and economic rights where institutions are weak or missing based on her argument that rights must be ‘claimable’. O’Neill’s argument articulates a political worry many have today that the discourse of rights has become far too loose and ambiguous. Philosophical supporters of universal social and economic rights have offered two principal responses to this line of argument. While some have denied that claimability is a condition for the existence of rights,⁷ others have sought to show that social and economic rights are indeed claimable against specific agents in the form of states, citizens or other obligation-bearers.⁸ I argue that O’Neill is correct in requiring that rights claims specify the identity of a duty-bearer, which is important in preserving political accountability, but that she overstates the determinacy required with respect to the content of rights in a way that circumscribes their value as a language of critique and reform. I demonstrate that moral rights are not simply aspirational rhetoric, but centrally tied to political action. Even in the absence of institutional remedies, it is often possible for citizens to politically exercise the rights they claim and this is a key way through rights are expanded and enforced.

In Part II of the thesis I critically examine four influential models of rights politics. The greater part of the literature on the protection and enforcement of rights concerns the role of judges whose role it is to interpret legislation with reference to the rights contained in a formal constitutional document, and, where necessary, strike down laws they deem inconsistent with those rights. The writings of American liberal philosophers have been especially influential here, given the progressive victories

⁷ I focus on John Tasioulas, “The Moral Reality of Human Rights,” *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* 75 (2007).

⁸ The most prominent approach of this sort is the ‘institutional’ approach of Thomas Pogge, *World Poverty and Human Rights* (Polity, 2008); but see also Simon Caney, ‘Global Poverty and Human Rights: the Case for Positive Duties’ in Thomas Pogge (ed.), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007) and Jesse Tomalty, “The Force of the Claimability Objection to the Human Right to Subsistence,” *Canadian Journal of Philosophy*, (2014): 1–17 for two other possible approaches to the allocation of duties that correspond to social rights.

attributed to the Supreme Court on civil rights and abortion. These theorists tend to conceive of rights as a set of moral norms that exist to some degree independently of democratic politics and serve to protect individuals from potential intrusions and abuses of power by political majorities. I term those theorists who favour empowering courts with authority over rights *Legal Constitutionalists* in contrast to *Political Constitutionalists* who favour parliamentary decision-making.⁹ The most powerful and comprehensive case for Legal Constitutionalism has been set out by Ronald Dworkin. His theory understands rights as ‘trumps’ that protect individuals from laws and policies justified by appeals to the general welfare that are likely to have been corrupted by the discriminatory and paternalistic preferences of political majorities.¹⁰

I discuss the strengths and weaknesses of Dworkin’s theory in Chapter 4. I find that the idea of trumps points to the valuable role of rights as a tool in critical morality and provides an attractive account of the justification of certain rights of discrete minorities and individuals. Furthermore, Dworkin’s theory allows a role for civic activism in the creation of new rights through civil disobedience and is therefore not as elitist as some critics have suggested. I nonetheless fault Dworkin for the misleading implication that rights exist to protect us from democratic majorities and not authoritarian elites, which I link to his unfavourable characterisation of the political process. The primacy Dworkin accords to judicial decision-making and his restriction of new claims to existing legal and constitutional formulas circumscribes the democratic elements of his theory.

Political constitutionalists have challenged the legitimacy and effectiveness of judicial review, as advocated by Dworkin and other Legal Constitutionalists. Given widespread disagreement among citizens about rights, the democratic process is the fairest way to decide on their content, weight and distribution through a system in which citizens participate equally in regular elections to majoritarian parliaments.

⁹ Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism,” *The American Journal of Comparative Law*, (2001).

¹⁰ Dworkin wrote prodigiously on rights across several decades. See especially: *Taking Rights Seriously* (Duckworth Publishing, London 1977); *A Matter of Principle* (Oxford University Press, 1985); and *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press, 1999). Other legal constitutionalist works of note include John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980); Bruce A. Ackerman, *We the People: Transformations*, vol. 2 (Harvard University Press, 2000).

Chapter 5 critically examines the works of Jeremy Waldron and Richard Bellamy who provide the most powerful argument of this kind, which they link to a distinctive conception of the nature of rights and the normative relations they entail.¹¹ I share the scepticism of political constitutionalists towards judicial authority and endorse their key claim that a political process, which respects the fundamental political equality of citizens, is the most legitimate way to reach decisions in the absence of a sufficiently wide moral consensus on rights. The problem is that the political constitutionalist account construes political activity almost exclusively with reference to voting, parties and parliamentary decisions. Their focus is on the patient and reciprocal negotiation of rights within formal electoral processes to the neglect of the vital role rights play as a vocabulary of protest in practices of moral critique and social struggle. Even under favourable conditions, the formal procedures of participation through which decision-making on rights is institutionalised are far from exhaustive of politics and will not give voice to the diversity of democratic opinion on rights in the absence of activist practices of citizenship to hold them inclusive and accountable.

The third approach to realising rights I examine is one that at first sight has most in common with activist citizenship: the model of liberal civil disobedience. The most influential philosophical theories of civil disobedience have come from Dworkin and Rawls. Since Dworkin's theory of civil disobedience is intimately tied to his wider theory of the rule of law and constitutional adjudication I deal with it in Chapter 3. The difference between activist citizenship and liberal civil disobedience is set out systematically in Chapter 5 in which I engage with Rawls's theory.¹² In Rawls's

¹¹ *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge University Press Cambridge, 2007; Jeremy Waldron, *Law and Disagreement* (Clarendon Press Oxford, 1999) Although Waldron himself does not use the term political constitutionalism, it is accepted by political constitutionalists and their critics that his work makes an important normative contribution to this literature. See e.g. Richard Bellamy, 'Political Constitutionalism and the Human Rights Act,' *International Journal of Constitutional Law* 9, no. 1 (2011), p. 5; Marco Goldoni, 'Two Internal Critiques of Political Constitutionalism,' *International Journal of Constitutional Law* 10, no. 4 (October 1, 2012), p. 926. Other notable works within the political constitutionalist canon include Adam Tomkins, *Our Republican Constitution* (Hart publishing, 2005); and the collection of essays in Tom Campbell, K. D. Ewing, and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford Oxford University Press, 2002).

¹² John Rawls, *A Theory of Justice* (Harvard University Press, 1999), Ch. 6. Rawls's theory is the pre-eminent statement of the liberal conception of political dissent and disobedience. A useful collection of essays, many responding to Rawls, is Hugo A. Bedau, (ed.) *Civil Disobedience in Focus*, (London: Routledge, 1991).

account, the role of disobedience is conceptualised within a justificatory framework that understands it primarily as a form of speech to remind wayward political majorities of the principles of justice they are already nominally committed to in a manner structurally parallel to judicial review. I argue that the Rawlsian framework is both too restrictive with respect to the permissible forms of activist claim-making and too conservative in tying the content and justification of rights to existing understandings of justice.

The critical comparison with Rawls highlights the differences between activist citizenship and civil disobedience within the liberal tradition. Insofar as the dynamic of claiming from below has been discussed, it is principally by ‘agonistic’ theorists, such as Jacques Rancière, Bonnie Honig and Etienne Balibar.¹³ This literature draws inspiration from Hannah Arendt’s notion of the ‘right to have rights’, which is taken to express the critical importance of political participation to the security and enjoyment of rights.¹⁴ These authors provide important insights into the dynamics of emancipatory politics, which inform this thesis. However, the agonistic literature tends to employ the concept of rights in quite general terms with little analysis of why political struggles might adopt the concept of rights in particular (as opposed to some other concept, such as non-discrimination); how rights give expression to normative principles and how these struggles relate to official political institutions and processes. The discussion in this thesis can thus provide theoretical clarification and normative explication of the dynamics of an agonistic politics of rights.

There is, in the theoretical literature, a recurring criticism that rights are in tension with the liberatory ideals of social movements; that they are tools of power, rather than a means to contest it. In Chapter 7, I engage with this criticism with a particular focus on a recent body of ‘sceptical’ literature that is suspicious of the role of human rights in contemporary politics. The sceptical writings of Wendy Brown and Costas

¹³ See Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press, 1993); Jacques Rancière, “Who Is the Subject of the Rights of Man?” *The South Atlantic Quarterly* 103, no. 2 (2004); Etienne Balibar, “Propositions on Citizenship,” *Ethics*, (1988).

¹⁴ Hannah Arendt, *The Origins of Totalitarianism*, vol. 1 (Mariner Books, 1973), 290; for a useful overview of this literature, see James D. Ingram, “What Is a ‘right to have rights’? Three Images of the Politics of Human Rights,” *American Political Science Review* 102, no. 04 (2008).

Douzinas, in particular, are examined.¹⁵ I argue that these sceptics raise important concerns with certain features of rights discourse, which I discuss under the categories of *individualism*, *statism*, *moralism* and *conservatism*. While sceptics rightly problematize certain theoretical configurations of rights that support the interests of the powerful, they make an unwarranted move in generalising from these problematic usages to reach conclusions about the concept of rights in general. The practice they problematize is largely the top-down practice of official rights discourse and not the more democratic and egalitarian practice of claiming from below. Sceptics are right in the assertion that rights are not a comprehensive ideology of social justice, but they nonetheless offer useful normative and conceptual resources to challenge relations of domination in modern capitalist states.

In the final substantive chapter of the thesis, Chapter 8, I provide a detailed illustration of activist citizenship, through discussion of a contemporary social movement centred around the right to housing, Take Back the Land. The purpose of this chapter is to render concrete certain elements of the theory previously discussed only at an abstract level and to elucidate key features. In addition, the chapter demonstrates how the framework afforded by the activist theory of rights provides a new perspective on existing debates on the realisation of social rights. Recent theoretical work on human rights has focused on the difficult question of how social rights are realised internationally with the work of Thomas Pogge in particular generating an extensive debate on the nature and scope of the obligations of wealthy citizens and states to relieve those suffering from severe poverty and deprivation.¹⁶ I do not intervene directly in these philosophical controversies but instead call attention to the partial focus of the overall debate. The activist theory of rights shows another side of the story, examining the active agency of rights-bearers themselves, the forms of action they take, the conceptions of rights they hold and the legal, political and ideological obstacles they face in trying to secure their basic interests in secure, decent accommodation. In the concluding chapter of the thesis, Chapter 9, I summarise the argument and explore some its implications.

¹⁵ The main works I focus on are Wendy Brown, “‘The Most We Can Hope For..’: Human Rights and the Politics of Fatalism,” *The South Atlantic Quarterly* 103, no. 2 (2004): 451–63; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing, 2000).

¹⁶ See Pogge, *World Poverty and Human Rights* and the collection of essays in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?*, vol. 1 (Oxford University Press, 2007).

b) *Empirical literature*

There has been considerable attention to the role of social movements in the creation and achievement of rights in the disciplines of social science, history, anthropology and law. Throughout the thesis, I apply theoretical analysis and insights drawn from this literature. I shall clarify the place of the more descriptive elements in the overall argument in Section III on methodology. The purpose of this brief overview is to conceptualise the nature and role of social movements as political actors and motivate the underlying claim that their methods are effective.

The classic pioneering studies of social movements came from historians, such as CLR James, E.P Thompson, and Christopher Hill, whose method of history ‘from below’ brought into view ordinary men and women as political agents, focusing on popular politics, expressed in everyday rituals and culture and tumultuous, frequently violent, uprisings.¹⁷ These historical studies helped influence a domain of social scientific research dedicated to examining the conditions under which social movements arise, the forms they take, and their political significance. The work of scholars such as Charles Tilly, Sydney Tarrow and Alberto Melucci, analyses the role of ‘contentious politics’ in the achievement of rights and elucidates the political tactics at the disposal of social movements in the form of petitions, marches, vigils, strikes, boycotts, and other methods, termed ‘repertoires of contention’. This mode of contentious politics occurs outside official institutions and is distinguished by social movement scholars from ‘non-contentious’ politics, which involves the continuous processes of public administration and official activities within the parameters of state institutions.¹⁸ The social movement scholarship stresses how contentious politics has been a key historical driver of democratisation. As Tilly writes, while ‘favoured participants in relatively democratic regimes condemn unruly claim making as a

¹⁷ See CLR James, *The Black Jacobins: Toussaint L’Ouverture and the San Domingo Revolution* (Penguin UK, 2001); E. P. Thompson, *The Making of the English Working Class* (New York: Vintage, 1966); Christopher Hill, *The World Turned Upside down: Radical Ideas during the English Revolution* (Temple Smith London, 1972).

¹⁸ See Charles Tilly, *Contention and Democracy in Europe, 1650-2000* (Cambridge University Press Cambridge, 2004). Sydney Tarrow, *Power in Movement: Social Movements and Contentious Politics* (Cambridge University Press 2011); Alberto Melucci, “The Process of Collective Identity,” *Social Movements and Culture* 4 (1995).

threat to democracy...in Europe after 1650, all the main historical paths to democratic polities entailed sustained contention'.¹⁹ Among recent work, that of Neil Stammers in particular has brought into focus the hidden history of popular activism, especially with respect to the battles for social and economic rights in the 19th century fought by socialist and working class radicals.²⁰

Six key features of social movements are worth highlighting from this scholarship. First, we may note the cultural dimension of movement politics: in addition to influencing governmental decisions, movements often have a more expressive dimension, which seeks to reconfigure dominant social norms and understandings and gain respect for stigmatized identities. Second, social movements have a loose informal structure. Although NGO's or political parties may form part of social movements or originate out of their activities, they themselves are not movements. Indeed, a social movement need not have any formal organisational representation in the public sphere. Third, movements have a conflictual logic to their activities. They are often hostile to established authorities, as reflected in their contentious protest repertoires. Fourth, movements often articulate hostility to existing channels of political participation alongside their central demands. They often seek to embody in their internal decision-making processes forms of participatory politics that they posit as an alternative to representative institutions. Fifth, scholars emphasise the interaction between local, national and international issues, with local campaigns often linked as part of international movements. Sixth, the rise of new digital technologies has facilitated new networks of association and rapid mobilization in ways that challenge the monopoly of traditional organizations and the conventional news media. The definition of social movements by Mario Diani encapsulates key insights from this literature. Diani defines social movements as 'networks of informal interactions between a plurality of individuals, groups, or associations, engaged in a political or cultural conflict, on the basis of a shared collective identity'.²¹ This definition provides the framework for my approach in the thesis.

¹⁹ Tilly, *Contention and Democracy in Europe, 1650-2000*, 28.

²⁰ Neil Stammers, *Human Rights and Social Movements* (London, Pluto 2009).

²¹ Mario Diani, "The Concept of Social Movement," *The Sociological Review* 40, no. 1 (1992), 13.

In addition to the social science scholarship, several works by legal scholars are worthy of mention. While the dominant focus is on ‘legal mobilization’,²² which tends to theorize the role of movements only insofar as they claim legal rights within the court room, a further approach explores the role of activists in redefining legal norms and generating new ones in a process that Robert Cover first termed ‘juris-generativity’.²³ Notable examples of this approach include James Gray Pope’s study of the early 20th century US labour movement and Balakrishnan Rajagopal’s analysis of how political movements of the global south have shaped and given content to international human rights law.²⁴ Gerald Rosenberg’s historical study of political movements in the US meanwhile attributes a much more modest role in progressive victories to the Supreme Court than is standard.²⁵ And while the mainstream of anthropology initially rejected the universalism of human rights on the basis of its alleged cultural relativism, a number of recent works highlight how diverse cultural groups, from Buddhist monks in Nepal to indigenous Bolivian peasants, have reinterpreted the official discourse of human rights via their own political and cultural traditions, giving it new content and meaning suited to their own local practices.²⁶

There is, then, a rich body of empirical scholarship on the role of social movements in rights politics with theoretical insights to be drawn on and applied. Although there is arguably a set of normative commitments underlying this scholarship that align with my own concern with popular participation, the studies are principally descriptive and explanatory in nature, calling attention to how social movements deploy rights without the additional philosophical work of generalization and abstraction that formulates these understandings into a coherent, normative theory.

²² The pioneering analysis of this concept is by Frances Kahn Zeman, “Legal Mobilization: The Neglected Role of the Law in the Political System,” *The American Political Science Review*, (1983).

²³ M. Robert, “Cover, The Supreme Court, 1982 Term-Foreword: Nomos and Narrative,” *Harvard Law Review* 4, no. 4 (1983), 1.

²⁴ James Gray Pope, “Labor’s Constitution of Freedom,” *Yale Law Journal*, (1997); Balakrishnan Rajagopal, *International Law from below: Development, Social Movements and Third World Resistance* (Cambridge University Press, Cambridge, 2011).

²⁵ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 2008).

²⁶ A useful collection of ethnographic studies examining the cultural politics of human can be found in Mark Goodale and Sally Engle Merry (eds.) *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press, Cambridge 2007).

It follows that empirical scholars looking for a normative and conceptual framework for their work will additionally benefit from my analysis.

Section III, Method

The method I follow in this thesis is an interpretive method that treats the concept of rights as a social practice that serves some point and purpose in our lives. The objective of the interpretive approach, as I apply it, is to provide a normatively appealing and theoretically coherent account of what the point and purpose of the practice of rights is in order to understand, critique and improve it.²⁷ In what follows, I set out how I apply the interpretive method; further specify the domain of theoretical inquiry and identify three tests for the theory to meet: the *fidelity test*, the *equal respect test* and the *realism test*. Each of these tests is formulated on both minimalist and maximalist lines: as a basic constraint on any theory and as an aspirational standard for the theory to meet.

I take the practice of rights to refer to the domain of activity in which people use the concept of rights that is governed by shared understandings and commitments, with certain conventional rules and ideals that make the practice intelligible to one another. Participants within the practice will share something like the preliminary concept of rights I have given, which is to say that when a participant in the practice uses the term ‘right’, they will, broadly speaking, be referring to an object that serves individual interests, places duties on others and embodies the idea of respect for persons. These elements are not proposed as necessary and sufficient conditions for correct usage of the concept, but ‘family resemblances’ that identify the domain under consideration.²⁸ Though they will frequently disagree with one another - over

²⁷ The canonical account of the interpretative method in contemporary political theory is Dworkin, *Law's Empire*, Ch. 2. See also the discussion of conceptual interpretation in his, *Justice for Hedgehogs*, (Cambridge: Harvard University Press, 2011), Ch 8. Dworkinian interpretation is understood as a three-part process, in which we first identify the practice under examination; offer an interpretation of its point and purpose (its value or usefulness) and then use this interpretation as a basis to understand and critique our real-world institutions and practices. While broadly Dworkinian, my approach differs in key ways that will become clear.

²⁸ The term family resemblances is originally from Wittgenstein, *Philosophical Investigations* (John Wiley & Sons, 2010), xciv.

what rights we have, who has them, how they weigh against other concerns, and so on – it is thanks to these familiar components that participants within the practice possess a sufficient degree of common understanding to render their claims mutually comprehensible.

Within the social practice of rights, the term is used in a wide variety of different contexts, spanning the domains of *ethics*, *law* and *politics*. It is important therefore to say where the contribution lies. There are (conceivably) rights that individuals have within personal relations of friends and family, such as the right to fidelity from a partner or the rights that arise from promising. I use the term *ethics* to demarcate this domain of intimate relations generally thought to be a private matter not for public concern or intervention. I define political rights, by contrast, as those rights that bear on the exercise of public power, primarily the state and its institutions, but potentially powerful organisations, such as corporations, and indeed individuals as private agents insofar as they participate in social structures with wide-ranging effects. I thus define politics principally in terms of its object: it is an activity that raises questions about the *res publica* or public things (the exact nature of this activity – what is sometimes called the ‘political’ – I discuss below). If a right is claimed that bears on the nature and organisation of collective arrangements then it is a political rights claim. This is so regardless of whether the right exists in law, whether the claimant aspires for the right to exist in law, who is claiming the right and whether they are claiming the right within an institutional context officially demarcated as political.

The category of political rights notably includes the important sub-category of human rights, said to belong universally to all human beings, in addition to citizenship rights and other rights individuals have by virtue of membership of a state or some other political association. A great number of political rights are institutionalised and coercively enforced by public institutions as legal rights. This is not a necessary condition of their existence as political rights however: as we shall see, it is perfectly coherent to think that rights have some independent basis in morality regardless of their factual recognition or enforcement. I use the term *morality* to identify the norms, values and principles that guide conduct in the political sphere in contrast to the domain of ethics. I follow other authors in occasionally referring to political rights as moral rights since the important point is that they have some

independent existence outside the law.²⁹ Note that the distinctions between different domains of the social practice of rights are not intended to be air-tight. There will be connections between how the concept of rights is used in politics and in the domains of ethics and law and at times it will be instructive to draw comparisons. While some conceptual discontinuity is to be expected across these domains, it would count strongly against any theory if no connections at all could be drawn. This is so not only because the same term is used in each domain, but because there is frequent crossover between them; as for example when an individual's ethical right against domestic abuse from a partner comes to be more generally articulated in concert with others as a political right that requires protection from the authorities, leading to its eventual coercive enforcement as a fully-fledged legal right.

We are now in a position to state the first test for our theory: the fidelity test. The minimal constraint of the fidelity test is that any theory should track the basic idea of a right in common usage. This is not to say that the usage of ordinary practitioners is definitive of the concept's meaning. Although common understandings constrain the range of possible interpretations, no particular understanding – no matter its popularity – is immune from scrutiny and replacement should an alternative interpretation prove preferable. A theory that departed significantly from our preliminary sketch of the concept of rights however would be radically revisionary and in all likelihood a new concept entirely. The second and more demanding requirement of the fidelity test is that our theory not only tracks the usage of agents within the practice, but explains it to us in an illuminating and original way. The theory should help us to make sense of dimensions of the practice that had previously been obscure or overlooked, bringing fresh perspectives and categorisations to bear that permit us to better understand and navigate the discourse of rights with a view to its improvement.

Having clarified the practical domain of inquiry, we should likewise be clear about which dimensions of the concept of rights the theory speaks to. The idea of rights is complex and multi-dimensional, raising a number of political and philosophical controversies. At the most abstract level, we may ask: (i) 'What are rights for?' (Their

²⁹ See e.g. Dworkin, *Taking Rights Seriously*.

function); (ii) ‘Why do we have rights?’; (iii) (Their *justification*); (iv) ‘What rights do we have?’ (Their *content*); ‘Who has rights?’; (v) (Their *distribution*); (vi) ‘How important are rights?’ (Their *weight*). A comprehensive theory of political rights would offer us a developed account of all six of these dimensions and explain how they relate to one another. My approach of looking at the role of rights in politics is more modest in that it is primarily addressed at (i). It addresses primarily conceptual questions to do with the role of rights in our political vocabulary, though this unavoidably involves substantive judgments about (ii) – (vi) and so I will also have things to say about these dimensions of the concept. This is because theoretical reasoning about rights does not proceed sequentially from conceptual to substantive matters, but instead takes a more back-and-forth approach in which we revise how we understand the function of the concept according to how we interpret its more substantive dimensions and vice versa.

The different dimensions of rights I have identified cannot be analysed wholly in isolation from one another. While substantively ‘thin’, my overall account is unavoidably informed by considered judgments as to which rights individuals may legitimately lay claim to. There are strong reasons to doubt the possibility of a purely neutral analysis of what rights are that exists prior to and independently of moral arguments about their justification, content, distribution and weight even in the higher-order conceptual debates between the will theory and interest theory.³⁰ In developing the activist theory of rights, normative and evaluative judgments enter the picture from the beginning in the selection and construction of the basic conceptual elements. The identification of one particular conceptual element as important above others logically connected to the idea of rights in common usage (such as ‘constraint’ ‘entitlement’, ‘interest’) will open up certain pathways for theoretical interpretation and close down others. The matter of which pathways are opened and which are closed will have substantive moral implications for questions of justice because it shapes and conditions what can legitimately be termed a right, the circumstances in which they are claimed, their relative importance, and so on.³¹ A theoretical account

³⁰ I therefore agree with Nigel E. Simmonds, “Rights at the Cutting Edge,” *A Debate over Rights*, 141-143.

³¹ Consider, for example, Robert Nozick’s well-known proposal that rights are ‘side constraints’ (i.e. their function). It is difficult to make sense of the central notion this involves - that rights provide

of rights will thus proceed from a particular moral point of view, according to which aspects of the practice we think are worth developing.³²

The account is nonetheless substantively thin in comparison to some other theories of rights. It does not argue for specific individual rights on the basis of certain moral values or interests, as for example with an argument for a right to welfare based on a particular understanding of what human personhood requires.³³ This is important to note because in developing the argument, I frequently make use of examples of rights claims by social movements. These examples should not be mistaken for substantive arguments of justification. Frequently, the right under discussion is deeply controversial politically, with wide-ranging implications for other agents, and for the nature and structure of social and economic arrangements. That is precisely why these claims are of interest to me, since the idea is to elucidate the nature and dynamics of principled political contestation. The place of moral notions within the theory is primarily in relation to the function of rights - the reasons for having the concept at all - rather than in relation to the justification of specific rights.

What moral standard, then, does the theory aspire to? I have said that rights express respect for individuals. A basic constraint on any theory, therefore, is that it should cohere with this core moral commitment to equal respect. The idea of rights is centrally tied to the egalitarian notion that individuals are of inherent moral value as persons with their own desires, projects and interests. This gives us the first component of the test of *equal respect*. Our theory should provide a morally attractive account of the ideal of equal respect and how it figures in relation to other moral values, such as freedom and dignity as part of an overall package. In addition, our

strong protections for individuals against interference - without the accompanying idea that rights may only be over-ridden in the event of a 'moral catastrophe' (their weight). Notably, the idea of rights as side constraints results in a very minimal libertarian list of individual rights over one's person and property (their content). To think of rights in this minimalist way is less plausibly viewed as a logical conclusion one reaches from the idea of side-constraints than as a factor that bears centrally on whether one conceives of them as such in the first place, *Anarchy, State, and Utopia*, (New York: Basic Books, 1974), 30-33.

³² There is an inherent conservatism in any purportedly neutral approach based on a purely logical analysis of ordinary usage. Even if such an approach were possible, it would add little from a theoretical perspective since we wish not only to understand our practices but also to reform and critique them.

³³ An eminent example of this type of approach is that of James Griffin, *On Human Rights* (OUP Oxford, 2008).

theory should explain how these proximate moral values and concepts relate to one another in a distinct and coherent way; how rights are distinct from duties, for example, and from comparable notions with which they might be confused, such as interests, needs or social justice. An advantage of this type of analysis is that it curtails the common urge to over-load the idea of rights with everything we happen to think desirable in politics, inflating the discourse beyond what is reasonable. Although there is no reason to think all our values and concepts must fit together mechanistically, like the pieces of a jigsaw puzzle, there is a presumption in favour of distinctiveness for the sake of discursive clarity and precision.

The approach I take to the task of moral justification is a pragmatic one that works with moral notions familiar from the social practice of rights. This includes not only the authoritative articulation of these notions, as found in the great charters of rights, but the concrete meaning and content given to rights by ordinary practitioners within the practice. If the thoughts and actions of ordinary political agents are to be understood as a source of moral innovation in practical politics, as I go on to argue, it follows that they are also a source of innovation for the theorist, understood as a fellow participant in the practice of rights. As Alasdair MacIntyre reminds us, political theories are ‘by and large, articulate, systematic, and explicit versions of the unarticulated, more or less systematic and implicit interpretations, through which plain men and women understand [their] experience of the actions of others in a way that enables them to respond to it with their own actions’.³⁴ Crucially, these men and women will bring into the analysis their own experiences, ideas and categorisations, which may not be accessible from more abstract modes of theorizing. They can therefore help to broaden the horizon of moral inquiry and theoretical possibility.³⁵

³⁴ Alasdair MacIntyre, “The Indispensability of Political Theory,” in David Miller and Larry Siedentop (eds.), *The Nature of Political Theory*, (Oxford University Press 1983), 23.

³⁵ This is comparable to Quentin Skinner’s description of the task of the intellectual historian as one that is ‘archeological’ in nature. As Skinner puts it, we ‘recover lost ways of thinking in order to denaturalize the present: the intellectual historian can help us to appreciate how far the values embodied in our present way of life, and our present ways of thinking about those values, reflect a series of choices made at different times between different possible worlds. This awareness can help to liberate us from the grip of any one hegemonical account of those values’, *Visions of Politics: Volume 2* (Cambridge, Cambridge University Press, 2002), 827.

This pragmatic approach can be contrasted with a more systematic method that derives the idea of rights from some foundational moral principle (such as the categorical imperative or the principle of utility). A more systematic moral approach of this kind is possible, but there is the danger that it will lead us too far from the real-world social practice of rights and so fail the fidelity test.³⁶ My approach begins with equal respect on the basis that this notion is an elemental moral feature of the real-world social practice of rights of presumptive moral importance. As I proceed, I introduce additional moral ideas in a piecemeal fashion, where appropriate, without deriving them from this one single idea or attempting to order them hierarchically according to their importance. Once we have a satisfactorily determinate account of rights in the form of the activist theory, new moral notions enter the picture alongside practical considerations as part of an overall argument for popular participation in rights politics. In this way, the conception of rights we arrive at informs our interpretation of democratic politics without being fully determinate in the manner of a more systematic ‘rights-based’ theory that sets out an overall scheme of political morality based around what we take the requirements of the concept to be.³⁷ Since rights are not exhaustive of justice, there will be important moral and political concerns that are not themselves rights-based and our theory should be sensitive to this fact.

It may rightly be said of the picture I present of social movements that it is ‘idealized’, given that I stress their positive democratic qualities over their real-world failings. This is a deliberate consequence of the theory being a normative political theory, with an aspirational quality in guiding political action. How convincing one takes the argument to be should depend not on the representative accuracy of this or that element (as in the manner of a political science case study), but on the moral attractiveness and political plausibility of the theory as a whole. This brings me to the third and final test I propose for the theory to meet: the *realism test*. This test is susceptible to misinterpretation given the range of ideas and approaches that have gone under this label and so it bears spelling out in some detail. There has been a

³⁶ As James Griffin puts it, these accounts risk ‘changing the subject’ by commandeering the term rights for entirely different purposes within their own comprehensive moral theories *On Human Rights*, 28.

³⁷ The approach of Dworkin who I discuss in Chapter 4.

good deal of recent philosophical debate over to what extent theories of rights should be constructed with reference to practical considerations about the role the concept plays within real-world politics, which reflect broader methodological debates over whether the discipline as a whole ought to be more practically oriented or ‘realist’.³⁸

In the literature on rights, those who take a realistic approach generally share my scepticism towards the search for a systematic moral foundation for rights from which an authoritative specification of their meaning and content is derived. The greater part of this literature is oriented to a specific set of debates on international human rights, with proponents of ‘political’ approaches mounting realist challenges to ‘moral’ approaches that presume to critique existing human rights doctrine on the basis of abstract notions of what is owed universally to human beings as such.³⁹ There is no unity among proponents of political conceptions over the precise nature of their methodological critique, much less on the substantive conclusions they draw. It is possible nonetheless to identify two broad families of methodological approaches:

³⁸ Although there is arguably a long-standing current of realism in political theory, Bernard Williams is generally considered to be its foremost recent exponent; see his *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2005). For a helpful overview of realist approaches in contemporary political theory, see Enzo Rossi and Matt Sleat, “Realism in Normative Political Theory,” 2014, <http://philpapers.org/rec/ROSRIN>, retrieved 15 November 2014. I deliberately use the term realism over other proximate methodological terms, such as ‘non-ideal’ or ‘practice-dependent’, since the notion of realism is not burdened with the specific methodological apparatus of these terms and thus affords greater flexibility in setting out the aims and standards of my approach.

³⁹ The terms ‘moral’ and ‘political’ are my own and are intended to map two broad families of methodological approaches that have gone under a variety of different labels in recent debates. In setting out my own approach, I lack the space to fully do justice to the presuppositions, motivations and substantive conclusions of these various methodologies and the often subtle differences between them. John Rawls is generally considered to have provided the first ‘political’ account of human rights in his *The Law of Peoples*. Since then, theorists have distinguished between ‘practice-dependent’ and ‘practice independent’ accounts, Andrea Sangiovanni, “Justice and the Priority of Politics to Morality*,” *Journal of Political Philosophy* 16, no. 2 (2008): 137–64; between ‘practical’ and ‘naturalistic’ accounts, Charles R. Beitz, *The Idea of Human Rights* (OUP Oxford, 2009); between ‘political’ and ‘traditional’ accounts, Joseph Raz, “Human Rights without Foundations,” in J Tasioulas and S. Besson (eds.), *The Philosophy of International Law*, (Oxford University Press, 2010); between ‘political’ and ‘humanist’ accounts, Pablo Gilabert, “Humanist and Political Perspectives on Human Rights”; and between ‘political’ and ‘natural law’ accounts, Laura Valentini, “In What Sense Are Human Rights Political? A Preliminary Exploration,” *Political Studies* 60, no. 1 (2012): 180–94. James Griffin distinguishes between ‘bottom-up’ and ‘top-down’ approaches in *On Human Rights*. He suggests his own approach is of the bottom up, practical variety. Beitz and Raz have nonetheless criticised Griffin’s theory of human rights for what they see as its vague and abstract moralism. Alongside the work of Griffin, that of Alan Gewirth is generally considered to be an exemplar of the moralistic type of approach proponents of political conceptions criticise, see *Human Rights: Essays on Justification and Applications* (University of Chicago Press Chicago, 1982), along with John Simmons, “Human Rights and World Citizenship,” *Justification and Legitimacy: Essays on Rights and Obligations*, 2001; and Maurice William Cranston, “What Are Human Rights?,” 1973.

ontological realism and *institutional realism*. I sketch these briefly below before explaining why I accept the first and reject the second.

a) Ontological realism

Theories of rights should pay attention to the nature of politics as a distinct and autonomous realm of human activity. They should not be approached as an exercise in applied moral philosophy that reasons independent of distinctively political considerations, such as disagreement, conflict, power, coercion and self-interests.

b) Institutional realism

Theories of rights should be constructed in light of their current role in the institutional order. The concept of rights is used within distinct institutional practices that have been created and maintained to serve specific political functions and it is important that our theories map those functions, as embodied in the rules, norms and political cultures of the practices within which the concept serves.

These two types of realist approach are not mutually exclusive and share common motivations in their aspiration to avoid conclusions that are too vague or impractical to guide real-world politics. I begin with (b) about which I am sceptical for two related methodological reasons. This approach is applied specifically to human rights. Its most systematic articulation comes from Charles Beitz who interprets human rights on the basis of a descriptive account of their role in setting standards for state action and intervention within the international regime of human rights law and institutions that emerged following World War Two.⁴⁰ I do not have the space to do justice to the arguments of Beitz and other institutional realists, but a central difficulty I note is that they would appear to presuppose precisely what is at issue in making our understanding of rights depend on the role assigned to the idea by a system of institutions and laws the concept exists in no small part to criticize.⁴¹ In

⁴⁰ Charles R. Beitz, *The Idea of Human Rights* (OUP Oxford, 2009); see also the discussion in Sangiovanni, "Justice and the Priority of Politics to Morality".

⁴¹ For criticisms along similar lines, see Baynes, Kenneth. "Toward a Political Conception of Human Rights." *Philosophy & Social Criticism* 35, no. 4 (2009); Jean L. Cohen, "Rethinking Human Rights,

treating the character of current institutions as definitive of the meaning of rights, we risk favouring one privileged class of participants within the practice: the institution-builders and administrators who have succeeded in getting their particular understandings of rights accepted and encoded above those of less successful groups within the practice.

In addition, Beitz and other proponents of institutional realism draw a strong analytical distinction between human rights, as a new and distinct global practice, and the historical tradition of rights that pre-dates international human rights law. This distinction overlooks the strong elements of continuity that exist between the two. As James Griffin notes, the United Nations put the term ‘human right’ to new use in the regulation of the global order ‘but it did not just amputate its history’.⁴² Participants within the current practice of rights, as we shall see, do not see the concept of human rights as entirely new and distinct from their own historical and political traditions with rules of application determined by the functioning of the international state system. A strong conceptual compartmentalisation may seem plausible if we treat human rights purely as a set of institutionalised norms that regulate international relations. But it is not sustainable if we consider the role of rights at the level of political argument where they may be applied and revised in new ways, generating new understandings, which in turn feeds upwards into international norms and practices. I understand the current social practice of rights - which includes human rights - as continuous with the earlier Enlightenment tradition of individual natural rights that introduced the concept in the familiar form we know today.

Thus, while I share the concern of institutional realists with the practical realisation of rights, I disagree that current institutional formations have presumptive normative authority over what we take rights to be. My own focus on the role of social movements is politically oriented to implementation without the quasi-statism of

Democracy, and Sovereignty in the Age of Globalization,” *Political Theory*, 2008. There are, as we have seen, strong reasons to doubt the possibility of a descriptively neutral account of the nature of rights that precedes moral judgments. This point is pressed against Beitz's approach in Saladin Meckled-Garcia, “The Practice-Dependence Red Herring and Better Reasons for Restricting the Scope of Justice,” *Raisons Politiques* 51, no. 3 (September 26, 2013).

⁴². See James Griffin, “Human Rights: Questions of Aim and Approach,” *Ethics* 120, no. 4 (2010), 751.

institutional realism: it takes the broad domain of politics as contextually relevant and not any particular institutional context within that domain. I therefore endorse a version of ontological realism as stated in (a). We must be attentive, as Bernard Williams urged, to the role of moral ideas and concepts in political argument and conflict and generally the experience of life under a political order.⁴³ In contrast to the enterprise of moral philosophy, animated by an impartial search for truth, politics is characterized by social conflict, disagreement and clashes of values and interests among large numbers of agents who are generally unknown to one another and yet require that binding decisions be reached within shared collective arrangements. Pluralism, disagreement and conflict, then, are inescapable facts of politics, arising from the fact, as Arendt put it, ‘that men, not Man, live on earth and inhabit the world’, each with their own experience, ideas and perspectives and endowed with the creative power to act.⁴⁴

Given the centrality of the two realist notions of conflict and power to my inquiry, a more substantive sketch of each will be helpful. Under one *cautious* version of realism, conflict points to the fragility of the political order and gives us reasons to be careful and conservative so as to minimise the potential for violence, cruelty and authoritarianism inherent in politics.⁴⁵ According to a second *agonistic* version of realism, closer to my own, conflict has a potentially more productive contribution to make. The essential elements of this agonistic view derive from Machiavelli who emphasised the tendency of political institutions to become corrupt and dominated by elites unless checked by popular contestation.⁴⁶ More recent work has provided evidence for the view that political conflict can have a beneficial epistemic role in

⁴³ Williams, *In the Beginning Was the Deed*.

⁴⁴ Hannah Arendt, *The Human Condition*, (Chicago, University of Chicago Press, 1998), 7–8.

⁴⁵ The pre-eminent account of this version of realism is Judith Shklar, “The Liberalism of Fear,” in Shaun P. Young (ed.) *Political Liberalism: Variations on a Theme*, (New York Press, 1989); among contemporary realists, a similar cautious outlook can be found in Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press, 2008).

⁴⁶ See Niccolò Machiavelli, *The Discourses* (Penguin UK, 2013); and the reading given of Machiavelli by John P. McCormick, *Machiavellian Democracy* (Cambridge University Press, 2011). On the constructive role of political conflict more generally, see Stuart Hampshire, *Justice Is Conflict*, vol. 5 (Princeton University Press Princeton, NJ, 2000); Honig, *Political Theory and the Displacement of Politics*; Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton University Press, 2009).

challenging social consensus and bringing new perspectives to bear into democratic discussion.⁴⁷

Due sensitivity to the role of conflict in politics should not lead us to neglect the relations of co-operation, solidarity and affection that are also aspects of its nature. The Schmittian view – endorsed by some agonists - that the war-like relation of enemies is definitive of politics is reductively misleading.⁴⁸ In preference to any reductive view of the political, it will help to think in terms of the following three-part typology that distinguishes political action according to its strategic qualities. Political agents may engage in: i) *Strategies of reform* that involve participation in processes of persuasion, negotiation and competition through official institutional channels, as with elections to parliaments and court-based strategies; ii) *Strategies of rupture* that involve sharp confrontation with authorities through forms of disruptive contestation outside official channels; iii) *Strategies of re-imagination* that involve the selective rejection of officially constituted authority in a particular domain in order to build associations that realise the desired values and objectives autonomously.

These strategies are not mutually exclusive. As we shall see, claim-making practices will often combine aspects of each to a greater or lesser degree according to the nature and urgency of the claim itself along with a strategic assessment of the structures of power being opposed. This brings me to the second of our two realist notions: that of power. I draw here on the classic work of Steven Lukes.⁴⁹ There are three dimensions to Lukes's view, with power becoming progressively impersonal and difficult to identify and overcome as we move up through the dimensions. The *first dimension* of power, as set out by Robert Dahl, refers to intentional decision-making by agents.⁵⁰ The *second dimension* of power, following the work of Bacharach and Baratz, calls attention to how certain political issues are removed from decision-making entirely by strategic control over the structure and composition of decision-making

⁴⁷ Cass R. Sunstein, *Why Societies Need Dissent* (Harvard University Press, 2003).

⁴⁸ Carl Schmitt, *The Concept of the Political: Expanded Edition* (University of Chicago Press, 2008); Chantal Mouffe adopts a broadly Schmittian approach, with some modifications, see: *The Return of the Political* (London, Verso, 2005).

⁴⁹ Steven Lukes, *Power: A Radical View*, (Hampshire and New York, Palgrave Macmillan 2005).

⁵⁰ Robert Alan Dahl, *Who Governs?: Democracy and Power in an American City* (Yale University Press, 2005).

institutions, which renders these issues ‘non-decisions’.⁵¹ The *third dimension* draws on Antonio Gramsci’s insights on ‘cultural hegemony’, to show how beliefs, preferences and cognitions are themselves shaped by dominant cultural and social structures, influenced by the media, education and cultural institutions. These structures entail that certain relations of power come to be experienced as natural and unchangeable, beyond the domain of politics itself.⁵²

What does this mean for our approach? The basic constraint the realism test spells out is that our theory should not make things worse. It should not, for instance, strengthen coercive and manipulative usages of rights by the powerful; create false hope and expectations, or generate political confusion and division that undermines the conditions of political co-operation. The more high-reaching ideal of the realism test is that our theory should actually guide us to the resolution of political problems. A good theory of democracy, for example, will tell us how moral values, such as fairness and equality are realized within the theory, but it will also offer us a practical solution to the problems of social conflict and the tendency of some groups to dominate others in their self-interest. No theory can be expected to tell us how to definitively resolve the perennial concerns realists identify (which are more or less permanent features of the political domain), but it must account for them and offer guidance on how to manage and lessen their corrosive effects. With respect to rights, we will need to consider the sorts of problem to which rights are the solution. Under what situations does talk of rights arise? What do agents hope to achieve by invoking rights in the actual circumstances of politics? What implications does rights talk have for other agents under shared political arrangements? Conceived in this way, the realism test is not in conflict with the idea that moral values inform politics: it ensures that our theory not only identifies the right moral values epistemologically, but tells us how to bring them about.

To recapitulate the approach: I provide a basic account of the concept of a political right in the next chapter. I then elucidate on certain relevant features of the concept with reference to the value of rights in our political practices: the activist theory of

⁵¹ Peter Bachrach and Morton S. Baratz, “Two Faces of Power,” *American Political Science Review* 56, no. 04 (1962).

⁵² Antonio Gramsci, *Prison Notebooks*, (Columbia University Press, 1996).

rights. The activist theory follows an interpretive pathway mapped out by our initial account to arrive at a conception of rights of sufficient determinacy to evaluate and critique current institutions and practices. On this basis, I assess four theoretical accounts of rights politics: the juridical account, the parliamentary account, the liberal disobedience account and the sceptical account. During the course of the analysis, I introduce new moral norms and practical considerations that contribute to an overall argument in support of activist citizenship for the achievement and enforcement of rights. I conclude with an illustration of activist citizenship from a contemporary social movement around housing. The criteria that guide the argument and inform its judgments are the fidelity test, the test of equal respect and the realism test. With the route plotted out, and the navigational equipment to hand, we can now begin.

Chapter 2: Rights as political claims: Core elements of an activist theory

Get up, stand up. Stand up for your rights.

- *Bob Marley, 'Get up, Stand up'.*

Joel Feinberg's celebrated writings on the concept of rights are marked by a distinct approach. Instead of searching for a 'formal definition' of the concept of a 'right' or the concept of a 'claim' with which it is closely linked in the legal and philosophical literature, we should, he says, turn our attention to the 'activity of claiming, which is public, familiar, and open to our observation'. Based on this approach, he proposes that a right is a 'valid claim', which consists in a justified 'claim to' something 'against' someone.¹ In this chapter, I adopt Feinberg's framework to set out an analysis of the structure and nature of rights that accounts for the role the concept plays in political practices of moral critique and struggle. In contrast to a more static focus on what it means for an agent to have rights, Feinberg casts rights as speech acts that do certain things for their bearers, noting how interpersonal claim-making links to the notions of respect and dignity central to the discourse. In contrast to Feinberg's writings, which are focused on legal and moral relationships, my concern is more explicitly oriented to the role of rights in politics. In Section I, I set out the scope and significance of my reconstruction of Feinberg's theory in relation to the dominant theories of rights that understand their role in terms of the benefits or choices they provide to their bearer. Section II outlines the basic definitional framework of political rights as claims to certain goods against others and draws out some preliminary implications of defining rights in this way. In Sections III-VI, I build on this account to elaborate a thicker explanatory framework that sheds light on how rights are created, fought and argued for in politics: the activist theory of rights. In Section VII, I deal with some possible objections to the idea of rights as political claims.

¹ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 149, 155.

Section I, The purpose of a theory of rights

Feinberg's writings on rights are known for a number of influential arguments and distinctions and his famous account of Nowheresville is widely regarded as having captured something valuable about the way rights empower their bearers to make demands on others. Feinberg's recommendation that rights be understood in light of the characteristic ways in which they are discursively deployed has been left underexplored however, with the greater part of philosophical discussion of the concept devoted to the search for an over-arching definition in terms of the single function rights are said to perform.² While proponents of the interest theory argue that rights protect the well-being of their bearers, proponents of the will theory argue that rights confer power over another's duty.³ The debate between these two camps is long-standing with both theories suffering from well-known deficiencies in their inability to account for cases we intuitively regard as rights on the basis that the defining function of either protecting interests or conferring choices is absent in those cases. With the debate between the will theory and the interest theory having reached something of a 'stand-off', the question of whether or not there exists a viable third theory of rights, which improves on the two dominant theories, has been the subject of a good deal of recent debate.⁴ Among participants within this debate, Feinberg's theory has generally been criticised for lacking the definitional precision of the interest theory or will theory. In order to remain logically consistent, it is argued, the idea of rights as valid claims must ultimately collapse into one of the two definitions. Certainly, the central emphasis on the right-bearer's active control over a duty through the activity of claiming suggests a close affinity with the will theory. The apparent tension between Feinberg's emphasis on claiming (in common with will

² A notable exception is Richard E. Flathman who provides a Wittgenstinian analysis of the practice of rights in, *The Practice of Rights* (Cambridge University Press, 1976), Ch. 1

³ For an overview of the arguments for and against both theories see Kramer, Simmonds, and Steiner, *A Debate over Rights*.

⁴ The term 'stand-off' is from Lawrence W. Sumner, *The Moral Foundations of Rights* (Clarendon Press, Oxford, 1990), 51. Some recent attempts to transcend this debate with a third theory include: Leif Wenar, 'The Nature of Rights,' *Philosophy & Public Affairs* 33, no. 3 (2005): 223–52; George W. Rainbolt, *The Concept of Rights*, vol. 73 (Springer, 2006); Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights,' *Oxford Journal of Legal Studies* 25, no. 2 (2005): 257–74; Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?,' *Law and Philosophy* 23, no. 4 (2004).

theorists) and his admission of incompetents who lack the capability to claim as rights-holders on the basis that they have interests (in common with interest theorists), has lead Christopher Heath Wellman, for example, to argue that Feinberg defends ‘two theories’ of rights and is therefore incoherent.⁵

Regardless of the merits or otherwise of these criticisms, it is possible to adopt the Feinbergian framework and stay agnostic on these over-arching definitional debates, the motivation of which is different to my own. The debate between the interest theory and the will theory aims to locate a general definition of Hohfeldian claim-rights that allows us to identify what counts as a right across the domains of ethics, politics and law. The leading exponents of this debate see their task as providing a sufficiently neutral definition within which substantive moral and political arguments about who has which rights and why can take place.⁶ Although Feinberg at points implies his theory is an alternative to these two leading approaches, the thrust of his work, I suggest, is less concerned with providing an over-arching definition of rights than with an account of how they are characteristically used by their bearers and what makes them such useful objects.⁷ As discussed, I follow this type of approach in constructing an argument that avoids any partisan intervention in the philosophical controversies that divide will and interest theorists. In particular, my focus on the activity of claiming should not be mistaken for an endorsement of the argument of some will theorists that only those entities that have the requisite moral competencies to enforce their rights can have them.⁸ Throughout the thesis, I focus on the rights of competent adult human beings because it is among competent adult human beings that politics almost exclusively takes place. But this should not be taken as an argument against children, mentally impaired adults, animals, future generations (or other candidate entities) having rights. Theorists for whom one or more of these categories qualify as rights-bearers can still agree with everything I have to say about activist claim-making without being put off by my focus on competent adult human beings.

⁵ Christopher Heath Wellman, “Feinberg’s Two Concepts of Rights,” *Legal Theory* 11, no. 03 (2005): 213–26.

⁶ See Kramer, Simmonds, and Steiner who characterize the debate as aiming for a definition that ‘overarches the numerous possible instances and varieties of rights’, *A Debate over Rights*, 5.

⁷ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 141.

⁸ See e.g. Carl Wellman, *The Moral Dimensions of Human Rights* (Oxford University Press, 2010).

Still, regardless of whether or not one thinks that claiming is definitionally linked to the concept of rights, the importance of this activity within the practice of rights as a whole is difficult to deny. Even those theorists – chief among them interest theorists – who deny that being capable of enforcing an obligation is a necessary condition for having a right nonetheless acknowledge the importance of claiming itself when they introduce the notion of third party representatives who are legally or morally empowered to claim rights on behalf of incompetent others. Indeed, it is possible to apply much of what I have to say about activist claim-making to political movements for the rights of dependent groups, such as children, animals and mentally impaired adults, which are typically led by competent adult human beings who are understood to be acting on behalf of those whose interests the rights serve. The same is also true of those types of political claim where the rights-bearer concerned may be a competent adult, but one who - due to threats, confinement, or some other debilitating condition - is not in a position to claim their rights themselves. This is the case, for example, with victims of torture who are evidently not in a position to issue effective political demands themselves. In cases of extreme debilitation, such as this, it is widely presumed and accepted that the rights-bearer happily accedes to political representatives, such as Amnesty International, asserting their rights on their behalf. The general anti-paternalistic presumption (I go onto discuss) that it is competent adult rights-bearers themselves who have authority over their rights is suspended in such cases on account of the disability of the rights-bearer and the urgency of their condition. In what follows, for the sake of clarity and smoothness, I generally stick to a formulation that suggests individuals are claiming their own rights. Should they wish, however, the reader is not logically precluded from imagining an alternative scenario in which the claimant is acting as a representative who presses the rights of incompetent or incapacitated others on their behalf. It follows that where I refer to actions that can be performed with rights in politics, in terms of ‘claiming’, ‘enforcing’, ‘asserting’ or (conversely) ‘waiving’ rights, this should be treated as part of a reflection on how rights politics is, as a matter of fact, conducted and not as an endorsement of the position of will theorists that the power to perform these things is fundamental to understanding what a right is. Since there is no need for me to take a position in these definitional disputes, I choose to remain agnostic on them.

Notably, my focus differs to Feinberg's in its orientation to the use of rights in politics. As I have noted, the discourse of rights is wide-ranging, spanning the domains of law (in its civil, criminal and constitutional domains) as well as rights as they are used in ethics (as, for example, with promising) and also in politics. There are similarities between these realms, but they are nonetheless distinct. Feinberg's conception of claiming as an 'elaborate sort of rule-governed activity' does not treat politics as a distinct realm of claim-making. His approach is to consider how rights operate in the law and then reflect on how this informs rights in the moral sense. As he puts it, he takes 'juridical' law as a model for the analysis of rights to understand the 'definite employment of the concepts that interest us before turning to the more troublesome uses of these concepts in moral discourse'.⁹ As discussed, it can be misleading to insist upon an overly rigid compartmentalisation of discursive domains with respect to rights. Nonetheless, a focus on politics suggests a more definite orientation to the distinctively political questions I have highlighted. Feinberg's approach is ideally suited since it orientates us towards the circumstances of conflict and disagreement characteristic of political life and the forms of action and behaviour rights authorize in such circumstances.

Section II, Rights as valid claims

Feinberg aims to provide an analysis of claim-rights, which are rights in the 'strict sense' according to Hohfeld's influential categorisation. Hohfeld distinguished claims from three further juridical 'elements' – 'liberties', 'powers' and 'immunities' - which, his analysis shows, confusingly go by the name of rights in jurisprudence.¹⁰ Claim-rights are the closest to what we mean by rights as they are used in politics in that they stipulate what other agents may or may not do. In ordinary parlance, other Hohfeldian elements go by the name of rights, but this is largely because they are accompanied by claims that protect their exercise against interference. For example, a liberty right to free speech - which entails the absence of a duty on the agent who possesses it not to speak freely - would not generally be classed as a right unless

⁹ Joel Feinberg, *Social Philosophy*, vol. 92 (Prentice-Hall Englewood Cliffs, NJ, 1973), 56.

¹⁰ Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,' *The Yale Law Journal* 23, no. 1 (1913).

protected by a claim-right against interference from other agents.¹¹

Significantly, Hohfeld's analysis notes that a claim correlates to a duty *owed* to the claim-right-holder and that it is held *against* the bearer of the correlative duty. One person's right is another person's duty with the same content. As he put it, if 'X has right against Y that he shall stay off the former's land', then, 'Y is under a duty toward X to stay off the place'.¹² The significance of a claim-right being held *against* the duty-holder and that duty being *owed to* them is not elaborated upon by Hohfeld whose concern was with specifying the logical relationships involved in rights rather than identifying their over-arching function, which is the concern of will and interest theorists. The will and interest theories can be seen as an attempt to capture this idea of something being owed to someone else.¹³ The former signals this relationship by the rights-bearer having control over another's duty and the latter signals it by the rights-bearer being the intended beneficiary of the duty. The well-known difficulties faced by each theory arise from the attempt to adequately capture every appropriate type of owing-relationship labeled a right in terms of a single defining function.

Feinberg's writings side step this problem to focus on the less abstract question of what type of society this form of relationship encourages and what this means for individuals. His discussion can be understood as an explanation of the value of rights having the relational structure Hohfeld describes without attempting to reduce that value to a single defining function. He offers the following flexible account of a right:

To have a right is to have a claim to something and against someone the recognition of which is called for by legal (or other institutional) rules, or in the case of moral rights, by the principles of an enlightened conscience.¹⁴

In what follows, I draw out six preliminary theoretical features of this framework to

¹¹ I borrow this example from Kramer and Steiner, "Theories of Rights," 284.

¹² W Hohfeld, "Fundamental Legal Conceptions," 52.

¹³ Peter Jones, "Moral Rights, Human Rights and Social Recognition," *Political Studies* 61, no. 2 (2013), 277.

¹⁴ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 159–160.

arrive at my own basic account of a political right.¹⁵ To recapitulate, my goal here is not to propose a higher-level conceptual definition. My aim in this section rather is to use existing work to elucidate a sufficiently determinate conception of rights, along with relevant terminological distinctions, so that we have something to work with when it comes to the next step of examining rights politics.

The first thing to consider is what it takes for a right to be morally justified or valid.¹⁶ Let us say that X's moral right consists of a claim to A against Y where X is the agent who bears the right (first and foremost individuals, but conceivably collective agents),¹⁷ Y is the obligation-bearer (paradigmatically states, but potentially fellow citizens, corporations, international institutions, and other non-state entities) and A refers to the content of the right (such as freedom of speech, health, political participation, and so on). The right is justified when Y is morally required to recognise X's claim according to the principles that ought to guide their moral subjectivity (an 'enlightened conscience'). These principles differ from legal rules in not being written down, but they are nonetheless authoritative: they render what would otherwise be a mere suggestion by X to Y, a morally binding claim on their conduct. Note how this sets up a justificatory system that is agnostic as to which meta-ethical outlook is called upon: the idea of authoritative moral principles that establish the existence of a right requires that there be some moral theory to give the principles their authority without presupposing any one theory in particular.

Note, further, that the justification of a right has a two-part structure: it is the union of a justified 'claim to' and a justified 'claim against'. X has a right to A if Y has both a justified claim to A and a justified claim against some Y to act in ways that make A available to X. The justification of the first element refers to the moral importance of

¹⁵ While I remain agnostic on the will versus interest theory debate, it follows from my endorsement of the Hohfeldian understanding of claim-rights as correlative to duties that I reject the non-correlative conception of the interest theory, as given by Joseph Raz. This theory holds that a right stands in a relationship of normative justification to a duty, see *The Morality of Freedom* (Clarendon Press, 1986), Ch.7.

¹⁶ Since my focus is on moral and not legal rights I will generally refer to the *justification* of a right and not its *validity*, though for my purposes they describe the same thing

¹⁷ I focus on individual rights in this thesis and have little to say of direct relevance to debates on 'collective' or 'group' rights.

X's having A based on some feature of X individually (based on some benefit to their well-being or perhaps some value, such as 'dignity', that is honored by treating them that way) or conceivably the benefit of according A to individuals like X serves to society collectively (in securing public goods, such as a democratic political culture, public health, and so on). In and of itself, a claim-to is not sufficient to establish a right without the identification of some second party, agent Y, who bears the obligation to secure X with A. This second justificatory step involves further moral and practical considerations in terms of Y's *capacity* to provide X with A (this involves reflection on Y's resources, long-term reliability and proximity to A) and the *relationship* in which Y stands to X (while some obligations, such as those that correspond to human rights, are said to be universally owed, some may arise out of special relations such as shared membership of a political association or potentially a historical injustice inflicted by Y on X). The justification of any right involves reflection on both the claim-to element and the claim-against element and how they shape one another.

Second, X's right has a moral weightiness to it that gives presumptively decisive reasons for action to Y. The idea of validity gives the claim an authority that distinguishes it from mere wants, needs, desires, or general terms of moral approval or disapproval. There is a presumption that a right will prevail in conflicts with other sorts of reasons and if not that some special explanation is owed to the rights-holder. The privileged status this gives rights within our political deliberations should not however be confused with their being absolute. It is well-established that political rights frequently clash both with other rights and with other legitimate objectives. There is nothing in the notion of a valid claim itself that entails that a right will *necessarily* prevail in conflicts with other reasons for action, whether these be collective reasons of the utilitarian sort or individualistic reasons in the form of other individual's rights. These moral conflicts require situational judgments and cannot be settled in advance. The idea of validity, then, does not suggest absoluteness. We can imagine a claim that is generally valid, but defeated by other moral and political considerations in some exceptional circumstance. The claim continues to be recognised by the political community, although it is not enforced in this particular case. In such cases, a moral loss has still occurred, which is why we say that a right has been regrettably (though justifiably) infringed, rather than that the right has temporarily ceased to exist.

We may therefore distinguish between a *violation* of a right, which is unjust and calls for a political response and an *infringement* of a right, which is justifiable and calls for moral regret.¹⁸

Third, the right has an inherently social dimension to it in that its validity presupposes a wider community of which X and Y are a part bound by shared rules or principles. In the case of legal rights, these are legal rules but in the case of political rights they are principles that appeal to the enlightened conscience of Z's who are third parties within the practice of rights. A political right functions as an appeal from X to Z to intervene on their behalf against Y. Third parties are not merely adjudicators of moral principles however. Their shared participation in the practice of rights means they have roles as both rights-bearers and obligation-bearers with respect to A: they thus stand to either gain or lose out via recognition of X's right to A. It is not only their moral conscience that is touched by X's claim but also their interests. The statement that a political right exists, then, is only intelligible when uttered within a social practice of rights based around shared moral principles with other agents capable of responding and acting on those principles. Rights are not the possessions of isolated abstract individuals, but implicate their bearers in relationships of justification, reciprocity and conflicts of interests with one another.

Fourth, a right may exist regardless of whether it is enforced by law or conventional morality. Feinberg is careful to say that recognition of the right is 'called for' by the principles of an enlightened conscience and not that it is in fact recognised by other agents. This captures the fact that moral justification is based on principles that ought to guide those within the practice of rights and not those that do in fact guide them. To clarify this point it will help to distinguish between *conventional morality* and *critical morality*. While conventional morality refers to the principles recognised and upheld by the community as a matter of social fact, critical morality refers to those principles that do not have this social status and yet may be deployed by way of criticism of conventional morality on account of the independent moral authority the principles

¹⁸ I owe the distinction between a violation and an infringement to Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1992), 232.

enjoy. The principles that justify a moral right are authoritative regardless of whether they are enforced in the laws, attitudes, habits and assumptions of those within the practice of rights.

It is an important feature of political rights that they may exist prior to and independently of law and conventional morality and be employed as a criticism of both. Contrary to the uncharitable interpretation of some positivists, such as Bentham, this does not entail some controversial meta-ethical standpoint, which presupposes some ghostly objective rule system, such as natural law, according to which statements about rights are objectively true or false according to natural facts built into the fabric of the universe. The existence of some transcendental system that would render a rights claim objectively valid (or ‘correct’ or ‘true’) is neither here nor there. The notion of validity instead functions as an epistemological ideal that regulates the whole enterprise: participants within the practice of rights conduct themselves as if a definitive case for the existence of a right can be established through a process of ongoing argumentation.¹⁹ While a right need not be recognised by conventional morality in order to exist, it is nonetheless true that a thin ‘baseline’ level of conventional morality is presupposed since any political rights claim will logically require at least a community of moral agents capable of recognizing and acting upon moral principles. It is part of their being moral agents however that they may fall short of these principles or not see how they apply in a particular context. This introduces a temporal component to the practice of claiming rights: other agents may fail to recognize a justified right at the moment it is claimed, but they nonetheless have the capacity, as reflective moral agents, to be convinced of its validity at some future time.

Fifth, the duties that correlate to claim-rights are *directed duties* owed to a specific agent in the person of the claim-right holder. This contrasts with *non-directed duties*, such as those of charity that are not owed to anyone in particular.²⁰ What is distinctive about

¹⁹ See Dworkin’s account of moral objectivity in “Objectivity and Truth: You’d Better Believe It,” *Philosophy & Public Affairs* 25, no. 2 (April 1, 1996).

²⁰ LW Sumner uses term ‘directed duty’, *The Moral Foundations of Rights*, (1990), 39-45; as does Sreenivasan, “Duties and Their Direction.” I use the terms directed and non-directed duties in preference to perfect and imperfect duties; a distinction that has confusingly been given a number of

a duty being a directed duty is the authority it confers on the claim-right holder. Agent B is accountable for their provision of X to A who has authority over the enforcement of the duty and may choose to release B from it. The violation of a directed duty is a personal wrong done first and foremost to the individual rights-bearer who is its 'terminus'.²¹ If the right is not a legal right but a moral right then the legal mechanisms that allow for its will be absent. In such cases, the wrong of violating a directed duty mandates a specific set of attitudes and behaviours, such as resentment and complaint, on the part of the rights-bearer towards the obligation-holder where appropriate and calls for remedy, usually in the form of an apology.²² In contrast to directed duties, no one has a claim against a specific agent that non-directed duties be enforced that would authorize such attitudes and behaviours.²³ The violation of a non-directed duty is an impersonal wrong, associated with non-directed moral attitudes of regret, despair, frustration and so on, on the part of other agents. As we shall see, Feinberg's writings can be understood as a powerful account of the array of claim-connected responses and attitudes appropriate to the performance or non-performance of directed duties and how these support the notion of respect central to the discourse of rights

Sixth, a right consists in a directed claim held against a specific agent. While it is common to distinguish between directed and non-directed duties, we may also note that claims may be directed or non-directed. A right is addressed to another agent who can be held accountable. A claim-to, lacking a claim-against, is a non-directed claim that is not addressed to any specific persons. It is addressed, as Feinberg puts it, 'against the world, even if against no one in particular'.²⁴ A solitary claim-to reflects the possibility of rights, which is presumptively prescriptive on other agents insofar as there is a presumption that the interests, needs and desires of individuals ought to be met so long as no one else is unduly burdened. Claims-to may provide us with reasons to identify who a duty-bearer is, so as to establish that a justified moral right exists, but

different meanings in philosophy. See George Rainbolt, 'Perfect and Imperfect Obligations,' *Philosophical Studies* 98, no. 3 (2000).

²¹ The phrase 'terminus' comes from Gopal Sreenivasan, "A Hybrid Theory of Claim-Rights," *Oxford Journal of Legal Studies* 25, no. 2 (2005): 257–74.

²² Matthew Kramer, *Where Law and Morality Meet* (Oxford University Press, 2008), Ch. 8.

²³ See the discussion in Darwall, *The Second-Person Standpoint* Ch. 4.

²⁴ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 153.

by themselves they are not a right.

To summarise: a political right is a claim to some good against another that is justified by authoritative moral principles and presumptively decisive in relation to other reasons for action. The rights-bearer has authority over its exercise and enforcement. Where necessary, a right functions as an appeal to third parties to aid enforcement against obligation-bearers.

Section III, Rights as actions

I have set out a basic account of a political right and highlighted some preliminary points of relevance to how rights are used in politics. I now turn to consider the significance of claiming as an activity. As Feinberg observes:

If we concentrate on the whole activity of claiming, which is public, familiar, and open to our observation, rather than on its upshot alone, we may learn more about the generic nature of rights than we could hope to learn from a formal definition, even if one were possible. Moreover, certain facts about rights more easily, if not solely expressible in the language of claims and claiming, are essential to a full understanding not only of what rights are, but also why they are so vitally important.²⁵

At first sight, this may seem like an unnecessary tangent to pursue. Since rights, too, can be understood as an, ‘elaborate sort of rule-governed activity’ which is ‘public, familiar, and open to our observation’, why not focus on rights? The answer is that there are certain features of rights more readily expressed in the language of claims and claiming. Specifically, claims are familiar not only as *nouns* but as *verbs*, that allow us to do things, whereas the concept of a right, in the sense we are interested in, is thought of exclusively as a noun. It is true that the term right also has several meanings, serving as a verb (in the sense of ‘righting’ a wrong) and as an evaluative adjective (in the sense of the ‘right thing to do’) but the concept of a right as an individual entitlement has largely lost any original connection it historically had to these meanings and is now principally used as a noun to denote the moral or legal

²⁵ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 149–150.

property of an individual.

The sideways shift to claims, then, is necessary to get a handle on rights as an ‘activity’ (as a social practice through which people do things) rather than as the ‘upshot’ of this activity (as recorded in the law or conventional morality). An important benefit of the focus on claiming, is that it allows us to develop a theoretical approach to rights orientated to the dynamic political processes through which rights come to shape and challenge the law and conventional morality through the agency of rights bearers, in contrast to a more static perspective on their role in regulating and stabilising these realms. Feinberg never puts it in those terms, though he stresses how his view dispels the temptation to think of rights exclusively as properties ‘on the model of coins, pencils, and other material possessions which we can carry in our hip pockets’.²⁶

The analogy between rights and property is recurrent in the literature and is expressed in the passive sense in which we are said to ‘possess’ or ‘enjoy’ rights. This possessive conception of rights is pronounced in libertarian theories, such as that of Robert Nozick, who draws on ideals of self-ownership familiar from traditional natural rights theory to present a view of rights as ‘side-constraints’, which pertain to individuals even in the state of nature where they cannot meaningfully be claimed against anyone.²⁷ Under this view, rights are a kind of moral force-field that shields us from one another. I examine this link between a possessive conception of rights and an atomistic view of social ontology in Chapter 7 in relation to radical critiques of rights. For present purposes, I mean to focus on the link between rights and the political agency of their bearers. While Feinberg occasionally relies on the idea of rights as ‘moral commodities’, the possessive form of claims is subordinate to the verbal form. Rights are things we can stand on, activate and deploy in social situations when required, ‘not mere abstract concepts; they are instruments and devices that can be used by their possessors to do things’.²⁸ Underlying this analysis are perspectives drawn from contemporary developments in linguistic philosophy and

²⁶ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 151.

²⁷ Nozick, *Anarchy, State, and Utopia*, 33-35.

²⁸ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 238.

the analysis of ‘speech acts’ by JL Austin, John Searle, and others.²⁹ The key insight these authors took from Wittgenstein’s linguistic pragmatic was that words are also ‘deeds’ with a function of doing certain things in language ‘games’.³⁰

Philosophers had previously assumed a statement can only ‘describe’ a state of affairs, imparting straightforward information to the listener, which it must do so either truly or falsely. The work on speech act theory shifted attention from ‘meanings’ (which denotes the sense and reference of words) to questions about agency, usage and ‘the range of things that speakers are capable of doing in (and by) the use of words and sentences’.³¹ These insights were applied to the analysis of politics, with the influential work of Quentin Skinner in particular showing how speech acts function to legitimate certain forms of political behaviour and action.³² It is part of the ‘game’ of politics that agents make use of existing words in unprecedented ways through a novel application of linguistic rules to legitimate forms of behaviour previously untoward and bring about change. Feinberg’s own description of the activity of claiming as an ‘elaborate sort of rule-governed activity’ mirrors Searle’s description of an ‘illocutionary act’ as a ‘a rule-governed form of behaviour’. As Searle notes, these rules provide the contextual conditions for any speech act, which, along with the intention of the speaker, help us to understand its meaning.³³

To claim a political right is to communicate to others that one has that right and that one is invoking it with the aim of enforcing one’s rightful entitlement against them. It is to assert, press or demand what is owed to one on the basis of morality. This performative species of claiming in which an agent makes claim *to* something can be distinguished from propositional claiming in which an agent claims *that* something is the case, as with the claim that the sun is shining or that Italy is a beautiful country.³⁴

²⁹ See J. L. Austin, *How to Do Things with Words* (Oxford University Press, 1976); John R. Searle, ‘What Is a Speech Act?’, in Robert J. Stainton (ed.) *Perspectives in the Philosophy of Language: A Concise Anthology* (Broadview Press, 2000).

³⁰ Ludwig Wittgenstein, *Philosophical Investigations*, ed. P. M. S. Hacker and Joachim Schulte, 4th Edition (Wiley-Blackwell, 2009).

³¹ Quentin Skinner, *Visions of Politics, vol. 1* (Cambridge University Press, 2002), 3.

³² Skinner, *Visions of Politics*.

³³ Searle, ‘What Is a Speech Act?’.

³⁴ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 150.

Anyone can claim *that* they have a right (whether they or do not) but in order to make claim *to* a right one must first possess a claim that is recognised as valid according to authoritative moral principles (or represent another entity that has such a claim). It is the possession of a valid claim or right that puts an agent in the moral position to engage in the act of claiming. Yet while having a valid claim is a pre-requisite to claiming, the reverse does not apply. That is to say, it is not necessary to claim a right in order to have that right. The act of claiming may bring to the attention of others that one has a right, but claiming itself does not create that right or count as evidence in support of it. The existence of a right is established by moral principles whose authority is binding irrespective of whether the right itself has been claimed. In claiming a right, one may point to those principles - such as dignity, equality, utility, and so on - as proof of the moral authority of one's claim, but the claiming itself - no matter how sincere or indignant - does not count as proof. Hence, in the ordinary course of things, a rights-bearer may happily go about their business without unwanted intrusions or deprivations and therefore never feel the need to claim their rights against others (perhaps because they are a member of a privileged social group or else inhabit a conscientious society which respects all its members' rights). Rather than indicating that they do not have rights, their lack of claiming indicates that their rights are secure, allowing them to *enjoy* their rights without ever having to *claim* them. It is even possible to have a claim without knowing that one has it (and can therefore claim it if needed).

Yet while the activity of claiming is not necessary for a right to count morally speaking, it is nonetheless relevant to the moral situation as a whole. As noted, by claiming a right, an agent lets it be known that they have that right, but also that they are actively enforcing it. It makes explicit that the claimant expects others to act upon their moral obligations with regards to them. This is the opposite of a situation in which an agent waives or forfeits their rights out of generosity or servility. Should the addressee continue to violate the right after it has been claimed, then this is an additional form of disrespect that denies the rights-bearer's status as an independent moral agent with authority over their interests. In such a case, the claiming of a right has served to expose the addressee as not merely careless or morally ignorant, but as

actively malicious in refusing to act upon the valid moral claims of others.³⁵ It is by virtue of this capacity to alter moral relationships that the claiming of a moral right is said to be performative, as I discuss further below.

Now, participants within the practice of rights will know under what circumstances it is appropriate to invoke rights in addition to the correct manner in which to invoke them. There are multiple ways in which rights can be invoked to perform a variety of speech acts, making a full specification of the rules that govern the practice a daunting task. Nonetheless, we can get a handle on the utility of rights as a political concept by considering under what circumstances they are characteristically called upon. The phrase ‘I have a right’ is not typically uttered unless that right is under threat. In such circumstances, the intention of the speaker is to change the behaviour of some obligation-holder by reminding them of an existing right, urging the recognition of a new right, and, if either of these fail, calling for the support of third parties to enforce the right against the obligation-holder. Beyond educational contexts, such as law and philosophy seminars, where the purpose is illustrative, it is difficult to think of cases where rights are invoked by their bearers without their being some threat or perceived threat to the enjoyment of the said right. It is nonetheless straight-forward to make sense of such cases as ones in which the speaker communicates to their audience that they *have* a claim and are *positioned* to claim it in response to some threat should they need to.

An agent who claims a right, by contrast, wishes it to be known that they *have* a right, but also that they are *actively* claiming it with the intention of producing some effects on the obligation-holder and on other third part agents by its recognition. It is helpful to understand these effects along the lines of Austin’s analysis, in terms of both *illocutionary* effects (what the agent accomplishes in uttering a sentence) and *perlocutionary* effects (the further effects the agent brings about in uttering a sentence, not immediately, but at some later time).³⁶ Illocutionary speech acts were of particular interest to Austin since they perform some action through their very utterance by

³⁵ Darwall, *The Second-Person Standpoint*, 84-85.

³⁶ J Austin, *How to Do Things with Words*.

virtue of social and institutional rules, as is the case with legal pronouncements, such as ‘I pronounce you husband and wife’. Such speech acts are said to be performative. Feinberg refers to the claiming of rights as performative where ‘making a claim to’ something establishes one’s claim in law and activates the obligation.³⁷ A claim in a legal sense is often validated by producing a particular physical artifact in the form of a piece of paper, as with the home-owner who produces the deeds to their house to validate their ownership.

Political rights are performative in that their successful utterance changes the moral situation of the parties involved in the way described. Such claims are validated not by reference to some physical artifact but by reference to moral principles that provide authoritative guidance to obligation-bearers and third parties. A claim to moral rights will usually count as successful if it is acted upon by the obligation-holder or third parties positioned to enforce it. Of course, claiming a right is not the same as having one. Not all speech acts are successful. It is perfectly possible for an agent to claim passionately and insistently and yet be wrong: it is the weight of moral principles that make a claim a valid right and not the strength of indignation felt. The claim may be invalid and therefore justifiably rejected by its audience. Alternatively, the claim is valid but unjustly rejected by the obligation-bearer and third parties due to moral blindness or self-interest. Immediate acceptance is not the only measure of success for the claiming of a moral right however. It is possible that X’s claim to A against Y may have failed to bring about the intended illocutionary effects in terms of recognition by Y or by some appropriately positioned Z who can enforce it. It will nonetheless have performed certain perlocutionary effects in letting it be known that X is demanding A as a right, potentially persuading some Z’s of the validity of the claim and laying the basis for future campaigning. In such cases, an agent claims a right not in order to activate an existing recognised right, but to let it be known that they are demanding that a new right be established and seeking to persuade and mobilise others to win support for that right.

³⁷ Having originally said that both ‘performative’ and ‘propositional’ types of claiming are types of claiming in “The Nature and Value of Rights,” *The Journal of Value Inquiry* 4, no. 4 (1970); Feinberg later restricts this to performative types in *Social Philosophy*.

Significantly, the speech act of claiming a right may still be performed without entailing that the locution ‘I claim’, ‘I have a right to’, or some similar formulation is spoken. As Searle puts it, ‘often in actual speech situations the context will make it clear what the illocutionary force of the utterance is, without its being necessary to invoke the appropriate function indicating device’.³⁸ If to speak is to act, then to act is also to speak. There are certain actions that communicate concepts and ideas to an audience even in the absence of semantic content. This becomes relevant when I consider the nature of activist citizenship: an agent’s exercise of a moral right not recognised by existing rules often functions as a claim that such a right should be established, as with the deliberate public flouting of prohibitions against certain forms of speech and public assembly.

There is an odd paradoxical quality to the language of rights that helps explain their discursive force. They have a proleptic quality in presenting themselves as descriptive, in describing how things are, but with the real purpose of saying that things are not as they ought to be. When the recognition of a new right is being urged, the action gains part of its force by appearing to adhere to existing conventions and practices while in fact subverting them and changing things. This quality of certain types of political speech is highlighted in a footnote by Searle discussing Proudhon’s statement that ‘Property is theft’. If one takes this as an internal remark, within an accepted system of linguistic usage, it would seem contradictory and nonsensical. For Searle, however, it ‘gets its air of paradox and its force by using terms which are internal to the institution in order to attack the institution’.³⁹ The fact that rights adhere to a framework of conventional linguistic ‘rules’ may at first sight appear to have conservative implications. But linguistic convention should not be understood as a hard discursive constraint on what can conceivably be claimed. As Searle points out, there are an infinite number of possible speech acts that can be performed, and hence of new rights claimed. Assertions of new rights present themselves as conventional and conservative, upholding some prior order, but this masks the fact they are challenging that order. Social arrangements are being challenged under the guise of their correct application and, as Skinner puts it, ‘to the extent that our social world is constituted

³⁸ Searle, ‘What Is a Speech Act?’, 6.

³⁹ John R. Searle, “How to Derive ‘Ought’ from ‘Is,’” *The Philosophical Review* 73, no. 1 (1964), 7.

by our concepts, any successful alteration in the use of a concept will at the same time constitute a change in our social world.⁴⁰

Section IV, Respect and empowerment

I have so far provided a basic account of a political right and an overview of their practical utility as speech acts both in terms of directing the behaviour of other agents and providing a flexible discourse for the emergence of new claims. This section adds moral ballast to the account showing how rights empower individuals to demand certain forms of treatment from others and how this links to the elemental moral notion of respect through interpersonal practices of claim-making. Feinberg highlights this characteristic via the famous example of Nowheresville where subjects have scrupulously observed duties of obedience to law, charity, and those of an ‘exacting private conscience’, but no rights. Their obligations are towards (or regarding) one another but owed to a ‘sovereign rights-monopoly’ akin to God, some elite, or a single sovereign under God.⁴¹ Although Feinberg does not use the terms, the duties that hold in Nowheresville are, in effect, non-directed duties since their violation is a wrong to God, or to one’s conscience, but not to a specific individual who can hold the violator to account in the here and now. In a memorable passage, Feinberg surmises the reasons why a world such as this is deficient:

In appropriate circumstances rights can be asserted authoritatively, confidently, and unabashedly. They are not gifts or favors; motivated by love or pity, for which gratitude is the sole fitting response. A right is something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame. When that to which one has a right is not forthcoming, the appropriate reaction is indignation; when it is duly given there is no reason for gratitude, since it is simply one’s own or one’s due that one received. A world with claim rights is one in which all persons, as actual or potential claimants, are dignified objects of respect, both in their eyes and in the view of others. No amount of love and compassion, or obedience to higher authority, or noblesse oblige, can substitute for those values.⁴²

The subjects of Nowheresville may benefit from the performance of obligations by

⁴⁰ Skinner, *Visions of Politics*, 276.

⁴¹ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 147.

⁴² Feinberg, *Social Philosophy*, 58.

their fellow subjects, and the failure to perform these obligations is a wrong. But since the obligations are owed to the sovereign-rights monopoly and not to them personally, they lack the normative authorization for a specific set of remedial responses associated with a dignified moral standing.

While the remedial responses connected to the possession of a right are typically thought of in terms of legal powers to enforce rights and seek compensation in cases of violation, here they are conceived as moral powers of admonition. The example of Nowheresville in many ways parallels the moral universe envisaged by early theorists of natural law for whom a divine creator was the only agent with ultimate power to judge of right and wrong.⁴³ In these early natural law theories, God is both the source of obligations and their terminus. An objective law of nature, prescribed by God, was the authoritative source of man's obligations and their ultimate guarantor with final powers to enforce or waive men's duties. The development of individualistic theories of natural rights, with later thinkers, such as the Levellers and John Locke, detached the source of obligations from their terminus. This entailed a more democratic ontology of the moral universe in which obligations were owed not merely vertically but horizontally. Man was thought of as being endowed with subjective reason that made him capable of forming and acting on moral judgments to enforce his natural rights. This meant that obligation-holders, which crucially included ruling monarchs, could no longer expect immunity from accountability for encroaching on individual rights until the afterlife: they could instead be held to account by rebellious subjects during their time on earth.

Crucially, the knowledge that one has rights is linked to certain psychological properties associated with self-respect. Rights confer on their bearers a moral standing to protest associated with self-esteem and a more confident and assertive attitude. This contrasts with the degrading and servile dispositions that come with being at the mercy of another's good will. One need not ever invoke one's rights to benefit from this form of self-respect: the knowledge that one can do so if needed creates a security

⁴³ For an account of the origins of modern rights discourse in Christian natural law theory see, Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge University Press, 1981).

of expectations that underlies these behavioural and attitudinal benefits.⁴⁴ Crucially, to be responsive to one another as claim-makers underlies relationships of equality. It is the difference between egalitarian relations of solidarity, and paternalism, or what Feinberg terms ‘noblesse oblige’. A paternalistic relationship is a hierarchical one between the compassionate master and the suffering subject. The subject is continually reliant on the goodwill of the master and so must petition for favours in a manner that is servile and timid lest they give offence. The subject may invoke sympathy and compassion, in the way we have sympathy for a suffering animal, but they are not held worthy of respect. The discharge of a duty to a right-holder, by contrast, reflects nothing more than what is owed to them as an equal.

A useful account of this type of respect has been given by Stephen Darwall who terms it ‘recognition respect’. Recognition respects denotes the fact that another agent should count morally-speaking in our deliberations. Darwall contrasts it with ‘appraisal respect’, which is based on an evaluation of an individual’s character and achievements in the manner that we respect someone for their generosity or their athletic skill. To owe someone recognition respect is to be responsive to them morally and hence to respect them as someone with their own desires, interests and purposes in life that have value to them independent of any extrinsic appraisal of their worth. Conversely, to have others responsive to one’s claims is to have one’s own desires, interests and purpose recognised.⁴⁵ As we shall see, to be properly responsive to others in this way involves recognition that they are not only the overseer of a pre-acknowledged list of authoritative moral claims, but also the potential authors of new claims when agentive judgment is brought to bear in new ways in response to new threats and circumstances. It is an important feature of the social practice of rights that it is a reflective and open-ended practice in which individuals and groups intervene to claim new rights that challenge the existing distribution of entitlements. These claims are worthy of respectful consideration as an extension of the respect owed to individuals as equal moral agents.

⁴⁴ There is a structural parallel here with republican accounts of the socio-psychological benefits of freedom as non-domination, as described by Quentin Skinner and Philip Pettit. See Quentin Skinner, *Liberty before Liberalism*, (Cambridge, Cambridge University Press 2012); Philip Pettit, *Republicanism: A Theory of Freedom and Government: A Theory of Freedom and Government* (Oxford University Press, 1997).

⁴⁵ Darwall, *The Second-Person Standpoint*, 122-126.

At one point, Feinberg suggests that ‘respect for persons...may simply be respect for their rights’.⁴⁶ On one view, this could simply mean that respect for an individual is realized when we conduct ourselves in a way that secures for them the content of their rights.⁴⁷ Yet full respect, it would seem, also means recognition that these are ‘their’ rights, over which they have control as a moral agent to whom we are responsive as recognised participants in a moral community. The significance of recognition respect is brought into focus from the fact that Y’s violation of X’s right is that much worse morally-speaking once X has drawn attention to their right and given grounds for it. To borrow Darwall’s example, if Y is inadvertently treading on X’s toe with their foot and then still refuses to move their foot even once X has demanded that they do so, then this counts not only as a physical harm to X but as an expression of contempt for them.⁴⁸ The action communicates that X does not have the authority to make claims on Y’s conduct in this way and does not count morally. The unresponsiveness of Y to X’s claim communicates that Y is no longer simply someone who has harmed X, but someone who has done so knowingly for their own sadistic pleasure in disregard for X’s dignity as a moral agent.

There is a personal harm of disrespect to X involved in the denial of the right beyond the direct physical pain of having their foot stood on. The concept of dignity central to the discourse of rights is not just a way of treating people, then, but an acceptance of the fact that they have authority to have some say over that treatment and to demand it of us where necessary. When a right is claimed by its bearer and yet wantonly ignored by its addressee, the claim functions to identify that addressee to others as a wronging agent, as actively dangerous and malicious in ignoring valid moral claims. This account of the complex of moral attitudes and behaviours linked to rights allows us to make sense of the commonplace observation that rights empower politically oppressed and disenfranchised groups. This phenomenon is described by Patricia Williams who draws attention to the resonance of rights for black Americans, such as herself, in response to critical legal scholars who viewed rights as a mystifying ideology

⁴⁶ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 151.

⁴⁷ This is the view of Raz who suggests that ‘respecting people is giving proper weight to their interests’ *The Morality of Freedom*, 188-9.

⁴⁸ *The Second-Person Standpoint*, 84-85.

that holds oppressed groups in place. Williams writes that:

The concept of rights is the marker of our citizenship. ‘Rights’ feel new in the mouths of most black people. It is still deliciously empowering to say. 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 behaviour, the collective responsibility, properly owed by a society to one of its own.⁴⁹

It is notable that Williams here draws attention to the illocutionary effects of rights as a form of speech. She notes the physical feeling of the locution, which she credits with emboldening psychological effects. The reason, it would seem, that rights are ‘deliciously empowering to say’ for a historically disenfranchised group is that, as claims addressed towards others, they are a form of speech that others are required to respond to. They ‘feel new’, no doubt, in comparison to utterances of complaint or some objective statement of wants and interests that do not compel recognition in this way. In the absence of the directed authority peculiar to rights, such complaints could be dismissed as mere noise emanating from a ‘human body’, rather than the political speech of a ‘social being’. Being in the ‘referential range of self and others’ is not merely to be a maker of claims, but also a respondent. Part of having rights is not only seeing oneself as entitled to certain treatment, but as someone responsible to the valid moral claims of others.

Within hierarchical social systems, those deemed inferior on the basis of race, class, or some other feature will frequently internalize certain narratives that denigrate their status leading them to accord recognition respect to those above them in the hierarchy without according the same respect to themselves. The path to rights involves the application of recognition respect to oneself; seeing oneself as a person with interests, desires and purposes that count morally speaking and someone capable of acting to defend them. In cases of political rights, disrespectful treatment of individuals often results from some feature the individual shares with a wider social group, such as

⁴⁹ Patricia J. Williams, *The Alchemy of Race and Rights*, (Harvard University Press, 1991), 164.

religion, poverty, race or gender. In such cases the disrespectful treatment communicates that all those who share that feature are themselves unworthy of respect. Typically, the first step subordinate persons, such as abused wives and exploited workers, take towards the achievement of rights is the understanding of themselves not as a powerless figures, but as agents with the standing to demand proper treatment.⁵⁰

There is a certain reactive logic to rights politics: it is often through the concrete experience of losing one's dignity, of being insulted, that new claims for rights emerge embodying substantive moral notions of what dignified and respectful treatment consists in. In order that a personal experience of disrespect become politically effective, isolated, personal feelings of blame, associated with individual complaint and remonstrance must be transformed from personal anger into a collective force through the articulation of one's claims with others. An excluded, oppressed or marginalised social group applies recognition respect to itself when it generates a collective 'we' with political identity and agency. In discussing the contribution of Gandhi to Indian independence, Nehru noted that his greatest achievement was encouraging the nationwide mobilization of social movements through the National Congress, which transformed a 'demoralized, timid, and hopeless mass, bullied and crushed by every dominant interest, and incapable of resistance, into a people with self-respect and self-reliance, resisting tyranny, and capable of united action and sacrifice for a larger cause'.⁵¹ To claim rights is to lay claim to the respect one is rightfully owed: the marker of citizenship. It constitutes individuals and groups as political subjects, with their own judgment, initiative and entitlement to be listened to. It also constitutes the addressee as a political adversary, as I now discuss.

Section V, Adversarial claim-making

In addition to constituting their bearers as political agents, the claiming of a right in politics will constitute an adversarial other against whom the right is held. The earlier

⁵⁰ John Gaventa describes this process as 'conscientization,' in which the powerless 'develop their own notions of interests and actions, and themselves as actors'; *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (University of Illinois Press, 1982); for a fascinating discussion of the role 'rights consciousness' can play in this process, see Pope, 'Labor's Constitution of Freedom'.

⁵¹ S. P. Varma, *Modern Political Theory* (Vikas Publishing House Pvt Ltd, 1999), 80.

example of the foot stamper illustrated how a claim that is ignored can cast the addressee as morally wrong through their action or inaction. At the very least they are negligent in not acting on a right, but they may also be dangerous and aggressive by wantonly violating it. The claiming of a political right frames the addressee as someone who is unjust. It may be that they are unjust out of pure malice (as with a tyrant like Nero), but more often than not the adversarial nature of claiming is linked to the fact rights are paradigmatically called upon in cases where there is a conflict of interests between agents X's and Y's.⁵² Agent Y's are not only obligation-holders, but more often than not *rights-withholders* who have most to gain from denial of X's right to A. They may be a boss denying her workers a livable wage; a racial minority that enjoys economic and political privilege at the expense of a majority, an authoritarian government restricting freedom of protest, and so on. It is particularly appropriate, therefore, to say a right is held *against* the obligation-bearer. The normal course of discussion that might resolve the conflict of interests has typically broken down by the stage rights are invoked.

The reference I make to interests here is meant in a morally neutral sense: it does not imply that Y's interest is a morally legitimate one. X's right against Y adversely affects Y's interests in that it regulates Y's conduct and prevents them from doing what they otherwise would have done in pursuing their own purposes. There is, of course, no reason to think that Y's interest is a morally legitimate. A government may have a factual interest in imprisoning a dissident citizen on account of her political criticism, A correct moral appraisal of the situation would show that the dissident's right to free speech adjudicates decisively in their interest, but this verdict does not render the government's factual interest in her imprisonment nonexistent. It is precisely because of the compelling factual interest governments have in imprisoning dissidents that the right to free speech is politically salient long after moral arguments for free speech have been won in mainstream public discourse.

⁵² In addition to Feinberg, this adversarial quality is noted by Henry Shue who comments that 'those who deny rights can have no complaint when their denial, especially if it is part of a systematic pattern of deprivation, is resisted', *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 1996). Carl Wellman too points out that rights are 'relevant to some potential conflict of wills between the right-holder and some person or organisation that might attempt to hinder or prevent the possessor from exercising or enjoying that right' in *The Moral Dimensions of Human Rights* (Oxford University Press, 2010), 33-34.

There are, of course, examples where X's right to A against Y does not adversely affect Y's interests. It may well be that someone who is a Y in one situation will be an X in another situation and so nonetheless have their interests advanced overall, as with the healthy taxpayer who happily pays towards funding a right to healthcare he later takes advantage of in old age when he falls sick. It is part of the egalitarian character of rights that they will often have this reciprocal quality. Yet reciprocity is not essential to rights since it does not hold where there is no possibility of Y's becoming X's (as with rights against racial discrimination, say). And while it holds for some rights when we consider the practice of claiming over a long enough time period, it does not detract from the fact there is a genuine conflict of interests at the moment the right is claimed.

A further caveat is that it is entirely consistent with the adversarial quality of rights as a practice that rights may be acted upon in a harmonious and non-confrontational manner. Recall the distinction between the possessive and verbal forms of claim: one may hold one's claims without ever having to claim them in the stronger, verbal sense. Where we are sure of our entitlements and confident that we will secure recognition we may act on them quietly, without much fuss. In practice, many people will go about their lives enjoying their rights without ever having to invoke them. Indeed, they may not even be aware that they have specific rights, as with the regular church-goer who has little need to dwell on or defend the freedom of religion they enjoy. Again, these people may be said to enjoy their rights without ever having to claim them. In such cases, the possession of a right creates a stability of expectations that allows agents to make plans in a predictable social environment, offering psychological assurance that they are an individual owed respect who is in a position of advantage to assert their rights if needed.

This routine usage should not detract from the distinct utility of rights in conflictual circumstances. As Robert Williams Jr. put it:

One cannot experience the pervasive, devastating reality of a 'right,'

however, except in its absence. One must first be denied that seat on the bus, one must see the desecration of one's tribe's sacred lands, one must be without sanitary facilities in a farm field, to understand that a 'right' can be more than a concept. A right can also be a real, tangible experience.⁵³

To the extent that one does not suffer these forms of deprivation and relates to rights on a purely intellectual level, one may be tempted to deride their conflictual character as unnecessarily divisive and anti-communal. It is however a valued feature of the practice linked to paradigmatic instances of rights politics. Many of the great rights documents, from the US Declaration of Independence to the South African Bill of Rights, were drawn up following major political and social conflicts. The 1793 version of the French Declaration of the Rights of Man even stated in Article 7 that 'The necessity of enunciating these rights supposes either the presence or the fresh recollection of despotism'.

In commenting on this adversarial dimension to the practice, Richard Flathman observes that if rights never had to be insistently acted upon by self-assertive agents, the concept would likely fall into disuse since it would be sufficient to offer ordinary reasons for action to other agents in terms of an objective expression of interests, in the form of 'wants' or 'desires', without the need to invoke the distinctive interpersonal authority of rights.⁵⁴ There are important areas of human freedom, such as the decision of how many hours to sleep each night, or what to name one's children, that are not typically thought of in terms of rights. This is not because they do not denote important areas of human freedom, but due to the fact there is no relevant agent who has a history of interference in this area. Rights are typically accorded recognition and enforcement not simply due to the importance of some good to X's, but due to the propensity and capacity of Y's for interference with it. The rights of workers, to sick pay, holidays, trade unions for example, protect areas where employers have historically interfered in pursuit of their interests.

⁵³ Robert A. Williams Jr, 'Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color,' *Law & Ineq.* 5 (1987), 103.

⁵⁴ This point is made by Flathman, *The Practice of Rights*, 72.

The differing propensity and capacity for Y's to interfere with X's enjoyment of A explains some of the historical and geographical variation of rights. Agent X may not even think of their access to A in terms of a right until the arrival of some Y with the propensity to interfere. This is the case with recent claims by concerned citizens for rights to digital privacy against the state, in response to the state's new technological capacity for blanket surveillance of Internet communications. It is common for philosophers to regret the inflation of rights discourse to include an ever-growing number of claims. Although this concern is no doubt justified in relation to some new claims, it should be recognised that the content of rights will by necessity evolve so as to track the changing capacities and propensities of interfering agents.

A final caveat with respect to the adversarial nature of rights politics is that, even in situations of aggressive claim-making, the appeal to rights is distinct from a situation of open conflict along the lines of Carl Schmitt's conception of politics as war-like antagonism of enemies in the mould of inter-state relations.⁵⁵ A claim may be asserted vigorously – and in combination with disruptive and coercive political methods - yet the underlying appeal to moral principles shareable with the addressee marks the claim as distinct from pure acts of aggression. The addressee, in the first instance, is being asked to act of their own volition and change their conduct on the basis of moral reasons taken to be authoritative for both parties. The claiming of a right shows a degree of respect to the other agent, agent Y, which is different from pure compulsion, as with a command given to an animal. Frequently, however the appeal to moral principles is not sufficient and a right will need to call on the support of third parties.

Section VI, The role of third parties

In addition to mobilising X's against Y's, a rights claim will appeal to some third party Z to intervene on X's behalf. A rights claim does not function purely by persuading the obligation-holder: it is also a political act that appeals to others in the community to recognise its authority and aid its enforcement. As Mill put it, rights are 'something

⁵⁵ Schmitt, *The Concept of the Political*.

which society ought to defend me in the possession of'.⁵⁶ With legal rights claimed in court, the third party is the judge, who is in a position of authority to oversee the relationship between X and Y. Hohfeld's model of claim-rights as a two-part relation tacitly invokes a third party in the form of a judge or legal official applying the law. Feinberg's analysis, too, is modelled closely on legal rights and implicitly invokes judges as a third party to the conflict. As I show in Chapter 5, theorists who favour a political model of institutional rights politics typically understand third parties as voters or legislators with indirect institutional authority through their input into parliamentary law-making. Yet once we conceptualise the activity of claiming beyond judicial verdicts, elections and parliaments, agent Z may be citizen-activists, campaign groups, political parties, or in certain cases of severe deprivations, other states and international institutions. Whereas the judge will enforce the right through activating the state's coercive application of the law, in politics third parties may be asked to carry out any number of political activities to support the rights claimant, including petitions, strikes, sit-ins, marches, meetings, boycotts, vigils, and other actions drawn from the protest repertoires of contentious action.⁵⁷ Each of these actions, characteristic of the practices of social movements, are ways in which third parties can politically support a right-holder against an obligation holder.

It is not automatic that the appeal will win the support of third parties. As we have noted, not all speech acts are successful. It may be that a claimed right lacks a sound moral justification and is therefore rejected with good reason by relevant third parties positioned to secure its authoritative enforcement. Alternatively, the claim may have a sound moral justification, but be ignored or opposed by those with the political power to enforce it. Immediate recognition is not the only measure of success for a rights claim however. A morally justified claim that is not recognised as valid by third parties with the political power to enforce it will have still achieved partial success if it persuades at least some others to recognise it and intervene on behalf of the claimant. This accounts for the temporal aspect of claim-making. It is often the case that

⁵⁶ John Stuart Mill, *Utilitarianism and Other Essays*, (Broadview, Ontario 2011), 89.

⁵⁷ Gene Sharp lists nearly 200 types of non-violent direct action in *The Politics of Nonviolent Action*, 3 Vols, (Boston: Porter Sargent, 1973). Many of these types amount to forms of non-compliance with authority, which provide possible avenues for resistance even for those whose situation would appear bleak and hopeless.

demands for moral rights initially ridiculed or ignored come to be seen as part of the general common sense thanks to ongoing practices of critique and activism that build political support over time.⁵⁸

Notably, whereas the judge has obligations (and rights) to oversee the relationship between X and Y that come with their particular institutional position, political agents, such as fellow-citizens, campaign groups, and so on, do not necessarily have specific obligations of this kind to uphold X's right against Y. These third parties may be said to have political responsibilities to support rights, which are different in sort to obligations. As Iris Marion Young notes, responsibilities are not the same as strict obligations.⁵⁹ While still morally obligatory, there is more openness in how they are to be fulfilled and those who fail to discharge their responsibilities are not susceptible to directed practices of moral blame in the same manner as those who fail to discharge obligations. Those individuals and groups, who, through the political work of organization and campaigning, defend and secure the rights of others, are thought of as fulfilling a general requirement to promote justice that comes with political membership of a community. Those who do not participate however are not directly to blame by rights-bearers in the manner of the obligation-holder who violates an obligation. Political responsibilities are vital nonetheless and they indicate that it is not only rights-bearers who are expected to achieve their rights - which in some circumstances might lead to a form of victim-blaming - but all those positioned as third parties to the claim in question. Plausibly, the less power the rights-bearer themselves has to alter their situation, the greater the political responsibility of third parties to assist them.

Section VII, Objections to rights as claims

⁵⁸ Gay marriage appears to be one right in the latter stages of this process. For a historical overview, see Ken Plummer, "Rights Work: Constructing Lesbian, Gay and Sexual Rights in Late Modern Times," in Lydia Morris (ed.), *Rights: Sociological Perspectives*, (Routledge, 2006).

⁵⁹ As Young puts it, 'We who share responsibility ought to take action, but it is up to us to decide what is reasonable for us to do, given our abilities and our particular circumstances'. She suggests that we may be criticized for taking action, but not blamed in the manner of those who violate a duty. There are a number of possible ways in which such responsibilities might arise, with Young herself opting for a 'social connection' model of responsibility, see *Responsibility for Justice* (Oxford University Press, USA, 2010), 143. I am grateful to Maeve McKeown (whose PhD looks at Youngian political responsibility) for bringing Young's work to my attention.

The idea that rights are intimately tied to claiming is in tension with theories of rights that stress their more consensual side as a set of shared norms and values. James Nickel, in particular, has articulated some powerful criticisms of the idea.⁶⁰ Nickel denies there is anything very interesting in thinking about rights as claims, outside of the performative claiming of rights in a legal context, ‘because any norm can be asserted and compliance with it demanded’.⁶¹ Nickel here misses the distinctiveness of rights vis-a-vis other concepts. It is true that other norms, such as equality or freedom, may be demanded, but they are not conceptually linked to a set of demanding responses from a particular agent in the manner of rights. Rights, as we have seen, confer a special kind of normative authorization to the right-holder to hold the bearer of the corresponding obligation to account and challenge them if the right is violated. The violation of the right is a wrong done to them, as an individual, because the duty is owed to them, and it is therefore morally appropriate that they protest against it. Other third parties may protest the violation of the right, but they are not empowered to claim it in the same manner as the right-holder. The claiming of a right further has an immediacy to it that these other norms do not. To claim that a right is being violated, is not to claim that some action or inaction ought to be recognised as wrong in the future, but that the action or inaction is a wrong in the here and now. The idea of a personal wrong, which is an immediate wrong in the here and now, is not expressed in appeals to more abstract norms such as equality or non-discrimination that cover the examples Nickel mentions.

Nickel further argues that to talk of a single speech act rights perform is redundant since most words, such as the word ‘good’, can be used to perform many speech acts. Nickel here confuses different types of speech acts. While it is true that most words can be used to ‘perform’ speech acts, only a sub-class of words are performative in the sense implied in that the utterance itself brings about a change in relations. Legally speaking, making a claim to a right is performative in activating a change in a legal relation. In politics, X’s claim is performative in situations where their rights are under threat and they wish it to be known that they are claiming their rights and

⁶⁰ Wellman, ‘Feinberg’s Two Concepts of Rights’; James Nickel, *Making Sense of Human Rights* (Oxford, UK: Blackwell Publishing, 2007).

⁶¹ Nickel, *Making Sense of Human Rights*, 27.

activating Y's obligation. As we have seen, this is not simply rhetorical: it changes the moral status of X in relation to Y. These are the illocutionary effects of a successful claim. The further effects of the speech act in terms of mobilizing fellow claimants and third parties in political support are its perlocutionary effects.

Nickel is correct that besides claiming rights, we can 'recognize them, question them, take them into account, disregard them, and use them as a basis for decision'.⁶² A number of actions can be performed with rights and whole categories of rights, such as inalienable rights, are defined by what can and cannot be done with them. These activities however do not express the significance of rights. Unlike claiming, the other activities Nickel mentions would not effectively meet the challenge posed by Nowhereseville since they could equally be expressed in the vocabulary of duties. In fact, the three features of rights Nickel identifies as especially important - 'high priority, definiteness and bindingness' could be articulated in a vocabulary of non-directed duties of care or indeed of some other norm, such as needs or interests.⁶³ The conceptual blurring of rights with the moral values they serve is a more general problem for those theories that decouple rights from their relation to duties and conceptualise them according to the desirable consequences they produce.⁶⁴

Nickel's problem with the idea of self-regarding claiming is that he wants to allow for the possibility of rights in a 'self-effacing society', which might rely almost entirely on an interested party claiming rights on behalf of others.⁶⁵ I have already noted how it is possible for rights to be claimed by representative agents in the cases of children, comatose adults and other categories of rights-holders who lack the capacity to claim their rights themselves. In any society with rights, there is likely to be at least some groups who are represented by altruistic others in this way. However, the notion of a practice of rights in which they were predominantly claimed by others sits in tension with a core feature of the idea that they confer the rights-bearer with discretion over their right on the basis that they are best placed to judge whether a particular exercise

⁶² Nickel, *Making Sense of Human Rights*, 24-25.

⁶³ Nickel, *Making Sense of Human Rights*, 25.

⁶⁴ See Saladin Meckled-Garcia, "Do Transnational Economic Effects Violate Human Rights?" *Ethics & Global Politics* 2, no. 3 (2009).

⁶⁵ Nickel, *Making Sense of Human Rights*, 28.

of the right is in their interest. Flathman usefully articulates this rationale with reference to two senses of the notion of authority: the rights-bearer *has* authority over the exercise of a right because they *are* an authority over what will best serve their interests.⁶⁶

The reasoning for such discretion is twofold: i) That people are the best judge of their own well-being ii) That they are best placed to defend their rights from incursions or else judge how others might help and support them. While the first reason expresses a familiar liberal presumption about individuals as moral persons (most famously set out by Mill), the second expresses a political assessment of how agents are strategically situated in relation to the ‘standard threats’ to their rights.⁶⁷ In cases of children and incompetents, where the agent is not the best judge of their interests, it may indeed be required that a third party agent assumes *de facto* authorization to claim rights on their behalf until the time they have the requisite agency to do so themselves. The same may also be required for those cases, such as a prisoner’s right against torture, where the rights-bearer may be best placed to judge their interests, but incapable of defending themselves against incursions or of alerting others to help.

In such cases, the rights bearer is still owed respect as one with the potential capacity to assume full authority over their interests, though temporarily unable to do so.⁶⁸ Aside from those types of cases where circumstances make it strictly necessary, there is a strong presumption against claiming rights on behalf of others. It would generally be regarded as an inappropriate form of paternalistic interference were a third party to claim a right for us without being authorized by us to do so, as it would be were they to insist that we exercise a right. To have a right involves discretion not to avail oneself of that right. Admittedly, within some legal systems, there are certain ‘mandatory’ legal rights, such as the right to vote in Belgium and Australia, where performance is not discretionary. The anomaly of mandatory rights of this kind poses difficulties for those theories that aspire to a general definition of all rights across law and politics, but we should acknowledge that these cases are anomalous precisely

⁶⁶ Flathman, *The Practice of Rights*, 83.

⁶⁷ Shue, *Basic Rights*, 13.

⁶⁸ As John Locke put it, ‘Children...are not born in this full state of equality, though they are born to it’, *Locke: Two Treatises of Government Student Edition* (Cambridge University Press, 1988), 304.

because of their paternalism, which sits in tension with the overall discourse.

Nickel's most powerful argument is that the notion of claiming is tied up with certain adversarial practices that risk limiting the appeal of rights:

A further problem is one can easily imagine the concept of a right functioning in cultures where actions such as demanding, claiming and protesting are frowned on as discourteous...we risk an ethnocentric account of the function of rights - one which overemphasizes social and legal procedures for bringing about the recognition of rights and which suggests that other cultures cannot have to adopt the concept of rights unless they are or become pushy and litigious.⁶⁹

In response, we might first question the empirical basis of the assumption - problematically shared with certain elite discourses within the 'Asian values' debate over the universality of human rights - that certain non-Western cultures are somehow more consensual and harmonious and therefore do not require an equivalent vocabulary of protest.⁷⁰ In fact, the vocabulary of rights has been found useful in many traditional societies precisely because it provides individuals with standing to protest against entrenched and oppressive structures of patriarchal, racial and class dominance. Typically, the only way in which these structures are overcome is by insistent and determined political opposition by affected individuals within the societies themselves. To recapitulate an important point: it is not the insistence with which these individuals push their claims that makes them morally correct, but their moral correctness that gives them the standing to claim insistently.

Jettisoning the idea of claiming, in favour of a more consensual vision of moral aspirations that society can unite around is flawed according to the realism standard. It downplays the fundamental clash of interests that typically characterize situations where rights are denied. The idea that claiming is a Western form of parochialism is misplaced, although there are some merits to Nickel's more general concern with a

⁶⁹ Nickel, *Making Sense of Human Rights*, 25.

⁷⁰ See Jack Donnelly, "Human Rights and Asian Values: A Defense of 'Western' universalism," *The East Asian Challenge for Human Rights* 69 (1999).

‘pushy and litigious’ culture. This argument however is more appropriately articulated not as an argument about Western bias or the idea of protest as such, but as an objection to the detrimental effects on political discourse of a legalistic culture of hostile and individualistic ‘rights talk’. This is a theme I return to in Part II where I examine legal constitutionalism and elaborate an alternate, more solidaristic model of rights politics in the form of activist citizenship.

Conclusion

In this chapter, I began by stipulating a basic account of a political right, according to which an agent A has a political right to X when they have a claim to X against another agent B. The claim is justified by authoritative moral principles and presumptively decisive in conflict with other reasons for action. The claim confers specific normative authorization on A over its enforcement against B and will function as an appeal for assistance to some third party C where necessary. This basic account explains how the familiar elements of the concept of rights cohere and interact with each other consistent with the requirement of fidelity. I also elaborated key features of rights relevant to their role in politics. Within this account, moral ideas familiar from the discourse of rights, such as dignity and equality, feature not as the justification for individual rights, but as part of the justification for the practice as a whole in conferring individuals with a particular status in relation to one another. The account demonstrates how the core ideal of equal respect is realized within a practice in which individuals recognize one another as having a moral standing that confers discretion over the exercise and enforcement of their recognised rights and, crucially, the capacity to author new rights as political circumstances develop and new threats emerge. I went onto present key features of rights relevant to the realism test, showing how rights function in circumstances marked by conflict, disagreement and inequalities of power. I noted the adversarial quality of rights and how this relates to the conflicts of interest they are typically invoked to decide. In such circumstances, rights function dynamically as a form of speech act in constituting the claimant as a political agent and the obligation-bearer as an adversary who benefits from an injustice. A right functions where necessary to mobilize third parties who have political responsibilities to intervene on the rights-bearer’s behalf. We now have the

core elements of the activist theory of rights. In the next chapter, I develop this account further in relation to recent philosophical debates about the limits and potential of rights as a tool to critique and reform of institutions, which involves paying closer attention to the nature of obligations.

Chapter 3: Rights through action: The power and possibilities of claiming

‘It always seems impossible until it’s done’.

- *Nelson Mandela*

In this chapter, I consider the role the concept of rights plays in the critique and reform of institutions, which involves reflecting on how and when they are claimed. As I have noted, there is a paradoxical quality to the idea of rights, which lies in the fact that although they purport to describe some state of affairs, they are paradigmatically uttered in situations in which the claimant believes the existing state of affairs is not as it ought to be. Invariably, this generates a significant degree of indeterminacy as to when the invocation of a moral right is appropriate. Philosophers frequently lament the loose and imprecise usage of the term in political argument linked to an ever-increasing proliferation of new claims. The language of rights, they allege, has become a convenient rhetorical tool to articulate any political goal deemed worthwhile in a way that risks debasing the term beyond use. Some philosophers draw the positivist conclusion that the language of moral rights is irredeemably confused and illogical and that talk of rights should be restricted to those rights recognised and enforced in law.¹ Others wish to preserve the discourse of moral rights as a tool of social criticism but seek to tame its utopianism by reducing the gap between aspiration and actuality through the specification of a determinate set of criteria for when it is appropriate to claim a right politically. The most systematic and influential statement of this sort has come from Onora O’Neill in an analysis of the social and economic rights found in international human rights declarations.² O’Neill provides a powerful deontological critique of political and philosophical talk of universal social and economic rights in

¹ The most vociferous proponent of this view today is Raymond Geuss, *History and Illusion in Politics* (Cambridge University Press, 2001); see also Susan James, “VII—Rights as Enforceable Claims,” in *Proceedings of the Aristotelian Society (Hardback)*, vol. 103 (Wiley Online Library, 2003).

² The main works I focus on are Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge University Press, 1996); ‘Women’s Rights, Whose Obligations?’, *Bounds of Justice*, 2000; and “The Dark Side of Human Rights,” *International Affairs* 81, no. 2 (2005).

circumstances of under-development where the duty-bearer and attendant costs of fulfilling the duty are indeterminate due to an absence of capable institutions. O'Neill argues that all rights must satisfy a claimability condition in specifying both who the claim is held against and how they are to deliver it. Her philosophical argument for a claimability condition is accompanied by an account of the deleterious political consequences of that condition not being satisfied. If it is not in principle clear where a claim can be pressed, she argues, proclaiming universal rights to such things as health, education and welfare is at best 'rhetoric' and at worst a 'bitter mockery of the world's poor' that breeds false hopes and cynicism.³

An important benefit of O'Neill's writings has been to encourage a focus within the philosophical literature on rights not just on the justification and content of rights, but on the more challenging political problem of how these demanding theories are to be realised in practice. She thus shares the orientation of my analysis towards thinking about how rights and obligations relate to political action, not passive possession. Her writings compel us to think about the function of rights as a discourse of social criticism and the constraints on that discourse imposed by the requirement of feasibility. The challenge, as I interpret it, is to find an account of rights that is not so vague and utopian so as to lose their special political significance as claims against others, but not too pragmatic and uncritical as to constrain rights claims to the political status quo. I argue that while O'Neill is correct to insist on a link between rights and obligations, she places an overly-demanding feasibility constraint on the content of rights and misunderstands how rights function politically when not institutionally enforced by reducing them to helpless rhetoric divorced from political action. In Section I, I set out O'Neill's claimability condition for a right before turning in Section II to a response by John Tasioulas, which separates the claimability of a right from the 'moral reality' of its existence.⁴ In Section III, I defend a practically utopian position that combines the best of both positions. It allows the capacity for moral critique (which is a strength of Tasioulas's view) with the political focus on the realization of rights (which is a strength of O'Neill's). In Section IV, I discuss the relationship between questions of political agency and feasibility. I present a dynamic

³ O'Neill, "The Dark Side of Human Rights", 133.

⁴ Tasioulas, 'The Moral Reality of Human Rights'.

picture of how rights themselves can be understood as political acts that contribute towards their own realization. The declaration of a right instrumentally makes its achievement more likely by constituting the claimant as a political agent, identifying a political adversary who bears obligations and mobilising the support of third parties. In Section V, I show how claimants do not merely argue for rights in politics, but may also exercise them directly in the absence of official recognition and this is a crucial way in which rights have been defended and expanded.

Section I, O'Neill's claimability condition

In this section, I set out O'Neill's argument that rights must be claimable, which she develops across several of her writings. Although O'Neill's primary concern is with social and economic rights, her analysis of how considerations of feasibility should constrain claims has broader relevance. O'Neill notes a categorical difference between 'liberty' rights to civil and political freedoms and rights to 'goods and services'. She rejects the libertarian view that universal rights to goods and services require universal duties of provision and are therefore incoherent due to the impossibility of everyone acting individually on duties to provide health, education, and so on, to everyone else. These rights are coherent so long as 'those aspects of the counterpart obligations which have to do with delivery are distributed or allocated to specific agents or agencies'.⁵

On this point, she agrees with Henry Shue's riposte to libertarians. However, O'Neill rejects Shue's further move, which places rights to goods and services in the same category as liberty rights. Shue had pointed out that liberty rights also entail positive obligations of protection on specific agents, as, for example, with the state's obligation to maintain a system of police and criminal justice to ensure the rule of law is respected.⁶ For O'Neill, this does not adequately distinguish between 'second-order' obligations of enforcement and the primary obligation itself. The second-order obligations of enforcement presupposes that we already know the scope and content

⁵ O'Neill, *Towards Justice and Virtue*, 62.

⁶ Shue, *Basic Rights*.

of the primary obligations to be enforced. The correspondence of liberty rights to primary obligations of non-interference is well-defined even where institutions are missing or weak: we may know that we all have obligations not to interfere in one another's freedom, which are claimable or waivable, even in the absence of a legal system that would make those obligations effective. In contrast, the correspondence of rights to goods and services to obligations of provision is always hazy in the absence of institutions to allocate those obligations. Crucially, it is not the case that these institutions enforce pre-existing primary obligations. Rather, it is only through institutions that the primary obligations are given specific content and allocated. This is in tension with the traditional view of welfare rights as pre-institutional universal moral rights and matters when it comes to who is to be held accountable. Where there has been a violation of the right against torture, say, it will be clear who is responsible for the violation even in circumstances where institutions are missing. For a welfare right, such as the right to food, it is indeterminate who, if anyone, should provide it in the absence of an institutional scheme of provision, which renders it systematically obscure who has violated the right. There is a genuine 'asymmetry' between liberty rights and rights to goods and services, therefore, according to O'Neill.⁷

The first point to be made in response to O'Neill is that she overdraws the distinction between liberty rights and right to goods and services. She overstates the extent of our knowledge of the content and cost of obligations that correspond to liberty rights and understates our knowledge of those that correspond to social rights. In certain cases, the obligations that correspond to social and economic rights will be far more determinate than those of classic civil liberties. A right to liberty, for example, implies a universal right not to be detained, but also a right to a fair trial, which implies special obligations fulfilled by a complex institutional system of courts and legal aid. There are, conversely, determinate universal obligations that correspond to social and economic rights. O'Neill treats a right to health as something of an absurdity since she interprets it to mean an obligation to ensure the health of every other citizen, which is medically impossible in even the most advanced societies. The obligations that correspond to a right to health, however, are perfectly intelligible in the first instance

⁷ O'Neill, "The Dark Side of Human Rights", 428.

as negative duties not to recklessly endanger the health of others. An oil company that pollutes farm-land that locals rely upon as a source of food and drinking water, for example, would be in clear violation of the right to health. In the case of both social rights and liberty rights there will be a mixture of universal rights of non-interference and special rights of enforcement and provision. We may grant the fact that it will generally be possible to say more about the obligations that correspond to liberty rights than social rights in advance, but this does not map on to a categorical difference as O'Neill suggests.

This point has been made effectively against O'Neill by Tasioulas.⁸ The reason I highlight it here is not to offer a defence of social rights as such, but to highlight some preliminary difficulties in viewing obligations exclusively as the 'active' part of justice, as O'Neill urges us to. O'Neill assumes that social and economic goods must necessarily be provided to passive claimants by some central agency (her term 'goods and services' is telling) neglecting the ways in which people may exercise these rights for themselves independently of state provision. O'Neill mentions universal obligations of abstinence that correspond to rights to goods and services, but these are understood as obligations not to interfere where an institutional scheme of provision is already in place. Adopting the point of view of the central planner obscures how people may be acting on their rights to social and economic goods independently of institutions. This is not to say that institutional provision is not important, or indeed crucial in many instances, but we must be sensitive to how individuals may be acting on their own interests and purposes on their own initiative. To ignore this fact diminishes independent forms of civic initiative and places institutions in an illiberal role as both creator and guarantor of rights.⁹

Although O'Neill's categorical distinction between the two 'types' of rights does not hold, this does not undermine the force of her general critique that talk of rights where the duty is unclear systematically obscures what is at stake. In fact, the critique might be extended further to liberty rights, so that a right to fair trial interpreted to require the provision of legal aid, for example, would have to say how the duty to

⁸ Tasioulas, 'The Moral Reality of Human Rights'.

⁹ I examine one such initiative in Chapter 8 where I examine popular housing activism.

provide lawyers to the poor could be fulfilled. A logical implication of O'Neill's position is that all rights, and not just social rights, must be claimable. The precise criterion of claimability however is not always clear in her writings. O'Neill's most common formulation implies that only the *identity* of the duty-bearer be known, but elsewhere she states the more demanding condition that 'claims about obligations have to specify not only what is to be accorded, but which obligation-bearers are going to have to do what for whom and at what cost'. This broader conception of claimability, as a requirement that both the *identity* and *content* of the obligation be specified, is the best interpretation of O'Neill since it reflects her concern not only with an absence of institutions, but with cases of 'weak' institutions due to political conflict or scarce resources.¹⁰ However, where O'Neill discusses the content of the duty, it is not always clear what degree of determinacy is required. Her view can be distinguished from the strong-form contemporary positivist position that a right must be both recognised and enforced by institutions in order to exist.¹¹ Under O'Neill's view, a right need only be potentially *enforceable* given the state of existing institutions, not actually *enforced*. As she puts it:

Everyone understands positive rights are institutionalized obligations, but the point of appealing to moral rights is not to endorse the positive rights embedded in existing institutions. The point is often to challenge existing positive rights (or their absence) and, of course, existing positive obligations (or their absence), or to justify different rights and different corollary obligations.¹²

O'Neill's view, then, is one that allows for the articulation of moral rights as a critique of existing law and institutions, but within certain bounds of institutional feasibility so that a plausible and reasonably determinate account of delivery can be given. I examine possible responses to this position in the next section.

¹⁰ See O'Neill, "The Dark Side of Human Rights," 435. Elizabeth Ashford also interprets O'Neill as having a broader notion of claimability, see "Inadequacy of Our Traditional Conception of the Duties Imposed by Human Rights, The," *Can. JL & Jurisprudence* 19 (2006); Jesse Tomalty, by contrast, takes a more restricted view. She sees the problem O'Neill poses as largely resolved once we specify that states are the duty-bearers in the case of international social and economic rights, Tomalty, 'The Force of the Claimability Objection'.

¹¹ Geuss, *History and Illusion in Politics*; James, "VII—Rights as Enforceable Claims."

¹² O'Neill, 'Women's Rights, Whose Obligations?', 99.

Section II, The moral status of rights

There have been a number of responses to O'Neill's view from theorists whose principal concern is to defend the existence of universal social and economic rights. These responses take one of two broad approaches. Either they dispute the claimability condition and argue that rights exist even in the absence of identifiable duty-holders or they accept the claimability condition and seek to identify real-world duty-holders against whom social and economic rights can be claimed.¹³ Since I am less concerned with the specific justification of universal social and economic rights (though what I have to say will have implications for this debate) than with the broader question of how rights function in politics, I focus on the former type of response as given by Tasioulas.

Tasioulas defends the existence of social and economic rights on the basis of an account that separates questions about the identity of the duty-bearer from the moral truth of its existence. This approach is based on the version of the interest theory as set out by Joseph Raz, according to which a right does not stand in a logical relationship to a duty, but in a normative relationship of justification. Under this view, it is proper to speak of rights provided one can justify them on moral grounds even if one cannot say who should bear the obligation. As Joseph Raz puts it, 'one may know of the existence of a right and the reasons for it without knowing who is bound by duties based on it or what precisely are these duties'.¹⁴ It follows from this theory that in order for social and economic rights to be justified, it is not necessary that they be claimed against appropriate agents capable of discharging the duty. Justification of a right is a one-step process: rights are justified by the interests that ground the claim-to with the specific direction of the claim-against left open. As Tasioulas puts it, 'a right exists if an individual's interest, taken by itself, has the requisite kind of importance to justify the imposition of duties on others variously to respect, protect, and promote

¹³ Tasioulas is an example of the first type of approach 'The Moral Reality of Human Rights' along with Jude Browne, 'O'Neill and the Political Turn Against Human Rights,' *International Journal of Politics, Culture, and Society* 26, no. 4 (2013). The most influential example of the second type of approach is Pogge, *World Poverty and Human Rights*, see also Tomalty, 'The Force of the Claimability Objection' (2014).

¹⁴ Raz, *The Morality of Freedom*, 184.

that interest'.¹⁵ The only political considerations relevant to normative reasoning about whether an interest is of sufficient importance to ground duties are general facts about our society and its historic and political conditions. In conditions of 'modernity', with complex integrated economies and central state bureaucracies, the social and economic rights found in international human rights documents are justified morally justified and may be said to exist as fully-fledged rights. We leave the question of deciding who has what duties - what scheme will realise social and economic rights - to a subsequent process of strategic reasoning that makes reference to practical considerations of which agents are appropriately placed to deliver them.

Tasioulas is motivated by a concern to preserve rights discourse as a language of critique. He rightly warns that if we restrict talk of rights to cases where there are effective institutional enforcement systems, then we lose the use of rights to address circumstances where those enforcement systems are not in place. There has to be some distinction between a right that exists and is violated and a right that exists and is not violated. This accords with my argument so far that rights matter precisely in those situations where they are denied. However, Tasioulas jettisons the directed nature of rights as prescriptive to other agents accountable for its realisation. The worry is that once we lose the directed nature of rights, as objects which may be claimed against others who bear the corresponding obligation, they become reduced to mere reasons within political debate and so lose their special normative role.¹⁶ As we have seen, a moral interest, by itself, which does not provide definitive reasons for action to specific agents, is best thought of as a claim-to. It is prescriptive in the sense that those appropriately positioned should do something if they hear it. It does not become a right however until the second, and often more difficult step, in the justificatory process, of justifying the claim-against has been completed.

An advantage Tasioulas claims for his account is that it preserves the 'dynamic' aspect of rights so that a right can be used to argue for new obligations as political circumstances change. A right to health, for example, may generate a new obligation to provide a certain drug should medical advances mean that drug can be provided

¹⁵ Tasioulas, 'The Moral Reality of Human Rights', 77.

¹⁶ This point is pressed against Raz's interest theory by Simmonds, 'Rights at the Cutting Edge', 204.

much cheaper. The question of which duties are generated by which right and who is best placed to provide them requires the weighing of costs and benefits and the balancing of rights against other concerns. Any full specification of the obligations in advance risks prejudging these political debates, creating a static inflexible framework of rights that cannot adapt to evolving concerns.

As others have pointed out, the difficulty with thinking of rights in this way - as moral intermediaries between interests and duties - is that reasoning about rights does not follow this two-step sequential process from claim-to to claim-against. The justification of the object of a right and its direction are interconnected.¹⁷ Moral reasoning about rights does not necessarily proceed sequentially from the identification of A's claim-to, based on the importance of some good to A, to the identification of some B who it is held against by virtue of the fact some goods only become available for distribution by virtue of A being in a particular relationship with B that renders such goods claimable in the first place. An employee's right to paid holiday against their employer, for example, only makes sense by virtue of the employer-employee relationship in which they stand.¹⁸ Tasioulas is correct that we need not state in advance exactly how a right is to be provided, but he does not distinguish adequately between the question of the identity of the duty-bearer and the scheme of delivery.

The greater force of Tasioulas's argument is against the idea that we must specify in detailed terms exactly how a right it is to be provided. This is because we wish to preserve the idea that individuals have strong moral claims in situations where institutions are under-developed. He is correct that the abstract character of rights, which allows their flexible deployment in novel circumstances, is an important strength of the discourse we should be reluctant to jettison. Yet in discussing our inability to know the 'implications' of a right, he moves too quickly from the idea that we do not have to specify how exactly a right is provided through an elaboration of its content of the obligation to the idea that we do not need to specify against whom the

¹⁷ See Matthew Kramer, "Rights without Trimmings," *Kramer, M*, 1998; Meckled-Garcia, "Do Transnational Economic Effects Violate Human Rights?"; Tomalty, "The Force of the Claimability Objection to the Human Right to Subsistence."

¹⁸ I borrow this example from Tomalty, 'The Force of the Claimability Objection', 4.

right is held.¹⁹ The difference is important. It is the difference between a rights claim being action-guiding against a specific agent, even where they cannot yet meet it, and its being action guiding to no one in particular. A rights claim against a specific agent will let that agent know that it is they who are to act even if they are incapable of fully discharging their obligation at the moment the right is claimed. There are likely to be steps that obligation-bearers can fulfill towards the realisation of a right even if it is not immediately achievable.

Crucially, the requirement that an obligation-bearer be specified (even where the precise content of the obligation is not) preserves the political relationship between claimant and addressee. There are likely to be political activities of critique, condemnation, campaigning, protest, disobedience, and so on, directed from the claimant and third parties towards the addressee, which will in turn prompt actions and responses on their part. This political relationship preserves an ongoing process of accountability. A right that is claimed, without being claimed against anyone in particular, is likely to obscure relations of accountability. The ambiguity within Tasioulas's view over who precisely bears the obligations may even be dangerous insofar as it obscures relations of power and the fundamentally important political question of who is to be held accountable for what. This would aggravate concerns expressed by sceptics, which I discuss in Chapter 7, that the current international human rights regime is paternalistic and unaccountable, with powerful international institutions, states and NGO's, acting in the putative interests of non-specified individuals who have no direct say over their behaviour. It is notable that in real-world politics, those who assert rights as a form of critique very rarely express them as free-floating ideals directed at no specific agent. This is more a habit of philosophers than political activists who are generally compelled by the logic of political circumstances to identify who their political opponents are and which are the individuals, groups and institutions frustrating the achievement of their rights.

¹⁹ Tasioulas, 'The Moral Reality of Human Rights', 95.

Section III, The role of abstraction

I have said that the identity of the obligation-bearer is required for the justification of a right, but some degree of indeterminacy is permitted in how the obligation is to be discharged. I now aim to show that some degree of indeterminacy is not only unavoidable with rights as a concept, but that it often serves a valuable political role in practices of critique and accountability. Rights are always to some degree vague and indeterminate. They are not a detailed manual for others on how to act, but by necessity omit certain details to allow for changing circumstances and some latitude in the discharge of an obligation. This is true not only in the dynamic world of politics, but across the discourse of rights as a whole. It is rarely (if ever) the case that the specification of a duty is fully determinate in the specification of a right, so that one is the mirror image of the other. Even in the paradigm case of a creditor's contractual right to the repayment of money by a debtor following a loan there is some latitude in how the debtor may deliver on their obligation. Take a case where A lends B £10, which B is contractually obliged to pay back. In this case, A's right to the £10 corresponds to B's obligation to A to pay him back the £10. Yet even with such a tight correlation between A's right and B's duty, there is some discretion in how B can fulfill the obligation. A may have discretion to pay by cheque or by cash. If A is promised cash, B may have discretion to pay A back with one £10 note, with two £5 notes, or five installments of £2, and so on. There are a large number of possible ways in which B can deliver on their obligation.²⁰

We are unlikely to find any rights where there is not some degree of indeterminacy and discretion in how the duty is to be fulfilled. This openness does not pose a major problem because rights are structured so that the right-holder themselves exercises a controlling influence over the actions of the duty-bearer to ensure they do not stray too far from what is morally expected of them. The possession of a right may not provide its bearer with an objective guarantee of future satisfaction (such a guarantee

²⁰ I adapt this example from George Rainbolt. As he notes, the unavoidable latitude in how duties are discharged renders problematic the idea of a binary categorical distinction between 'perfect' duties, which are determinate, and 'imperfect' duties, which are indeterminate, suggesting the distinction is more scalar depending on the degree of determinacy involved, 'Perfect and Imperfect Obligations,' *Philosophical Studies* 98, no. 3 (2000).

would be impossible given the contingency of human affairs), but because of the relations of accountability it creates. If A lends B £10, which B goes on to spend immediately, A does not thereby lose her right to the £10 because B can no longer repay it. B continues to owe A £10 and will be accountable to B for its repayment. If A asks B, 'Where is my £10?', A will usually expect some account of when and how they will receive their money back. Agent A may accept that B pays her half of the money now and half of the money back later or she may choose to take payment in the form of B mowing her lawn or some other service. If B refuses to co-operate entirely, and refuses payment, then A has the option to activate their right through an appeal to a third party in the form of a judge who can enforce the contract in court. The point to draw from this simple example is that there is an ongoing exchange between the various parties that persists - and indeed becomes more important - in circumstances where the obligation-holder cannot meet their obligation.

The situation with political rights will undoubtedly be more complex and it will typically be less clear what counts as the violation of an obligation. The crucial question, though, is not whether some indeterminacy is permitted but what degree of indeterminacy is permitted in the specification of an obligation. For O'Neill, to claim a right we must know both the identity and the content of the obligation in terms of a 'cost' the obligation-bearer is capable of discharging. This interpretation of claimability suggests institutions must have the resources and structures in place to deliver the right in the here and now. Given the open-ended character of political decision-making, it is preferable to say that they should be plausibly in a position to fulfill it now or at some future stage, which requires a conditional evaluation of what political changes may be necessary to bring about the fulfillment of the duty.²¹ A strict interpretation of the capability condition, along O'Neill's lines, proves too restrictive. Take, for example, a government whose revenue is sufficiently low that it can justifiably claim it lacks the money to fulfill its obligations to provide social housing, yet at the same time its tax base is restricted by the fact wealthy millionaires with political power pay only minimal tax. Does the government have the capability to fulfill the duty to provide social housing? It is unclear whether O'Neill's view allows

²¹ See the discussion of 'dynamic duties' in Pablo Gilabert, "Debate: Feasibility and Socialism," *Journal of Political Philosophy*, Vol 19, No. 1 (2011).

for the claiming of a right in such circumstances. Perhaps it would, because the resources to provide the right are within reach in the form of the untaxed wealth. But what if the wealthy elite were so entrenched in their privilege that any challenge to their wealth would result in a coup against the government? Or alternatively, what if they keep all their money in off-shore bank accounts that are not known about?

The difficulty is that, in politics, those with the power to bring about reforms will frequently misrepresent questions of feasibility to suit their interests. To borrow a distinction from David Estlund, many political responses that are put in the manner of ‘we can’t do that’ (a legitimate response based on what is possible) are more accurately understood as ‘we won’t do that’ (an illegitimate response based on what people are motivated to do).²² Such cases are all too familiar from the history and practice of rights. In cases of demands for civil and political freedoms, political elites will claim that however desirable such freedoms may be, their recognition will invariably lead to political conflict and instability that will undermine the stability of institutions and hence freedom generally in the long run. In the case of social and economic rights, those in a position to effect progressive change point to impersonal forces in the domestic and global economy that supposedly render deliberate political action towards the achievement of social rights futile and self-defeating. The ideological repackaging of ‘won’t do that’s’ as ‘can’t do that’s’ is an important means by which political and economic elites maintain their privilege. In practice, any judgment about feasibility will be influenced by a number of contingent political factors, and an important part of that judgment will be about whether there exists the political will and the organised political forces to campaign for and bring about the right in question. The question of feasibility, then, unavoidably implicates questions of political agency, which is the subject of the next section.

²² David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2009), 259. I leave aside the many hard cases that fall between these two possible responses; in particular at what point motivational limits count as a strong constraint on feasibility of the former kind. See the discussion in Patrick Tomlin, “Should We Be Utopophobes about Democracy in Particular?,” *Political Studies Review* 10, no. 1 (2012).

Section IV, An alternative account of political agency

An important fact to consider with respect to feasibility is that the claiming of a right itself is a form of political action that can contribute to the conditions of its own realisation. O'Neill overlooks this dynamic and operates instead with a restrictive conception of agency that singles out obligations as the 'active' part of justice.²³ At times, O'Neill comes close to implying that obligations do all the work and the concept of rights is entirely redundant.²⁴ Yet she also suggests that the distinction between justice and virtue may be that while 'justice is owed and hence claimable or waivable...virtuous action, even while required, is not owed'.²⁵ She does not explore the significance of justice being 'claimable or waivable' except for in certain passages where she allows that rights may have some 'rhetorical force' in persuading government to reform. The most generous accounts of the role of rights she gives is the following:

At best a premature rhetoric of rights may have political point and impact...may guide agitation, politics and legislation in a quest for institutionalized, claimable rights.... The resonating ideal may galvanize people who once conceived themselves as subjects may come to conceive themselves as citizens who can insist justice is violated and claim what is owed to them. But at worst a premature rhetoric of rights can inflate expectations while masking a lack of claimable entitlements.²⁶

It is generally wise to be cautious when a political statement is dismissed as an instance of rhetoric, since this label often obscures more than it clarifies. First, rhetoric, which involves the construction and defence of political demands, entails the legitimation of certain ideas, behaviour, individuals and groups and the de-legitimation of others. It is not purely passive. In the case of rights, such rhetoric is not only addressed to obligation-bearers, in the form of governments, but to third parties in the form of fellow citizens and organisations within domestic and global civil society to build up political power and support through the mobilisation of political constituencies, the construction of alliances, the justification of political programmes, and so on.

²³ Onora O'Neill, 'Agents of Justice,' *Metaphilosophy* 32, no. 1–2 (2001), 185.

²⁴ As for example where she says 'we can take full account of rights from the perspective of obligations', O'Neill, *Towards Justice and Virtue*, 146.

²⁵ O'Neill, *Towards Justice and Virtue*, 139.

²⁶ O'Neill, *Towards Justice and Virtue*, 133.

The form of argument O'Neill appears to have in mind is what might be called the *aspirational* view of the role of moral rights. The view that moral rights function in an aspirational sense as a set of motivational standards for states to strive towards is common in much of the philosophical literature (it is implicit in Tasioulas's view). It is a view which places the onus on the state and its officials to recognise the correct moral values and live up to them and to that extent it can be regarded as politically naïve, over-estimating the efficacy of worthy moral ideals in the absence of the political agents to bring them about. Under the activist theory, by contrast, the practical import of rights comes when they are used by rights bearers themselves to galvanize forms of political action. This kind of relationship between political agency and feasibility is discussed by Paolo Gilbaert. An important feature of political action and thought, he notes, is that some conditions of feasibility can be not only found, but also made by us. In this sense, 'something like the slogan used by the World Social Forum that "another world is possible" might be interestingly self-fulfilling...if we act on the idea that another, more just, world is practically feasible, then it might actually turn out to be so'.²⁷ This underscores a relevant fact about political feasibility, overlooked by more static approaches oriented to an institutional evaluation of existing rules, procedures and delivery mechanisms: the objective limits of what is possible are to a great extent shaped by our thoughts, beliefs and actions about what we take to be possible.

Through the deliberate cultivation of an optimistic political outlook accompanied by concerted pressure, campaigning, civic association and direct action, rights claimants and their supporters do not merely respond to the existing limits of political possibility, but contribute towards shaping and expanding them. I term this a *practically utopian* view. It is practical because it demands attention to the agents who will deliver on obligations of justice and preserves the vital relations of political accountability that links them to rights claimants. It is utopian because it does not restrict rights claims according to contingent institutional facts and circumstances that can be overcome through political action.

²⁷ Pablo Gilbaert, 'The Feasibility of Basic Socioeconomic Human Rights: A Conceptual Exploration,' *The Philosophical Quarterly* 59, no. 237 (2009), 681.

I turn now to address the second political aspect of O'Neill's critique, which consists in a pessimistic evaluation of the effects of rights discourse even where enforcement mechanisms exist. Much of her argument is focused on the inertia-inducing effects of state institutions and bureaucracy. As she puts it:

[W]hen claimants point to other's (but which others?) duties they do not have to take much action, and may even wrap themselves passively in a cloak of grievance or of resentment. They do not need to work out who will have to do what for whom at what cost, let alone what they themselves will have to do at what costs to themselves. In short, the rhetoric of rights, although more active than a rhetoric of pleading, or mere subjects, is still a rhetoric of recipience rather than of activism. It still takes the perspective of the claimant rather than of the contributor, of the consumer rather than the producer, of the passive rather than of the active citizen.²⁸

There is some merit to this critique insofar as it is directed at a certain litigious culture of rights.²⁹ I go on to argue in the next chapter that a litigious culture can indeed depoliticize rights and encourage a rigid and paternalistic framework. My principal concern here is to offer an alternative view to the one that casts rights-bearers as purely passive recipients. The idea that rights are a passive idea that mocks the poor implicitly adopts a perspective that it is 'we' - the wealthy and privileged - who are the ones proclaiming them and not the poor themselves. It overlooks the effects of rights in bolstering self-esteem and assertiveness of individuals as agents who can legitimately demand proper treatment, placing them in the 'referential range of self and others', as Patricia Williams put it. O'Neill's analogy of the rights-bearer as consumer and the obligation-bearer as a producer is misleading. The market-based analogy, on the standard economic model, suggests a harmonious picture in which both sides realize their interests through the transaction. Yet rights involve a clash of interests: the 'producer' of the right is not some neutral entity concerned for the well-being of a passive 'consumer', but often a party who benefits from its denial and will be reluctant to concede it.³⁰ As I show in the next section, this may require the remedial political

²⁸ O'Neill, "Women's Rights, Whose Obligations?", 101.

²⁹ I discuss the accusation that rights are depoliticizing in greater depth in Chapters 4 and 7.

³⁰ This point is made by Browne, "O'Neill and the Political Turn Against Human Rights".

exercise of the right itself, regardless of its institutional enforcement.

Section V, The political exercise of rights

By this stage, I have considered how a rights claim functions as a political act and suggested that the claim itself is frequently linked to certain forms of (non-verbal) political action. I now consider the question of what types of political action so as to set the stage for the more practical discussion of rights politics in Part II. We are most familiar with the activation of rights in a legal setting. When HLA Hart wrote that ‘it is hard to think of rights except as capable of exercise’, he was thinking of the legal powers of enforcement, waiver and compensation that relate to legal rights.³¹ Rights may also be exercised in a political sense when they are consciously claimed and acted upon by agents directly in defiance of political authorities and conventional norms. Historically, this has been an important means by which rights have been enforced and created. In the first category of *enforcement* cases a right recognised by the law and/or social convention, but not enforced due to the inefficacy, corruption or unwillingness of relevant obligation-bearers, is exercised in order to give an empty formal right (which exists only or in the reassurances of political officials) concrete effect. One such example is the ‘Reclaim the Night’ protests by women, who march through urban areas together at nighttime to assert a right to be free from street harassment and violence; a right technically upheld in both law and social convention yet routinely flouted.³² In the second category of *creative* cases, a right not recognised by the law and/or conventional morality is exercised as part of a claim that such a right should be recognised and enforced.³³ The flouting of anti-drug laws by mass gatherings of protesters openly smoking marijuana together - which has become an annual event in some Western countries – is an example of this sort, since the right they claim to medical and recreational usage of marijuana does not exist under law.

³¹ H. L. A. Hart, *Essays on Bentham*, (Oxford: Oxford University Press, 1982), 183–84.

³² "Reclaim the Night - Why Reclaim the Night?" *Reclaim the Night - Why Reclaim the Night?* Accessed December 13, 2014. <http://www.reclaimthenight.co.uk/why.html>.

³³ Verma, Rahul. "Why Thousands of People Are Going to Get High in Hyde Park." *The Guardian*, April 16, 2014. Accessed December 13, 2014. <http://www.theguardian.com/society/shortcuts/2014/apr/16/high-in-hyde-park-420-day-cannabis>.

In both categories of cases, rights are exercised in an oppositional fashion to meet the object of the right independently of its positive enforcement as part of a political claim that challenges law and dominant morality. A right that applies in one area is exercised in a new area or a right that has been granted to one group of people is exercised by another in a dynamic, unfolding process. We are perhaps most familiar with the idea of rights being exercised in this way in the case of the classic civil rights that date back to the 17th century. In England, subterranean congregations of Catholics and Protestant dissenters practiced their moral rights to religion long before freedom of religion was officially granted. The rights religious groups were eventually granted were exercised by political groups in the 18th and 19th centuries to hold meetings and demonstrations long before those rights to political association were officially legalized. In turn, the history of a free press is one of individuals practicing their rights to speak freely in the face of state persecution and imprisonment.³⁴ Initially, the exercise of these civil and political rights functioned as a claim against the state for repeal of the prohibitive law. They eventually took the form of a claim against the state that the freedom in question is of such fundamental importance that it deserves special legal and constitutional protection to guard interference from the state and private citizens. The eventual recognition of these freedoms in law was often a *de jure* acknowledgement of a *de facto* right that already existed.

The political exercise of a right may function to test, challenge and overcome the limits prescribed by entrenched modes of thought and behaviour. Jacques Rancière tells the story of a woman in France in 1848 who turned up to present herself for election at a time when women did not have the vote, bringing to public attention the contradiction between the universal principles of political rights proclaimed by the state and their own disenfranchisement.³⁵ Here, the right was exercised against the state, which had an obligation to provide women with the vote, and called on the support of fellow citizens as third parties to bring the right about through campaigning and reform. At times, those denied the right to political participation

³⁴ Tilly writes that historically rights were won and bargained for by ‘pushing at the limits that attached existing rights to certain populations, activities, organisations, or places’. For example, those who enjoyed rights to assemble as taxpayers or members of a religion ‘dared to use the right to assemble’ for the ‘formulation and expression of shared demands.’, *Social Movements, 1768-2012*, 54.

³⁵ Rancière, ‘Who Is the Subject of the Rights of Man?’, 303.

physically presented themselves at a political institution from which they were officially excluded. This was the case with the *sans-culottes* who in 1792 burst into the meetings of the National Assembly to observe and participate in its debates. In doing so, they meant to challenge the distinction between ‘active’ and ‘passive’ citizenship according to which the constitution made property the exclusive basis of citizenship.³⁶

The denial of rights to excluded groups, such racial minorities and women, is often justified - tacitly or explicitly - through systems of thought which deride them as servile and subordinate in nature. The excluded are denied the recognition respect that members of the ‘in’ group accord to one another on the basis that they lack the capacities for autonomous judgment and decision that characterizes those who count morally speaking. The surest refutation of this reasoning is the political demonstration of these very capacities through the direct exercise of the right they are denied. This form of action can make what would otherwise be dismissed as idealistic or impractical real and tangible; the ability to act on the right in time and space can demonstrate that the right ‘exists’, despite its absence in positive law. It is difficult for self-interested parties to dismiss the right as utopian, since, there it is, manifest in the here and now.

In Arendtian terms, these forms of action will often manifest the dimension of politics as ‘appearance’, appropriating spaces not previously branded as political so that individuals or groups ‘make their appearance explicitly’, coming into being as political subjects, forming relations of solidarity with others and creating shared claims.³⁷ As Frances Fox Piven, a historian of social movements notes, the impact of disruptive uprisings in which groups rise up and defy the rules that ordinarily govern them can be profound, ‘since the drama of such events, combined with the disorder that results,

³⁶ Engin Fahri Isin, *Being Political: Genealogies of Citizenship*, (University of Minnesota Press, 2002), 192.

³⁷ Arendt, *The Human Condition*, 199. Arendt is often criticised for the rigid distinction she draws between the public world of politics and action and a supposedly private world where questions of gender, sexuality, work and other ‘social’ questions linked to particular classes of people are bracketed. Bonnie Honig provides an illuminating reconstruction of Arendt’s work that separates her account of political action from this conservative dualism. For Honig, Arendt’s restriction of politics to permissible sites and objects is in tension with her account of action as boundless, unsettling, and contingent. Honig writes: ‘action’s generative power can be used to proliferate the sites and subjects of politics, to include resistance to system, the aggravation of fissure, and the disruption of process in the private realm. It might call attention to the extraordinary measures that reproduce ordinary life, daily’. *Displacement of Politics*, 123.

propels new issues to the center of political debate' and pushes reform forward as 'political leaders try to restore order'.³⁸ The actions of the *sans culottes*, for instance, shaped the course of revolutionary events and set the scene for the progressive struggle for rights to political participation in France for non-propertied citizens for the next century. While many such actions are of short duration and local character with small numbers involved, their political significance may exceed their particular time and place. Combining aspects of both ruptural and re-imaginative strategies, these forms of action preserve the utopian horizon of rights as a discourse of moral critique.

Conclusion

This chapter set out to examine the precise role rights play in the reform and critique of institutions and practices. I began with an analysis of O'Neill's argument that a right is only claimable when both the identity of the obligation-bearer and the content of the obligation are specified. I endorsed the first of these elements on the basis that the directed nature of rights as claims against others is crucial to preserving relations of political accountability that authorize ongoing critique, mobilization, protest, and other claim-making practices. I noted how the alternative view, of Tasioulas fails to provide a distinctive account of the moral contribution of rights in relation to other values and further falls short of requirements of the realism test. Tasioulas's moralized conception of rights risks losing track of who is to be held accountable, obscuring the relations of power and interest that oppose and frustrate the achievement of rights. I found that the second claimability condition given by O'Neill, with respect to the content of rights, is too demanding. The abstraction of rights with respect to how they are to be upheld is a political virtue: it permits the idealistic deployment of rights as a tool of critique and allows for some discretion and flexibility in enforcement within a relationship of ongoing accountability. I then addressed O'Neill's more practical concerns with rights discourse. I noted how the criticism that rights are mere rhetoric that mock the poor is plausible on a top-down conception of their role as moral aspirations. On an alternative political view, claiming a right is not a purely passive act but functions to mobilize a constituency of affected interests and sympathetic

³⁸ Frances Fox Piven, *Challenging Authority: How Ordinary People Change America*, (Rowman & Littlefield Publishers, 2006), 2-3.

allies; define an adversary and in the process open up new pathways of political possibility. I concluded by noting that the direct political exercise of claimed rights regardless of legal or conventional recognition has been an important means by which to win those rights. Thinking about these forms of political action leads us to consider more directly the different political models for protecting and enforcing rights, which is the subject of the next part of the thesis.

Part II: Four models of rights politics

We now have a theoretical basis from which to evaluate the alternative models of rights politics proposed by theorists. Recall that I began with an account of political rights based on Feinberg's notion of rights as valid claims. This served as a starting point from which to elaborate an activist theory of rights that accounts for the value the concept has as a tool of oppositional critique and struggle. To summarise its key elements, the theory notes: i) The central value of equal moral respect which denotes the status of persons within a practice in which individuals recognize one another as makers of claims with discretion over their rights and the capacity to author new ones; ii) The conflictual character of rights discourse resulting from the conflicts of interest they are typically invoked to decide; iii) The properties of rights as a form of speech act that constitutes the claimant as a political agent, the obligation-bearer as an adversary and calls on the support of third parties with responsibilities to assist and intervene; iv) The directed nature of rights as claims against specific others who are held accountable through ongoing political action; v) The utility of political abstraction with respect to the content of claims which permits the flexible and idealistic deployment of the discourse. I have shown that this is a politically realistic account of rights, faithful to the practice, which embodies the core moral ideal of equal respect for individuals.

*In this, the second part of the thesis, I examine the strengths and limits of four influential interpretations of rights, each of which can be viewed as emblematic of a different ideological approach to the question of social change, ranging from a focus by liberals on the judicial application of law to the radical rejection of law as an instrument of domination. I single out a few key theorists as representative of each approach: Chapter 4 examines the idea of rights as trumps within Ronald Dworkin's theory of law; Chapter 5 examines Jeremy Waldron and Richard Bellamy's argument for parliamentary decision-making in preference to the judicial model; Chapter 6 examines the pre-eminent account of liberal civil disobedience in pursuit of rights given by John Rawls, and Chapter 7 addresses theorists who draw on long-standing revolutionary critiques of rights to paint a pessimistic picture of the discourse as an obstacle to liberation. In general, the analysis of each chapter proceeds through a critique of the theoretical interpretation of rights that underlie the approach under discussion alongside a broader critique of the understandings each has of the nature of democratic institutions and practices and the appropriate standards by which to judge their legitimacy. I argue for the importance of activist citizenship on the basis of democratic inclusion, moral innovation and civic education. I provide a more sustained analysis of how social movements realize these values in Part III where I discuss *Take Back the Land*, a squatting movement around the right to housing.*

Chapter 4: Rights as trumps: The juridical model

Laws are always useful to those who possess and vexatious to those who have nothing.

- *Jean Jacques Rousseau, The Social Contract.*

In this chapter, I critically examine the influential philosophical theory of rights proposed by Ronald Dworkin. I focus on Dworkin as the foremost champion of Legal Constitutionalism whose works provides the most powerful and comprehensive case for the role of constitutional adjudication by courts in the protection and enforcement of rights. Any examination of Dworkin's work is complicated by the fact he has written prodigiously on the subject of rights in numerous books and articles over several decades, and, where his views have undergone modification, he is not always explicit in saying how. The consistent thrust of his work has been to link a philosophical conception of rights as trumps to an account of the nature of law and legal interpretation in which courts figure as a principled forum for the protection of individual rights against the threats that exist from the unrestrained majoritarian preferences that feature in the democratic process.¹ The role of judges is to 'discover' the individual rights of parties to a case through an interpretation of how they ought to be treated that embodies the foundational principle of equal concern and respect, as enshrined in the US constitution, and is consistent with the country's legal tradition.² Dworkin's work is thus centrally concerned with the practical task of judges in identifying the place of rights within a community's overall scheme of political morality as recorded in the law. Insofar as citizens are able to participate in the creation of rights under this scheme, it is in bringing cases before the courts; in public discussion of the court's verdicts, and, most significantly, through civil disobedience, in which citizens violate laws that infringe moral rights they believe are latent within the

¹ This thread runs throughout Dworkin's writings from his early essays in *Taking Rights Seriously* to his final major work, *Justice for Hedgehog*.

² Dworkin, *Law's Empire*.

constitution but not legally upheld so as to bring test cases before the court or influence its deliberations indirectly.

There is an extensive body of secondary literature that takes issue with Dworkin's theoretical writings on rights, law and politics. Criticism has focused on his conception of rights as trumps;³ on his advocacy of judicial review;⁴ on his account of the nature of law and the judicial role;⁵ and on his views on civil disobedience.⁶ It is worth highlighting two important strands of critique of Dworkin, which have produced arguments and insights relevant to my own analysis of his work, but whose core commitments differ in crucial respects from my own, as I make clear in later chapters. Political constitutionalists have criticised Dworkin for his exalted view of courts and the undemocratic implications of empowering judges with powers to over-ride the decisions of elected representatives on rights given the deep and widespread disagreement among citizens on the content, nature and distribution of rights. As I argue in Chapter 5, political constitutionalists mount a powerful case for democratic decision-making on rights on the basis of equal respect for citizens' views, but their concern to protect the primacy of legislative decision-making against judicial review leads them to overlook more fundamental obstacles to political equality that necessitate political struggles beyond parliament. An earlier strand of radical critique, by critical legal scholars, took issue with the purportedly elitist nature of Dworkin's model of law, which they linked to a critique of the ideological nature of legal rights, from a perspective sympathetic to the struggles of popular movements. I engage directly with this strand of radical critique in its more recent guise, in Chapter 7.

³ See Hart, 'Between Utility and Rights,' 828; H. Pildes Richard, "Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J," *Legal Stud* 725, no. 744-47 (1998); Jeremy Waldron, "Pildes on Dworkin's Theory of Rights," *J. Legal Stud.* 29 (2000); Richard H. Pildes, "Dworkin's Two Conceptions of Rights," *The Journal of Legal Studies* 29, no. 1 (2000); Joseph Raz, "Professor Dworkin's Theory of Rights," *Political Studies* 26, no. 1 (1978).

⁴ Waldron, *Law and Disagreement*; Bellamy, *Political Constitutionalism*.

⁵ See E. Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute," *Michigan Law Review*, 1977, 473-519; critical legal scholars suggested that Dworkin's account of law is ideological, see e.g. Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies,' *Left Legalism/left Critique* 178 (2002), 216.

⁶ Robert E. Goodin, 'Civil Disobedience and Nuclear Protest,' *Political Studies* 35, no. 3 (1987); Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Mit Press, 1994), Ch. 11.

My critique has four parts. I begin in Section I with an examination of the idea of rights as trumps in the different guises it appears in Dworkin's work, as either a 'reason-blocking' view or a 'protected-interest' view. I show how the idea of trumps helpfully brings into focus the potent critical role rights play in relation to law and conventional morality. The theory provides a plausible account of the justification of certain individual and minority rights and is more politically orientated than some critics have suggested in reflecting how many rights are justified according to the contingent prejudices of society at large and the distribution of power among social groups. However, as I argue in Section II, by construing rights conflicts in terms of a clash of rival moral theories the idea of trumps misleads as to the political threats to their enjoyment. I relate this to Dworkin's overall conception of politics and the democratic process. By incorporating the concern of liberal constitutionalism with tyrannous and myopic majorities into the very definition of a right, Dworkin is unable to explain the important role rights play as a check on dominant classes and fails to offer a plausible account of rights, such as those to welfare, where majoritarian discrimination is less of a concern. In Section III, I examine the role Dworkin sees for citizen involvement in upholding a 'rights-based' rule of law. Dworkin makes a number of claims as to the beneficial effects of judicial review on public discourse. Ultimately, however, citizens are confined to minimal forms of indirect influence in arguing over legal norms and decisions, falling far short of a truly deliberative and participatory political culture of rights that accords with equal respect for their opinions and interests. In Section IV, I examine the role Dworkin sees for civil disobedience, which represents the most authentically democratic element to his thought. While Dworkin allows a creative role for civil disobedience in the formulation of new rights (and is therefore more radical than the Rawlsian view of civil disobedience I critique in Chapter 6), its role is conceived in a politically unrealistic form in terms of its impact on courts as a form of argumentative persuasion that draws attention to the majority's failure to abide by the principles of political morality latent within the constitution. Dworkin ultimately misrepresents a radical practice of movement activism as a species of moralized legal disagreement, neglecting its essentially political dimension as a claim against powerful others.

Section I, Trumps and the power of moral condemnation

In this section, I outline the idea of rights as trumps, which takes several forms in Dworkin's work, leading to some disagreement among critics and interpreters as to which is his true view.⁷ Sometimes Dworkin takes a 'reason blocking' view in which rights trump decisions for the common good where those decisions have been corrupted by a prejudicial or paternalistic class of reasons and sometimes he takes a 'protected interest' view in which rights trump a decision for the common good where there is a fundamental interest at stake which overrides that decision.⁸ The consistent theme in the idea of trumps is that rights place limits on the kinds of justification that can legitimately restrict the autonomy of individuals. As Dworkin puts it, rights are 'needed as some distinct element only when some decision that injures some people finds prima facie support in the claim it will make the community as a whole better off and the objection is that it pays insufficient attention to the minority'.⁹

I shall first examine the reason-blocking conception. Dworkin first elaborated this idea in the form of an argument that rights protect individuals against an unmodified utilitarian decision procedure that counts the preferences of voters about what is good and right for others. Dworkin initially described this in terms of the formal structure of the preferences in a utilitarian calculation. Whereas 'personal' preferences, about laws and policies that affect oneself are legitimate, 'external preferences', about the entitlements of others, are a form of 'double counting' that contradicts the utilitarian ethic.¹⁰ In allowing a majority to control what individuals and minorities are entitled to based on who they are, the counting of external preferences undermines the egalitarian commitment of utilitarianism in which preferences are counted equally regardless of distinction or merit. Rights exist to exclude preferences about the lives of others since these preferences fail to treat people with equal concern within the

⁷ See the disagreement between Waldron and Pildes. Pildes, "Why Rights Are Not Trumps"; Waldron, "Pildes on Dworkin's Theory of Rights,"; Pildes, "Dworkin's Two Conceptions of Rights".

⁸ I am indebted to the clear and helpful exposition in Paul Yowell, "Critical Examination of Dworkin's Theory of Rights," *Am. J. Juris.* 52 (2007), 93.

⁹ Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1985), 371.

¹⁰ Dworkin, *Taking Rights Seriously*, 235–236.

decision-making process and so violate the egalitarian commitment of utilitarian politics that is the basis of its appeal. As Dworkin writes:

If Utilitarianism is to figure as part of an attractive political theory, it must be qualified so as to restrict the preferences that count by excluding political preferences of both formal and informal sort. One very practical way to achieve this restriction is provided by the idea of rights as trumps over unrestricted Utilitarianism. A right to political independence would ensure no one receives less because others think he should have less because who he is or is not, or care less about him.¹¹

Significantly, then, the reason-blocking conception does not involve a claim about the substantive importance of rights based on the fundamental interests they protect, but about the character of political decision-making procedures and whether they treat people fairly. The central concept that grounds rights so conceived is not liberty, but equality: the wrongness of a law or policy that intrudes on a right lies in the fact it was decided by a procedure that doesn't treat people as equals, owed equal concern.

The idea of external preferences has been subject to some powerful lines of criticism.¹² The difficulty, as Donald H. Regan put it, is that 'in a populous and heterogeneous democracy like our own almost every law is passed in response to external preferences and that these preferences are crucial as often as not'.¹³ Taken logically, it has the unfortunate implication that it would bar altruistic external preferences for the welfare of others in politics, while allowing violations of rights if they are based on personal self-interest, as with the white citizen who supports segregation not due to racism, but to improve their job chances. In response to criticism by Hart, Dworkin appeared to drop the idea of 'double counting' altogether and his later work emphasises that it is the prejudicial or paternalistic nature of preferences that is objectionable rather than their externality.¹⁴

While Dworkin abandoned the distinction between the formal structure of preferences, he retained the utilitarian characterisation of politics as an aggregation of

¹¹ Dworkin, *A Matter of Principle*, 364.

¹² Hart, "Between Utility and Rights"; Donald H. Regan, "Glosses on Dworkin: Rights, Principles, and Policies," *Michigan Law Review*, Vol. 76, No. 8, (1978).

¹³ Regan, "Glosses on Dworkin", 1221.

¹⁴ Dworkin refers to 'banned' sources of prejudices in *Law's Empire*, 384.

self-interested and potentially prejudicial and moralistic preferences throughout his entire work. This is tied to a view about the institutions of democracy: legislatures are incapable of sorting legitimate personal preferences from corrupting preferences and so judges, who are insulated from society's intolerant predilections, are needed to overturn political decisions based on corrupted utilitarian justifications through judicial review. An important implication of tying rights to the procedural character of political decisions in this way is that the existence of particular liberties, such as free speech or sexual relations, is dependent on the prevalence of prejudicial preferences in society at large, which determines the likelihood that political decisions will be corrupted. As community morality changes, what rights we have changes too. This contingent, historical dynamic to rights is clearly set out by Dworkin in a lesser-read article on racial discrimination and the 'bussing' of blacks to white schools to implement desegregation:

[R]ights are based on antecedent probabilities. It could not be said, for certain, that a particular law restricting speech, for example, is the result of prejudice against the view being expressed rather than the result of the fact that voters don't like noise. But because we sense, based on our knowledge of our own community, and a more general sense of human nature, that certain kinds of political decision have such an antecedent probability of corruption, we do not trust the political powers to make those decisions.¹⁵

Accordingly, the function of the equal protection clause in the US Constitution is to ensure that 'no decisions with a high antecedent probability of corruption through prejudice should be left to the normal political process'.¹⁶ If conditions change so that blacks have political power or prejudice abates, then there is no need for such rights against racially segregated education.

This approach to the justification of rights is attractive insofar as it captures the idea that society's political morality, along with the balance of power between different social groups, influences what rights there are. The recognition and enforcement of specific rights, as I have discussed, will be sensitive to contextual social and political considerations with respect to the likelihood of interference by others in the area of

¹⁵ Ronald Dworkin, "Social Sciences and Constitutional Rights-the Consequences of Uncertainty," *JL & Educ.* 6 (1977), 10.

¹⁶ Dworkin, "Social Sciences and Constitutional Rights", 10.

freedom it denotes, which, as Dworkin makes clear, includes the content of society's morality and the distribution of political power among social groups. Rights against racial discrimination for blacks are needed in the US, he argues, due to a history of oppression on the basis of race and their relative lack of political power. By contrast, Dworkin argues against those who see affirmative action programmes to lower the barriers to black students entering college as a violation of equal protection rights.¹⁷ He is able to do so consistently on the basis that whites in the US are not a historically oppressed group subject to discrimination in the political process. It follows that the rights in any bill of rights reflect the community's accumulated historical experience of which liberties are likely to be infringed by the counting of inegalitarian preferences.¹⁸

Dworkin's theory of rights is often criticised for moralistic abstraction and linked to an atomistic conception of the individual standing outside and against the rest of society.¹⁹ The idea of trumps however - at least in its reason-blocking form - has a distinctly realist focus in its attention to the historical realities of oppression and powerlessness within a given society. It takes into account the evolving, historically-situated nature of social stigma and marginalisation within the justification of rights. A consequence of this approach is that there is no final endpoint, for Dworkin, where the content and meaning of rights has been decided by society once and for all. There will always be new moral rights that emerge against new threats in response to changing historical developments. Within this framework, rights function as a tool of social criticism that gives politically marginalised individuals and minorities an especially powerful tool to make demands that condemn the prevailing consensus of opinion.

There are notable problems in defining rights in terms of the content of community morality. Hart noted the curious consequence of tying rights to the antecedent possibility of intolerance that as a society becomes more tolerant, its rights will 'wither' away, like the state under Marxism.²⁰ It makes more sense to say that rights are historically sensitive to evolving threats in their justification, but that they vary in

¹⁷ Dworkin, *Taking Rights Seriously*, Ch. 9.

¹⁸ Yowell, "Critical Examination of Dworkin's Theory of Rights,"

¹⁹ See e.g. Quentin Skinner, "The Paradoxes of Political Liberty," *The Tanner Lectures on Human Values 7* (1986), vol. vii, 1986, ed. Sterling M. McMurrin (Cambridge, 1986), 248.

²⁰ Hart, 'Between Utility and Rights'.(1979), 840.

weight and priority according to political circumstances, rather than implying that the rights themselves disappear. More troubling is the indeterminacy of the idea.

Dworkin's reference to our 'sense' of whether there has been prejudice, based on 'knowledge of our community' and 'human nature' reflects its inevitable ambiguity.²¹ Dworkin's work is heavily influenced by the anti-racist activism of the Warren Court era and he tends to envisage the threat to rights primarily in terms of overt prejudices by a majority who fail to treat a minority with the equal concern and respect they deserve. This view seems well-equipped to identify rights where we can clearly identify prejudices based on our historical experience, but less so for struggles where there is a less clear separation of prejudices from the political reasons that justify apparent mistreatment.

Some laws, steeped in intolerance, may be motivated by an apparent desire to treat a minority with equal concern. This would be the case with a law that prohibited the teaching of homosexuality as an acceptable family relationship in state schools in the context of efforts to halt the spread of HIV among the homosexual community.²² Conversely, our historical sense of whether a particular religious denomination has suffered discrimination in the past may mislead us as to whether a prohibition on the teaching of creationism in science classes at religious schools is a violation of their freedom of speech. Dworkin does not propose to enter into the heads of legislators to ascertain whether there has been prejudicial or paternalistic motivations (an impossible task). The problem however is that in any decision there will be a mixture of justifications and there is no way of sorting justifications based on legitimate preferences from justifications based on corrupted ones. Leaving aside the fact judges themselves are not immune from the intolerance of society at large, any form of justification centrally oriented to speculative judgments about historical experience is too vague and will in many cases be misleading. Dworkin is correct that the likelihood of oppression and prejudicial opinion within society is evidence that a particular minority are susceptible to unequal treatment and this will likely figure in the justification for certain specific rights. What we cannot do is make the exclusion of certain forms of reason definitive of the general concept of rights. This approach not

²¹ Dworkin, "Social Sciences and Constitutional Rights", 10.

²² As was the case with the notorious 'Section 28' law in the UK introduced in 1986.

only risks misleading us as to which rights we have but also about the general function they have in our politics, as I argue in the next section.

Section II, Political power and the threats to rights

A serious flaw with Dworkin's approach is that it does not allow for the possibility that rights are threatened by powerful individuals or minorities acting in their own interests without regard for the general welfare. Dworkin addressed this argument in response to Hart's point about rights not existing in the case of a 'tyrant' by saying we may want a different type of claim to be made about those societies, not articulated in terms of rights. We do not need the idea of rights, he says, to condemn the wicked acts of a tyrant, which are not formulated in the name of the general welfare.²³ The suggestion appears to be that where a powerful individual or minority is clearly acting in their own self-interest we have no need for the language of rights to issue a condemnation in political morality; we can simply point out that an individual or minority is profiting at the expense of the majority and this will be convincing enough without the additional idea of rights. The difficulty with this line of reasoning is that it presupposes precisely what is at issue when rights are invoked against the tyrant, namely a functioning democratic process based on political equality in which the simple exposure of tyrannical self-interest to the majority of voters would be sufficient to defeat it.

A better explanation is offered if we understand rights in less moralized terms, as claims individuals possess to the fulfillment of obligations against others, which empower them to urgently press and insist upon their entitlements in cases where they are being denied regardless of the characteristic of the justification being challenged. Dworkin's work pays little attention to this relationship between rights and obligations, concentrating instead on the justification of rights within an overall political theory. As noted, rebellious populations have found the vocabulary of rights useful for challenging authoritarian governments, since at least the time of John Locke, who asserted the doctrine of natural rights against the 'arbitrary' power of the

²³ Dworkin, *A Matter of Principle*, 369-370.

Stuart monarchs.²⁴ The anti-authoritarian understanding of rights is written into the Universal Declaration of Human Rights, which, written as it was in the aftermath of World War Two, is explicitly presented as a protection against authoritarian regimes. Dworkin's view is sharply at odds with this influential view of how rights function: it fails the standard of fidelity since Dworkin does not provide us with good reason to abandon this historically important pattern of anti-authoritarian usage.

Dworkin might plausibly argue that he is talking about rights only in liberal democratic regimes and not in tyrannies. Yet the problem of ambitious political leaders and classes monopolising power in their interests is hardly limited to extreme cases of authoritarianism. In liberal democratic regimes, equal access to political rights is routinely undermined by inequalities of wealth and income. Consider a familiar scenario in which an elite class of wealthy individuals and corporate interests control the legislative process through their dominance of campaign finance and lobbying. This class use their power to prevent laws that threaten their wealth and income from passing and to dismantle social programmes so as to decrease their tax burden.²⁵ In this scenario, there need be no appeal to the general welfare: perhaps the self-interested minority offers no justification for their behaviour since their power leaves them insulated from political challenge or perhaps they argue that society's minority of 'winners' should be entitled to the fruits of their success. Where this ruling minority dominates the principal means of information and communication in society through its control of media, and educational and cultural institutions, there is the likelihood that those who suffer from the denial of right will passively accede to the situation thanks to the prevalence of ideologies that mislead them as to their interests. With the minority's power entrenched, no justification need be offered for the numerous 'non-decisions' on rights that threaten elites, since they do not register in official politics.²⁶ Given the possibility of non-mobilised or ignorant majorities, even in the most impeccable liberal democracies, rights are also needed against minorities acting in their own self-interest without regard for the common good.

²⁴ Locke, *Locke*.

²⁵ This is the picture presented by recent empirical studies of 'oligarchy', Jeffrey A. Winters, *Oligarchy* (Cambridge University Press, 2011). I return to the problem of oligarchic influence in the next chapter.

²⁶ Bachrach and Baratz, 'Two Faces of Power'.

The phenomenon of political powerlessness, then, is more complex than Dworkin's framework allows. The notion that rights are needed only to protect minorities from majorities only become plausible if we make the idealised assumption that political equality is fully instituted within the liberal democratic regimes to which the theory is taken to apply. This creates an uneasy tension in Dworkin's theory between his highly idealized assumptions with respect to the functioning of democratic institutions and his distinctly non-ideal view of the motivations of democratic actors as corrupt and prejudicial. Dworkin is both too optimistic about the functioning of democratic institutions and too pessimistic about the character of democratic citizens. In any case, Dworkin's stipulation is arbitrary since we value rights precisely as a means to redress injustices to individuals regardless of the reasons for which the injustice is committed. In his most recent work, Dworkin appears to admit as much, writing in a footnote in response to an objection by James Griffin along these lines that:

Of course, political rights do not hold only against a government that aims to improve the general good. The trump test sets a standard that a claim of right must meet - the interest it protects must be sufficiently important that it would overcome even a generally proper political justification. The test does not suggest that people have no rights against tyrants whose aims are not proper.²⁷

This represents a significant revision to his response to Hart where Dworkin accepted that an alternative political morality may be needed to condemn a tyrant. The existence of a right no longer depends on the actual justification of a political decision and its likelihood of corruption, but on the importance of the interest and whether it is sufficient to trump a hypothetical 'proper' justification, which presumably involves some uncorrupted reference to the common good. Dworkin here makes use of an understanding of rights that he rejected as 'inadequate' in response to Hart; namely that there are at least in large part 'timeless rights necessary to protect enduring and important interests fixed by human nature and fundamental to human development'.²⁸ In *Justice for Hedgehogs* he summarises this protected-interest view as the view 'that some interests particular people have are so important that these

²⁷ Dworkin, *Justice for Hedgehogs*, 473.

²⁸ Dworkin, *A Matter of Principle*. 370

interests must be protected even from policies that would indeed make people as a whole better off.²⁹

Under this amended view, no matter the character of the actual justification in play, the correct test for the existence of a right is whether it protects an interest sufficiently important to trump a hypothetical justification in terms of the general good. This is a curious move that imposes an unnecessary further step in the justificatory process for a right. If we want to assert a right to protest against a tyrant, why is it not enough to say that our right to protest is a fundamental interest held against political authorities whether they be self-interested tyrants or intolerant democratic majorities? Why must we take the additional step of asking whether our right is sufficiently important to outweigh a hypothetical justification in terms of the general good? Furthermore, who sets the benchmark for this test given the legitimacy of ‘proper’ collective justifications can vary widely, ranging in this case from distaste for the traffic delays caused by protests to more troubling fears a protest might spark inter-ethnic violence? Dworkin has conceded that rights are not only threatened by majoritarian arguments for the common good yet he bizarrely still wants to make that the test of whether a right exists.

Notably, the later protected-interest theory is more expansive than the earlier reason-blocking view. It would allow rights against a decision for the general welfare even without the procedural judgment that the decision had been influenced by prejudicial or paternalistic preferences. The damage to human dignity is what matters under this theory. Selective reference to the importance of the interests protected by rights allows Dworkin to deal with several criticisms of his work, yet the central concern in his later writings on rights remains the exclusion of justifications opposed to equality from the political process. His argumentative strategy against the US’s post-9/11 legal restrictions on civil liberties, for example, is that the laws will disproportionately burden Muslim citizens who will be singled out by the authorities and so the law will have failed to treat them with equal concern and respect.³⁰ In cases such as this, Dworkin’s historically-sensitive mode of moral reasoning has important strengths,

²⁹ Dworkin, *Justice for Hedgehogs*, 329.

³⁰ Ronald Dworkin, “Terror & the Attack on Civil Liberties,” *New York Review of Books* 50, no. 17 (2003).

highlighting how the universalistic formalism of law conceals the social inequalities that condition its origin and application. The burdensome effects of anti-terror laws on Muslim minorities can easily be overlooked in more abstract debates over ‘liberty’ versus ‘security’. There nonetheless remain unavoidable difficulties in characterising rights in terms of their weight against other reasons since it is not possible to say in advance against which considerations they will prevail. Dworkin himself admits that rights will need to be balanced with other concerns despite the absolutist connotations of the term trumps. The idea of trumps implies that rights have a certain moral weight, which entails that they will generally triumph over considerations for the general welfare unless a certain argumentative threshold is met. This notion is better captured by the idea of presumptive decisiveness, as I have stated it, which avoids the absolutist connotations of the term trumps and is open as to which class of reasons rights over-ride.

The idea of trumps must also deal with the observation that many rights are justified in part by the way in which they serve the general welfare, rendering any conception of rights that presupposes a conflict between rights and the general welfare misleading. This point, first made by Raz, is emphasised by political constitutionalists who wish to highlight the collective dimension of decisions on rights. Raz’s examples are of civil liberties, such as free speech, which derives its justification not merely from the moral importance for individuals of being able to speak freely (which many ordinary citizens will never need to invoke), but from its contribution to a democratic political culture in which power is held to account.³¹ The same is true of many social rights, such as the right to education, which receives part of its justification from the contribution of education to public goods such as a rich and reflective public culture and economic prosperity. It is misleading to think of rights as conceptually opposed to collective political considerations when such considerations may play a part in the justification of rights.

The trumping notion of rights faces particular difficulties with respect to social and economic goods. Dworkin discussed rights to housing for the poor on the basis that the poor are a minority without political power who suffer from discrimination from

³¹ Joseph Raz, “Rights and Individual Well-Being,” *Ratio Juris* 5, no. 2 (1992): 127–42.

policies decided for the prosperity of the rest of society, which fail to treat them equally.³² There is something distinctly unrealistic, from a political standpoint, to the notion that social inequalities are best explained in terms of moral discrimination and that counteracting such discrimination is a sure strategy to justify social rights. It is possible that the idea of discrimination does some work in accounting for the immorality of the poor's condition, but it is surely misleading to frame their plight principally as being victims of discriminatory economic policies decided for the general welfare. A historical examination of the distribution of wealth and income across US society shows that it is a dominant class of wealthy elites who have profited at the expense of society as a whole with an underclass of very poor the principal casualty of an individualistic economic ideology that works in the interests of the top few.³³ This accounts for the fact, as I discuss in Chapter 8, that political movements for housing frame their demands against the banks and corporations who have monopolised wealth and the political power it brings at the expense of the majority, rather than seeing themselves as victims of the majority's moral blindness. The popular slogan of the 99% versus the 1% is used to articulate the demand for access to housing in common with the Occupy Wall Street protest movements.³⁴ Insofar as a moral justification is being challenged in this struggle, it is the individualistic, 'winner takes all' ideology of free market economics, rather than some notion of the common good.

Ultimately, Dworkin's focus on prohibiting discriminatory reasons works better for discrete categories of people, such as racial minorities, than it does for permeable categories, such as the poor. There is no reason why the rich could not make use of an excluded-reasons case against their being taxed on the basis that policies that limit their wealth are based on discriminatory reasons, such as distaste for their luxurious lifestyle. Dworkin denies that property rights can be justified on this basis, since property owners have not historically been discriminated against, but this assumes precisely what is at issue: according to their own conceptions of themselves as victims,

³² Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton University Press, 2006), Ch. 4.

³³ Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014).

³⁴ David Graeber, *The Democracy Project: A History, a Crisis, a Movement* (Allen Lane, 2013).

they most certainly have been discriminated against.³⁵ There is, once more, an inherent vagueness to the idea of defining rights in terms of a society's community morality. Having critically assessed Dworkin's theory of rights, I now turn to discuss his proposals for how they are to be realized and enforced.

Section III, Courts and the public political culture

The idea of rights as trumps is linked to a particular conception of democracy, which Dworkin dubs the 'constitutional' conception in contrast to a 'majoritarian' democracy based on parliamentary sovereignty.³⁶ The constitutional conception, he claims, explains the intuition many of us share 'that a society in which a majority shows contempt for the needs and prospects of some minority is illegitimate' and provides the best interpretation of American legal and political practices.³⁷ Under the constitutional conception, courts are 'forums of principle' whose institutional role is to uphold the commitment, embodied in the 14th Amendment to the US constitution, that government decisions treat all citizens with equal concern and respect by blocking laws and policies corrupted by the inegalitarian preferences that inevitably emerge in the 'policy' domain of legislative politics. In practice, this requires judges to interpret the abstract moral principles expressed within constitutional rights in order to enforce those principles in new areas and extend rights previously reserved for one group or situation to others. Judges are not free to invent whichever rights they choose however since their interpretations are disciplined by the requirement of 'constitutional integrity', which requires that any interpretation of rights must 'fit' with the overall structure of the constitution and dominant lines of past constitutional interpretation by judges. Dworkin sometimes uses the metaphor of a chain novel to describe how a country's unfolding legal tradition forms one continuous historical picture of a society's commitment to treat its citizens with equal concern (as human beings of equal objective value) and with equal respect (as human beings responsible for pursuing their own path and success in life).³⁸

³⁵ Dworkin, *Is Democracy Possible Here?*, Ch. 4.

³⁶ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1999), 17–26..

³⁷ Dworkin, *Freedom's Law*, 25.

³⁸ Dworkin, *Freedom's Law*, 10–11.

It follows from Dworkin's view that there is no conflict between democracy and individual rights as democracy is not majority rule, but legitimate majority rule in accord with substantive values. Powerful criticisms have been made of Dworkin's account of the place of judicial review within a democracy and his conception of democracy in terms of specific substantive outcomes. Political constitutionalists have linked their democratic critique of Dworkin to a defence of legislative decision-making on rights, advancing principled and pragmatic arguments for the benefits of parliaments over courts. Parliamentary decision-making on rights, they argue, secures political equality and the fundamental right of citizens to participate on matters of moral controversy. Furthermore, they claim, the representative nature of legislatures makes them well-suited to resolve the disagreements on rights that divide citizens. Given citizens disagree profoundly about rights, and we have no reason to believe judges are any more likely to arrive at an objectively 'correct' answer, Dworkin's claim that judicial review upholds the legitimacy of democracy by securing rights is question-begging.³⁹ In the next chapter I criticise the political constitutionalist account of citizenship. I nonetheless share their scepticism towards judicial review and concern for democratic fairness in decisions on rights. I do not intend to rehearse the institutional arguments about courts versus legislatures here, but instead draw out the more participatory elements in Dworkin's thoughts to evaluate what role there is for civic action within a legal constitutionalist framework.

Dworkin is sometimes presented as a supporter of unquestioned and infallible judicial rule. He has been accused of elevating judges to 'the rank of moral prophets and philosopher monarchs', leading to an 'oligarchic politics' that is no more than a 'spectator sport' for citizens.⁴⁰ Yet closer attention to his theory reveals that he does see a place for civic participation in the politics of rights. This follows from his moral conception of law, not as what appears in the 'rule-book', as positivists think, but as an integrated and systematic set of principles that express the moral values of a community. He acknowledges that the Supreme Court frequently makes incorrect decisions. He therefore sees a role for citizens in vigorous discussion and critique of its verdicts, and, in extreme cases, disobedience of those laws that violate their moral

³⁹ Bellamy, *Political Constitutionalism*; Waldron, *Law and Disagreement*.

⁴⁰ Allan C. Hutchinson, *Indiana Dworkin and Law's Empire* (JSTOR, 1987). *Ibid.*, 655.

conscience and sense of justice. This argumentative input by citizens helps to uphold the ‘rights-based’ character of the rule of law, as an approximation of the objectively correct conception of rights, through the ongoing discussion and contestation of legislative and judicial decisions.⁴¹

Dworkin points out against his critics that his references to the ‘correct’ (or sometimes ‘true’ or ‘objective’) view of law does not presuppose a metaphysical position that there is always a right answer ‘locked up in some transcendental strongbox’. Rather, it provides an explanation of the practices of ongoing argumentation and contestation in which lawyers, judges and citizens argue *as if* there is a right answer.⁴² The truth of any view comes from its being tested and scrutinized and no particular view is immune from future revision. For Dworkin, the rights-based conception of the rule of law:

[E]ncourages each individual to suppose that his relations with other citizens and with his government are matters of justice, and it encourages him and his fellow citizens to discuss as a community what justice requires these relationships to be. It promises a forum in which his claims about what he is entitled to have will be steadily and seriously considered at his demand.⁴³

Citizens are encouraged to develop and act on their own understanding of what justice requires and not accept judicial and legislative decisions as final. This is an appealing picture of how rights function as part of critical morality. The objectivist conception of correctness in Dworkin operates in a manner akin to the idea of validity, as I have described it. It functions according to an anti-positivist logic, as an epistemological principle that allows us to argue intelligibly with one another about moral rights and act on them in ways that challenge law and convention. We may never arrive at a definitively just account of rights, given human fallibility and the changing nature of human affairs, but broad argumentative input from citizens helps us to approximate it.

⁴¹ ‘Civil disobedience’ Dworkin, *Taking Rights Seriously*. I am indebted to the insightful reading of Dworkin given by Jeremy Waldron in ‘The Rule of Law as a Theater of Debate,’ in Justine Burley (ed.) *Dworkin and His Critics: With Replies by Dworkin*, (Wiley-Blackwell 2004), 31.

⁴² Dworkin, *Taking Rights Seriously*, 216.

⁴³ Dworkin, *A Matter of Principle*, 71.

Dworkin therefore allows for the fact citizens will disagree vigorously with one another about rights and will be able to argue and contest a court's decision. Noting the civic benefits of a constitutional culture of rights, he claims that where the Supreme Court reaches a decision about some important matter of controversy:

The public participates in the discussion - as it has in the United States, for example, about abortion, school prayer and many other issues - but it does so not in the ordinary way, by pressuring officials who need their votes or their campaign contributions, but by expressing convictions about matters of principle. In that sense, even the terrible debate in the United States about the Supreme Court's abortion decision, *Roe v. Wade*, has been beneficial.⁴⁴

The presence of constitutional review encourages a refined form of public discussion about rights oriented to matters of principle, rather than as contests over power.

Judicial institutions themselves can also offer avenues for participation. Dworkin notes that some citizens may have 'more influence over a judicial decision by their contribution to a public discussion' than by the vote and that the Senate's confirmations of judges provide a 'superb opportunity for the public to participate in the constitutional process'.⁴⁵

The democratic credentials Dworkin claims on behalf of courts are at best exaggerated. If Dworkin's concern is with encouraging informed and active citizenship, it is questionable that mere discussion of judicial decisions will have the effects he claims. The kind of public discussion Dworkin envisages could exert influence on the court in only the most weak and indirect sense of shaping the background political culture within which judges make their decisions. Intuitively, it seems more plausible to think that the reverse of what Dworkin claims is true: that citizens are less likely to take an interest in issues of rights when that decision is out of their hands. Citizens will form political views and identities through participation in collective efforts where discussion and action has the chance of concrete effect. The impotent debate of judicial verdicts is more of an intellectual exercise than a political one: it may be conducted with passionate conviction, yet remain wholly inconsequential from a practical standpoint.

⁴⁴ Ronald Dworkin, "Constitutionalism and Democracy," *European Journal of Philosophy* 3, no. 1 (1995), 11.

⁴⁵ Dworkin, *Freedom's Law*, 6.

In addition, Dworkin's claim that judicial review fosters refined deliberation is at odds with the powerful case others have made that a litigious culture has encouraged an anti-social and absolutist culture of rights, which leaves little room for compromise.⁴⁶ Indeed, there would seem to be some inconsistency in Dworkin's descriptive claims given that the debased and polarised state of American political discourse also provides the motivation for his book, *Is Democracy Possible Here?*, in which he laments that the issues of abortion and gay marriage 'have been the most dramatic magnets drawing evangelicalism into politics'.⁴⁷ The adjudication process can have an individualizing political logic. Citizens are treated as solitary claimants before the court within the parameters of a particular case and are cut off from wider political responsibilities and affiliations. This is the case even when the claimant is standing in as a test case for a broader movement. Where there has been progress in the US on society's views, as on racial equality and abortion, there is strong evidence for the view that these breakthroughs owed more to the effects of social movement activism and consciousness-raising projects than the court's decisions.⁴⁸ Martin Luther King himself saw the dangers of a court strategy arguing that, 'Wherever it is possible we want to avoid court cases in this integration struggle' since they made the 'ordinary negro a passive spectator' and his 'energies were unemployed'.⁴⁹

A further problem is the inherent conservative bias of constraining political argument to legal and constitutional formulas. The normative resources for social critique are to be found within the law conceived as a record of society's political morality. For Dworkin, there is a more fundamental morality at play within a community than majority opinion founded on reason and conviction that reaches beyond the superficial attitudes and moods people may have at any given moment. The role of judges is to discover this deeper morality as expressed in the country's legal tradition, rather than majority opinion. The idea that there is a moral consensus underlying the fabric of society's legal and political institutions, which provides sufficient resources for ongoing practices of critique, seems decidedly optimistic given the divided and

⁴⁶ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Simon and Schuster, 2008).

⁴⁷ Dworkin, *Is Democracy Possible Here?*, 55.

⁴⁸ See Rosenberg, *The Hollow Hope*.

⁴⁹ Rosenberg, *The Hollow Hope*, 76.

pluralist nature of society. Moreover, it sits in tension with paradigmatic struggles for justice in the US, including the civil rights movement whose activists used the idea of rights to make a more wholesale condemnation of the social order, as I discuss in the next section. With the legalisation of rights discourse, there is the further danger that rights become an obscure and technical activity that favours lawyers or those with the resources to hire them. To argue effectively, citizens are required to reason in technical terms, citing constitutional principles and past decisions to achieve the requirement of ‘fit’ and present the constitution in its ‘best’ light.⁵⁰

With respect to social rights, there are particular concerns with court-based strategies. Judges themselves tend to be drawn from elite strata of society and no matter how sincere and well-motivated they may be they are likely to endorse ideologies of rights favorable to propertied interests. The bias of the US Supreme Court to propertied interests is well documented,⁵¹ and recent studies of the effects of introducing judicial review in other countries have shown that while judges may be progressive in the protection of civil liberties they are often unfriendly to social rights. Ran Hirschl analyses the global trend to judicialisation as a form of ‘self-interested, elite preservation’, which he contextualises as part of a wider phenomenon by which elites freeze their policy preferences for free market economics from the vicissitudes of democratic politics in counter-majoritarian, technocratic institutions. As he notes, there is ‘a clear, common tendency to adopt a narrow conception of rights, emphasizing Lockean individualism and the dyadic and anti-statist aspects of constitutional rights’.⁵² Hirschl demonstrates that economic corporations are by far the most active litigants in courts which see their role as protecting a ‘private’ sphere of individual freedom from the collective, leading to the pull-back of state welfare programmes, deregulation and a decline in labour rights. In this context, the limits of a court-based strategy focused on the prevention of alleged majoritarian discrimination against the poor seems clear. There are, nonetheless, more direct forms of participation available to citizens in urgent cases within Dworkin’s overall theory, which I consider in the next section.

⁵⁰ On the legalisation of political discourse and the elitist effects this can have, see Joo-Cheong Tham and Keith D. Ewing, “Limitations of a Charter of Rights in the Age of Counter-Terrorism,” *Melbourne University Law Review* 31, no. 2 (2007).

⁵¹ See e.g. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000).

⁵² Ran Hirschl, *Towards Juristocracy* (Cambridge, Mass.; London: Harvard University Press, 2007), 146.

Section IV, Dworkin on disobedience

The most participatory element in Dworkin's thought comes in his discussion of civil disobedience, first in an essay on the civil rights and anti-war activism of the 1960s and 70s, and later in a commentary on the anti-nuclear protests at Greenham Common.⁵³ Dworkin provides one of the more radical interpretations of the practice of civil disobedience within the liberal philosophical tradition. Dworkin's aim in addressing the topic of civil disobedience is to counter the argument of conservatives that it is unfair for some to disobey the law and some not. The rule of law is more 'intelligent and complex' than the 'draconian view' that crime must be punished, and that he who misjudges the law must take the consequences'.⁵⁴ A citizen's allegiance is to the law, not to any particular institutions interpretation of what the law is. This entails that an authoritative ruling by the Supreme on the validity of the law in dispute, while nonetheless a factor to be considered in any reasonable decision on disobedience, is not treated as conclusive, given the Court itself is not infallible in Dworkin's eyes and has historically changed its mind on rights issues.

If in a citizen's own considered and reasonable view the law is wrong, the 'issue is one touching fundamental personal or political rights, and it is arguable that the Supreme Court has made a mistake, a man is within his social rights in refusing to accept that decision as conclusive'.⁵⁵ For Dworkin, civil disobedience is a further means by which citizens contribute to shaping and testing the law so that it best tracks justice. It functions, principally, as a kind of social barometer that provides evidence of the practical effects of certain policies and the changes in society's morality over time. In this way, Dworkin's historical perspective on the development of social morality allows him to appreciate the effects of numerous acts of individual transgression in such a way that Rawls's theory, focused on more exceptional public acts of disobedience cannot. This is of special importance when we consider rights over sexual autonomy,

⁵³ Dworkin, 'Civil disobedience', *Taking Rights Seriously*; 'Civil disobedience and nuclear protest', *A Matter of Principle*.

⁵⁴ Dworkin, *Taking Rights Seriously*, 222.

⁵⁵ Dworkin, *A Matter of Principle*. 215.

such as rights to homosexual partnerships, abortion and contraception. Dworkin notes that without violation of anti-contraception laws by some organisations, for example, the community's indifference to those laws would never have become established.⁵⁶ Disobedience therefore has crucial epistemic benefits: it generates new norms and practical understandings with which to evaluate dominant arrangements. These in turn feed into wider civil society and inform processes of social change enhancing the overall quality of political and social change. Disobedience is also an indicator of the strength of feeling on an issue:

If we did not have the pressure of dissent, we would not have a dramatic statement of the degree to which a court decision against the dissenter is felt to be wrong, a demonstration that is surely pertinent to the question of whether it was right. We would increase the chance of being governed by rules that offend the principles we claim to serve.⁵⁷

A law that a large number of people are tempted to disobey is doubtful on moral grounds and hence on constitutional grounds, for Dworkin, given that the community's morality is relevant to the question of a law's validity. In this way, civil disobedience feeds in relevant moral and practical information into the Supreme Court's decisions. Thus, the 'record a citizen makes in following his own judgement' in violating a law and the 'arguments he makes supporting that judgment when he has the opportunity, are helpful in creating the best judicial decision possible'.⁵⁸

In keeping with his moralized conception of constitutional rights, and his historically-sensitive method of interpretation, Dworkin's theory allows a creative role for civil disobedience in the formulation of new rights through novel readings of the abstract clauses of the constitution. Nonetheless, the potential for moral innovation is limited by the fact rights must be translatable into constitutional terms. This has the regrettable consequence of rendering illegitimate those forms of civil disobedience that refer to the moral ideal of rights without a legal textual basis or appeal beyond domestic legal and constitutional practices to the rights in international human rights law. In addition to this in-built conservatism, the need to adhere to particular

⁵⁶ Dworkin, *Taking Rights Seriously*, 212.

⁵⁷ Dworkin, *Taking Rights Seriously*, 214.

⁵⁸ Dworkin, *Taking Rights Seriously*, 213.

constitutional formulations and past precedent may distort the moral issues at stake. This is most obvious in Dworkin's attempt to defend the legitimacy of anti-Vietnam war protests by interpreting actions aimed at the draft and use by the US of immoral weapons and tactics in constitutional terms. Although the Vietnam protesters did make constitutional arguments in support of Congress having war powers, it is surely a mischaracterization of their motivations to construe them exclusively in constitutional terms.

There are further issues with the limited range and forms of disobedience Dworkin's theory permits. In his essay on anti-nuclear protests, Dworkin distinguishes between 'integrity-based', 'justice-based' and 'policy-based' civil disobedience. The first form of civil disobedience involves defensive violation of any law that runs contrary to personal integrity and conscience, as with Jehovah's witnesses who refuse to salute the flag. Justice-based civil disobedience involves seeking out and imposing unjust laws and policies where a majority is pursuing its own interests and goals at the expense of the rights of a minority, as with the black civil rights movement in the US. Finally, policy-based obedience is when people break the law not because it is unjust or immoral but because they think it 'unwise, stupid, and dangerous for the majority as well as the minority'. Dworkin classes protests against American nuclear missiles in Europe as an example of policy-based civil disobedience.⁵⁹

Different conditions obtain for the justification of each type of civil disobedience. There is a presumption that disobedience is an option of last resort after official avenues of redress have been tried and failed. Integrity-based disobedience is typically a matter of urgency, involving an immediate moral loss, and so there is no need to work through the political process before disobeying the immoral law. By contrast, justice-based disobedience requires that people must exhaust the normal political process to have the programme they dislike reversed by constitutional means. Dworkin draws a further distinction between 'persuasive' civil disobedience, which aims to change the mind of the majority, and 'non-persuasive' civil disobedience, which functions by coercion by imposing some cost on the programme the majority

⁵⁹ Dworkin, *A Matter of Principle*, 107-115.

favours in the hope it will find the cost unacceptably high.⁶⁰ Dworkin admits the legitimacy of non-persuasive forms of civil disobedience in pursuit of rights, but he imposes extremely stringent conditions on its use with the effect of limiting it to very rare cases.

Non-persuasive disobedience is justified, says Dworkin, when the targeted program is deeply unjust; the political process offers no realistic hope of reversal; persuasive civil disobedience is ineffective and there are non-violent, non-persuasive techniques available that hold out reasonable chance of success without the risk of being counter-productive. These demanding conditions reflect the fact that, for Dworkin, non-persuasive civil disobedience is by its nature elitist: instead of attempting to persuade a majority, it attempts to compel them towards justice. Nonetheless, he notes, while only justified in exceptional circumstances, the case of justice-based disobedience can at least appeal to the example of judicial review and the ‘constitutional power of judges to hold acts of the majority's representatives void when they outrage principles of justice embedded in constitution’.⁶¹ The use of non-persuasive methods however is not permissible for policy-based civil disobedience, as practiced by the peace protesters at Greenham Common who attempted to disrupt work at the weapons facility through non-violent means. Questions of policy concern the common interest, rather than minority rights, and therefore cannot appeal to the same anti-majoritarian principle.

There are difficulties inherent in Dworkin’s classifications of both the form and the justification of civil disobedience that will lead us to mischaracterize actual instances of civil disobedience. I have already mentioned the difficulty Dworkin has in interpreting the anti-Vietnam protests as grounded in principles of constitutional justice – it seems more plausibly a dispute over the national interest and hence of policy. The issue of nuclear weapons meanwhile might be viewed from the perspective of the right to life and hence of ‘justice’ or indeed as a question of ‘integrity’ since, as Robert Goodin points out, personal moral integrity may require us not simply to refrain from certain

⁶⁰ Dworkin, *A Matter of Principle*, 109-111.

⁶¹ Dworkin, *A Matter of Principle*, 111.

acts but to deliberately pursue moral action. It is likely that many involved in the anti-nuclear protests saw it as a matter of personal moral conscience.⁶²

Dworkin regards civil disobedience on economic grounds as unjustified, as he sees it as an instance of policy where a majority has its preferences challenged on the basis they are wrong. He leaves open the possibility that it might be permissible as a matter of justice - presumably where a minority is being discriminated against in the provision of basic economic goods – but has little more to say on the topic. It is not clear how his theory would deal with paradigm cases of civil disobedience, such as strikes and tax boycotts. The fundamental problem with Dworkin's approach, underlying some of these difficulties in classification and justification, is that he regards justice as the overriding principle that legitimates civil disobedience to the exclusion of democratic concerns. Throughout Dworkin's work he maintains a dichotomous conceptualisation of politics between a realm of 'justice' and 'morality' on one side and 'policy' and 'interests' on the other. As we have seen, democratic politics is cast disreputably as a forum for the pursuit of personal interests, with the ever-present likelihood of intolerant and corrupting preferences. Civil disobedience is legitimate insofar as it conforms to the institutional function of judicial review as a principled check on the threat of democratic politics conceived in these vulgar utilitarian terms. Under this view, the essential problem for a theory of civil disobedience mirrors the difficulty with judicial review: it challenges a majority's decision-making. Dworkin maintains the uneasy combination of an idealised view of how democratic institutions function with a distinctly non-ideal view of the motivations of democratic actors. He assumes that the law or policy being challenged by disobedients is endorsed by a majority of voters. Yet this would not necessarily be the case even in the most well-functioning political system, given the sheer number of decisions to be made, the variety and complexity of the issues involved and the asymmetries of information among voters and political officials. Disobedience under these circumstances can force an issue into political discussion that has not been considered or else provoke the public to rethink a previous decision in light of new circumstances. In less ideal cases, the political process itself may systematically exclude opinions and interests that threaten dominant classes and place barriers on the participation of less favoured groups. Dworkin's insistence

⁶² Goodin, "Civil Disobedience and Nuclear Protest."

that justice-based civil disobedience should have first exhausted the official political process ignores the fact that the process itself may be illegitimate. This was the case for Dworkin's preferred example of the civil rights movement given the fact blacks were excluded from democratic institutions in the South.

Dworkin's disapproval of non-persuasive disobedience except in extreme circumstances poses a further difficulty with the classic liberal model that I return to in my discussion of Rawls. The principal difficulty social movements face is not simply that the majority views them as morally mistaken. Typically, movements will face significant obstacles to having their issues considered at all due to the dominance of public discourse by vested interests and the prevalence of entrenched modes of thought and behaviour that marginalise their issues from discussion. A crucial function of disobedience is to force neglected issues on to the political agenda by interrupting the ordinary flow of political life and unsettling dominant frames of understanding. As Sidney Tarrow notes, disruption forces marginal issues on to the agenda by getting in the way of the everyday routines and behaviour of, unsettling their practices and thus waking citizens up to the protesters' existence and their demands.⁶³

The co-ordinated violation of laws, especially when conducted over a sustained period of time, often has as its aim the deliberative provocation of authorities as part of a ruptural strategy of political change that lays bare the brute reality of political domination in contradiction to the regime's claims to legitimacy. In the words of Martin Luther King, it is part of a political strategy that forces a 'crisis' in the system to press the moral urgency of the situation and compel a fundamental rethink of issues at stake. While King's 'I have a dream speech' is known for its stirring vision of a harmonious society of racial equality, he also warned 'there will be neither rest nor tranquillity in America until the Negro is granted his citizenship rights'.⁶⁴ Even the most tame and orderly protest march imposes a cost on the state in terms of resources for policing and the closure of roads. The mobilisation of large numbers of discontented individuals on the streets meanwhile always carries with it the tacit

⁶³ Tarrow, *Power in Movement*, 96.

⁶⁴ Discussed in Adam Fairclough, *To Redeem the Soul of America: The Southern Christian Leadership Conference and Martin Luther King, Jr* (University of Georgia Press, 2001), 226.

underlying threat of social disorder. It is neither plausible nor morally desirable to conceive of civil disobedience as primarily persuasive by nature.

Conclusion

In this chapter, I have drawn out the participatory strands of Dworkin's theory according to which all citizens have a role to play in the realisation of rights, whether indirectly through principled public debate of judicial decisions or directly through civil disobedience. I began by noting how the idea of trumps meets the standard of fidelity insofar as it provides an attractive explanation of how certain minority rights are justified. Moreover, his theory is more politically oriented than is often suggested in its sensitivity to realist considerations with respect to the balance of power between social groups. I further noted the virtues of Dworkin's anti-positivist conception of the practice of rights as one in which citizens contribute to an open-ended project of justice through the ongoing defence and assertion of moral claims against law and majority opinion that embody new conceptions of what equal respect requires. I nonetheless noted a number of difficulties inherent in defining rights as trumps in explaining key parts of the practice: the misleading implication rights are absolute; the difficulty accounting for social rights; the collective dimension of rights and rights held against authoritarian elites. Political rights are better thought of, in line with the fidelity standard, as claims against others that are presumptively decisive against competing reasons for action with the character of the justification left open. I made a number of democratic criticisms of Dworkin's account of the judicial role and noted the conservative bias of a constitutional politics of rights: Dworkin's theory fails to show equal respect to citizens as authors and respondents of claims. Insofar as civic participation is valued within Dworkin's theory, it is principally for its instrumental benefits in enhancing the overall epistemic quality of decision-making on rights, which typically occurs when a minority brings to the attention of the majority the fact they have not been treated respectfully. Thus, civic involvement in rights politics contributes to the *likelihood* of achieving justice and is not *in itself* a requirement of justice. The contribution of civic activism towards a rich and pluralistic discourse on justice is important, as we shall see, but of equal or greater importance is its role in securing political inclusion and hence the recognition respect owed to democratic citizens. I concluded by noting that Dworkin's theory presents an unrealistic account of disobedience at odds with its fundamental nature as a political practice. An

important role for social movements is to challenge and overcome the democratic deficits of political institutions. In the next chapter, I examine the claims made on behalf of political constitutionalism, which sees a more active role for civic participation in rights politics.

Chapter 5: Rights as electoral proposals: The parliamentary model

It just happened that the driver made a demand and I just didn't feel like obeying his demand. I was quite tired after spending a full day working

- *Rosa Parks*

The legal constitutionalist model of judicial rights review has been adopted by a large and growing number of liberal democracies in recent years. In response to this trend, a dissenting note is struck by political constitutionalists who argue that judicial veto powers over legislation is undemocratic: since citizens disagree profoundly about rights, they ought to actively participate in how rights are decided through the election of representatives to sovereign parliaments. Jeremy Waldron and Richard Bellamy provide the most powerful and influential theories of this kind, which they link to a distinctive conception of the nature of rights and the normative relations they entail. They argue that rights do not demarcate a domain of morality outside and against politics that functions to limit and constrain it, but instead exist within the 'circumstances of politics' as claims made by equal citizens upon one another regarding the distribution of benefits and burdens within society. Waldron has linked his influential criticisms of judicial review to a procedural theory of the rule of law that locates the authority of law in the unique capacity of parliamentary decision-making to legitimately represent and debate the principled political differences and interests that divide citizens.¹ Bellamy's work, meanwhile, brings into focus electoral participation in an account of the constitutional character of democratic citizenship, which presents citizenship not as a legal status, tied to a package of judicially-protected rights, but as the active creation and definition of rights by citizens through participation in political institutions modelled in accordance with republican principles of non-domination.²

¹ Waldron, *Law and Disagreement*.

² Bellamy, *Political Constitutionalism*.

Political constitutionalists make a persuasive case for active participation by citizens in accordance with the demands of political equality, noting its potential to open up official ideologies of rights to democratic challenge. My aim in this chapter is to critique political constitutionalism from a perspective that takes seriously the politically contested nature of rights and the requirement that citizens' views on their content, nature and distribution be accorded equal respect.³ I argue that the political constitutionalist account of citizenship is inadequate since it construes political activity almost exclusively with reference to voting, parties and parliamentary law-making, neglecting the vital role rights play as a vocabulary of protest in practices of moral critique and social struggle outside and against the official institutions of democratic citizenship. A commitment to democratic participation entails recognition of the importance and legitimacy of activist forms of citizenship, which involves an array of contestatory activist practices that render political institutions more inclusive and accountable and contribute new democratic norms and perspectives into debate.

The chapter proceeds as follows. In Section I, I show how, in their concern to refute the trumping notion of rights associated with legal constitutionalism, political constitutionalists present rights in the manner of ordinary preferences traded within electoral processes, and so overlook their utility as claims that can be demanded and insisted upon against authorities in appropriate circumstances. In Section II, I argue that the political constitutionalist account of disagreement about rights, while plausible for some forms of disagreement, does not account for those situations in which sharp conflicts of interest underlie the denial of rights which require a more insistent, activist politics to challenge authorities and dominant social groups. The model of parliamentary politics Waldron and Bellamy present does not adequately attend to the structural inequalities of power that shape the terrain of electoral contestation and the deliberations and decisions of representatives. Section III examines forms of rights politics beyond parliament. Political constitutionalists have little to say on a social movement politics of civil disobedience and direct action, which is linked to a more general difficulty they have in conceptualizing the existence of justified moral rights held outside and against the law. In Section IV, I differentiate Waldron and Bellamy's

³ The argument of this chapter can be found in Guy Aitchison, "Rights, Citizenship and Political Struggle," *European Journal of Political Theory*, (2015).

constitutional citizenship and the view of activist citizenship I am developing in terms of two alternative readings of the Arendtian ‘right to have rights’.

Section I, The political value of rights as claims

The political constitutionalist commitment to representative institutions for the definition and protection of decision-making on rights stems from a particular account of the conceptual nature of rights as democratic claims addressed to others within a shared political community. Bellamy offers an analysis of the basic structure of a right that aims to show how certain logical and normative features of the idea make it particularly appropriate that rights be decided by a democratic procedure in which all take part.⁴ The justification of rights lies in democracy, he says, not in some ideal, theoretical sense, according to which they mutually imply one another, but in the practical way citizens must negotiate and decide rights among themselves in conditions of conflicting interests and values. The case for democratic decision-making, as he puts it, stems from ‘the very nature of rights and the claims we make of others with regard to them’.⁵ It is important, for Bellamy, that rights be asserted in a ‘democratic spirit’ due to their logical form and content which entails that the recognition of any right has implications for others within a shared set of collective arrangements.⁶

The argument that democracy is conceptually entailed by the nature of rights is presented, by Bellamy, as a challenge to the liberal reading of rights as protections for a pre-political freedom that he associates with Dworkin’s trumping notion.⁷ The liberal impulse to divorce rights from democratic decision-making, he argues, is a function of a reductive misconception of the normative relations they entail. As Bellamy puts it:

Rights are sometimes presented as a two- term relation, whereby x has a right to

⁴ Richard Bellamy, ‘Rights as Democracy,’ *Critical Review of International Social and Political Philosophy* 15, no. 4 (2012).

⁵ Bellamy, ‘Rights as Democracy’, 451.

⁶ Bellamy, ‘Rights as Democracy’, 460.

⁷ Bellamy, ‘Rights as Democracy’, 460.

some *y*. That gives rights a somewhat peremptory sounding character. However, rights are always a three term relation, whereby *x* asks some *z* to recognize and respect his or her claim to *y*, with attendant costs and benefits to *z* who will wish *x* to like- wise recognize either his or her similar claim to *y*, or to some other good such as *v*.⁸

Once we properly understand the normative relations entailed by rights, their political significance becomes apparent. Bellamy highlights three characteristics. First, it is an important feature of rights that although they protect individual interests, they are collective as well since they are by logical necessity also a statement about the interests of those who fall under the same category of agents who bear the right. As he puts it, rights ‘apply equally to all’ and have a collective dimension, as they are ‘not claimed solely for the individual in question but as a right that can be held and upheld equally by all other individuals’. Second, they are social in that they touch on others’ interest about how benefits and burdens are distributed under ‘shared’ collective arrangements where resources are limited. The recognition of any given right will have consequences on the resources available for other collective projects and for the recognition of other rights. For the right to be upheld requires ‘common, publicly provided, structures’ of law and a criminal justice system. While these two features show how rights are intimately linked to democracy by their structural make-up, the third element Bellamy refers to is the ‘traditional’ role rights have as ‘claims against authority in what should not be done or not be denied any individual’.⁹

I have suggested how Dworkin’s theory, with its historically-sensitive mode of justification, is more political than the notion of trumps might be thought to imply. I further noted however that Dworkin’s theory neglects the relational nature of political rights that links their holders to duty-bearers. Bellamy’s political reading helpfully brings into the picture the complex web of social relationships in which a right is embedded alongside the fact many rights will be justified, in part, through more distinctively political modes of reasoning that refer to common goods. In his emphasis on the more reciprocal, co-operative qualities of rights, Bellamy addresses the long-standing criticisms of conservatives and radicals that condemn the discourse of rights

⁸ Bellamy, ‘Rights as Democracy’, 452.

⁹ Bellamy, ‘Rights as Democracy’, 454-455.

for its anti-social egotism.¹⁰ I go on to engage with these criticisms directly myself in Chapter 7 in relation to contemporary critics of human rights. Putting aside these points of agreement, I focus here on the difficulties of Bellamy's own approach, which lies in the idealised picture of a rights claim. There is an under-explored tension in Bellamy's account between the reciprocal negotiation of rights in a 'democratic spirit' and what he describes as their 'traditional' role as claims that can hold power to account.¹¹ This idea of claiming brings to mind a purposeful, self-assertive form of politics that Bellamy's conception appears to have little room for.

Under Bellamy's picture the link between rights and obligations is loosened. It does not appear that z is someone against whom an obligation is held: their relationship is that of an interlocutor who remains to be convinced of the merits of the right. The significance of a right as a claim against authority is lost and we are left with an account of rights as proposals to others. Rights are akin to requests or suggestions; something we ask others to fulfill for us in the ordinary process of political discussion. This works as a description of cases when a new right is suggested in political discussion, but not as a description of the structure of a valid right that is held decisively against authority. The idea of authority does not appear to fit into Bellamy's picture since the account only deals with appropriately-motivated fellow citizens whom we are addressing, rather than powerful institutions and structures.

Where authority refuses to recognize a claimant's valid right there will be a conflict of interests between the two. This does not rule out the kind of reciprocity Bellamy envisages, but it cannot be relied upon. The inequalities of power, wealth and status that make rights necessary also create dramatically unequal bargaining positions when it comes to the mobilisation of political resources and talents: those struggling to have their rights recognised are often from marginalised, exploited groups without access to the levers of power. Rather than someone appropriately-motivated to reach agreement, the addressee of a rights claim may be a rights-withholder: someone who enjoys certain advantages that come from the denial of a right and is therefore hostile

¹⁰ See Karl Marx, 'On the Jewish Question'. in David McLellan (ed.) *Karl Marx - Selected Writings. Second ed.* (Oxford and News York, Oxford, 2000); Edmund Burke, *Reflections on the Revolution in France* (Digireads.com, 2005). I address these critiques in Chapter 7.

¹¹ Bellamy, 'Rights as Democracy', 459.

to its recognition. These agents will act to preserve their own power and privilege and may use ideological manipulation, social coercion and violence to do so. In these circumstances, a more forceful type of claiming is necessary.

Waldron's writings also tend to overlook the central importance of conflictual claiming to the politics of rights, reducing rights to ordinary forms of reason-giving. Waldron works with a conception of rights as weighty political reasons, which follows from his endorsement of Raz's interest theory view in which a right stands in a relationship of normative justification to a duty, rather than a relationship of logical correlativity.¹² As noted, this view loses the distinctive significance of rights in normative reasoning, which is based on the directional nature of the duty being owed to the claim-right holder. In the absence of this relationship of accountability, it is difficult to adequately distinguish between rights and other reasons for action. In arguing against judicial review, Waldron tends to portray disagreements about rights as the polite exchange of reasons. He claims that disputes about rights among professional philosophers are as fundamental as those of citizenry, 'and yet we maintain not only civility with one another, but a quite robust professional esprit de corps and even friendship with those we oppose'.¹³ This restates his earlier claim that theoretical discussions of rights are not different in kind to 'that of a citizen-participant engaged in politics'.¹⁴ Having said he is interested in the circumstances of politics, this is a peculiarly unrealistic comparison for Waldron to make. The social interests of philosophers are not fundamentally at stake in the polite and reasoned disputes of academic conferences and there is an openness to these exchanges that distinguishes them from the communicative asymmetries characteristic of the real-world situations in which rights are called upon.

The model of a reasoned process of deliberation and negotiation only becomes plausible thanks to idealising assumptions according to which politically-constituted citizens address one another within an egalitarian framework of shared values. This view inappropriately identifies the idealistic endpoint of rights with the forms of

¹² Waldron, 'Introduction', in Jeremy Waldron (ed.) *Theories of Rights* (Oxford University Press Oxford, 1984), 11.

¹³ Waldron, *Law and Disagreement*, 229.

¹⁴ Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights,' *Oxford Journal of Legal Studies* 13, (1993), 35-36.

political claim-making necessary to achieve them. Rights may point towards a future of political equality, based on equal concern and respect, but it is a mistake to think they must be claimed in a manner that assumes that endpoint is already realised. In his critique of the notion of the ‘tyranny of the majority’, Waldron rightly points out that there is ‘no necessary connection between the idea of majority-decision about rights and the idea of the tyranny of the majority’.¹⁵

It remains the case nonetheless that minorities are often politically vulnerable, suffering various forms of stigma and discrimination, and therefore have difficulties registering their claims in formal politics. Even under ‘ideal’ conditions they will face epistemic obstacles to having their claims heard. We may grant Waldron’s assumptions that political institutions are well-functioning and that voters are well-motivated and approaching issues in good faith, but the majority may not be able to ‘see’ the injustice of a particular issue facing minorities unless challenged to do so.¹⁶ We have to stack up Waldron’s examples of affirmative action and feminist men where minorities and women do not themselves share the view of others about their interests with the countless examples of minorities being permanently ignored despite enjoying formal rights of political participation. I explore some of the various obstacles faced by groups to effective participation in the next section.

Section II, Rights, disagreement and ideology

The political constitutionalist support for parliamentary structures of decision-making follows from their account of the contestable nature of rights, which, they persuasively argue, are not to be thought of as natural or self-evident. As they point out, we disagree profoundly about what rights we have, why we have them, who has them and how they relate to other concerns. Bellamy and Waldron show how these disagreements are intimately linked to the ideological divisions that characterise any modern, pluralistic political community. Their position does not presuppose a meta-

¹⁵ Waldron, *Law and Disagreement*, 14

¹⁶ Mathew Humphrey and Marc Stears describe this as a challenge to the ‘stickiness’ of ‘certain cognitive frames’, ‘Animal Rights Protest and the Challenge to Deliberative Democracy,’ *Economy and Society* 35, no. 3 (2006), 416-417. For an overview of the cognitive biases that influence real-world communication, see Lynn M. Sanders, “Against Deliberation,” *Political Theory*, 1997, 347–76.

ethical commitment to moral relativism or the sceptical denial of rights. It is an empirical fact that citizens disagree about rights and given the absence of any epistemological criteria to adjudicate between them, the fairest procedure with which to resolve these disputes is parliamentary majoritarianism, which secures political equality and hence equal respect for citizens' views on rights. Further, it is said to provide an informed and representative mode of decision-making that appropriately accounts for the diversity of interests and opinions in the polity. As will become clear, I do not wish to deny or evade the ultimate need for such a decision. In the final instance, there is a need for a collective decision-making process on rights that is legitimate and authoritative. However, even under favourable conditions, the formal procedures of participation through which collective decision-making is institutionalised are far from being exhaustive of politics and by themselves will not effectively represent the views of citizens on rights in the absence of activist citizenship.

Part of the attraction of the political constitutionalist commitment to democratic majoritarianism is that it can provide a check on the rights of wealthy and powerful minorities by opening the official regime of rights to ongoing revision and contestation.¹⁷ This is an important aspiration given the trend, already discussed, of political and economic elites in democratic societies to defend their privileges by freezing a particular conception of rights, based on individualistic negative liberty and private property, beyond the reach of collective decision-making in the hands of judicial guardians.¹⁸ The commitment to treat rights politically avoids the problems I have identified with judicialised politics that compel citizens to constrain their discussion of important moral matters to a technical legal language that favours lawyers and other experts. The difficulty is that the political constitutionalist account operates on a single dimension of power in assuming a smooth translation between citizens' undistorted preferences with respect to rights and the votes of their representatives.

Waldron and Bellamy frequently make it seem as though democracy is direct and

¹⁷ Bellamy, *Political Constitutionalism*, 34-35; Waldron, *Law and Disagreement*, 288.

¹⁸ Hirschl, *Towards Juristocracy*.

citizens are themselves deciding about rights, rather than having representatives decide on their behalf. In the core cases of democracies they have in mind, however, legislatures do not represent a majority, let alone a majority of those eligible to vote due to mass abstention and the workings of the electoral system. Bellamy endorses a number of possible procedural and institutional changes, such as the introduction of proportional voting systems, which would have the beneficial effect of making legislatures more representative.¹⁹ Yet these proposals do not deal with the more fundamental concern that the terrain of electoral contestation is itself skewed. It is precisely these subtle and more pervasive power relations critical theorists call attention to when they argue that today's dominant discourse of liberal rights masks an inherent ideological bias towards the capitalist free market and the interests of private property.²⁰ Here, the danger is not so much the tyranny of the majority, but the tyranny of the minority: the domination of non-mobilised citizens by elites acting in their own interests.

Bellamy's theory of 'constitutive citizenship', with its orientation to electoral processes of alliance-building in civil society, addresses the dangers of private concentrations of power in a way that Waldron's focus on parliamentary debates does not. Bellamy draws on interest-group pluralist models of decision-making, according to which legislative majorities are shifting coalitions of minorities, which entails that no minorities are permanently ignored. For Bellamy, under a competitive party system, with 'one person, one vote', which requires voters to 'hear the other side', the 'prospects of any tyranny of the majority are low'.²¹ Under this system, failure to have one's rights recognised is not due to the imbalances of power that are characteristic of situations in which rights are needed, but as a result of 'not convincing fellow citizens that their view would treat all with equal concern and respect and that comes from not heeding their equally important rights claims of a sufficient number of their fellow

¹⁹ Bellamy, *Political Constitutionalism*, 229.

²⁰ See for example, Wendy Brown, "The Most We Can Hope For...: Human Rights and the Politics of Fatalism," *The South Atlantic Quarterly* 103, no. 2 (2004): 451–63; and Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Pub, 2000). This critical literature on rights draws heavily on the analyses of ideology and power in Marx and Foucault. I engage with these criticisms in Chapter 7.

²¹ Richard Bellamy, "Rights as Democracy," *Critical Review of International Social and Political Philosophy* 15, no. 4 (2012): 464.

citizens so costs and benefits fairly shared by all'.²²

The explanatory relevance of the pluralist model of power this account draws on has not gone uncontested, with one of the most influential pluralist theorists, Robert Dahl, coming to revise his earlier assessment in the context of the vast inequalities of wealth and power in US politics.²³ There is now a growing body of empirical literature that challenges fundamental pluralist assumptions as they relate to contemporary liberal democracies.²⁴ Jeffrey Winters, for example, has recently characterised the US political system as an 'oligarchy', pointing out that:

(R)egardless of the other ways in which political power might be equal - such as one-person-one vote or an equal right to speak or participate - yawning differences in material power create enormous inequalities in political influence and account for key political outcomes won by oligarchy.

These elites exercise power indirectly through donations to political parties and a highly remunerated industry of lawyers, lobbyists, and campaign groups that protect and increase their wealth and income by blocking efforts to impose and collect taxation and promoting the withdrawal of social provision. Contrary to pluralist views, there is no countervailing influence to this force. Thus, the 'expression of minority power operates within a liberal democratic framework, but almost entirely off the national radar screen and through means that cannot be understood by representation, voting, or pluralistic politics'.²⁵ In the UK, structural changes in the domestic and global economy have had a similar hollowing-out effect on democratic institutions. The major political parties no longer possess the effective capacity to represent and organize the interests of social groups and classes in civil society in any meaningfully democratic sense. With internal democratic procedures largely discarded and membership numbers in long-term decline, political parties are increasingly detached from civil society and vulnerable to monied interests and

²² Bellamy, *Political Constitutionalism*, 463–464.

²³ Robert A. Dahl, 'Rethinking Who Governs? New Haven, Revisited,' *Community Power. Directions for Future Research*. (Beverly Hills: SAGE, 1986), 30.

²⁵ Winters, *Oligarchy*, 214, 273. The most systematic empirical studies of 'oligarchy' relate to the US, on which see also Martin Gilens and Benjamin I. Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens,' *Perspectives on Politics. In Press*, (2014).

capture.²⁶ If oppositional views of rights face such substantial obstacles to entering the formal political agenda, it is difficult to sustain any optimism in the power of the vote to achieve them.

The political constitutionalist model tends to construe disagreements about rights as a species of reasonable moral disagreement. Bellamy draws on the deliberative strain in Rawls's theory in *Political Liberalism*, extending the 'burdens of judgment', which express the limits of human reason, not only to conceptions of the 'good' but to conceptions of the 'right'.²⁷ Similarly, Waldron notes how Rawls's burdens of judgment apply to 'the public issues of justice and right that are under discussion in politics'.²⁸ Undoubtedly, the considerations of the burdens of judgment matter in controversies over rights. The forms and limits of such judgments are not a neutral inheritance however, but themselves shaped by patterns of thought and behaviour promoted and sustained by ideological configurations that favour dominant interests. An emphasis on the complexity of political decision-making, due to the deficiencies in our knowledge, as expressed in the burdens of judgment, can have conservative implications. As Sheldon Wolin puts it, in a critique of Rawlsian political liberalism: 'The rhetoric of the desperate is likely to be a simplifying one, reflective of a condition reduced to essentials. A rhetoric of complexity, ever since Burke, has found favour with those whose expectations are secure.'²⁹

Those who seek to challenge dominant political understandings and dislodge the habituated forms of thought and action that privilege the status quo will frequently resort to a simplifying and polarizing moral rhetoric with disruptive modes of politics. Political constitutionalism gives a plausible account of disagreement about rights where parties act in good faith and are motivated to find a solution with one another. Where their account is missing is as an explanation of conflictual cases, marked by

²⁶ A helpful account of the political and economic forces that have shaped these developments in the UK is provided by Colin Crouch, *The Strange non-Death of Neo-Liberalism* (Cambridge, UK; Malden, MA: Polity Press, 2011); see also David Beetham, 'Unelected Oligarchy: Corporate and Financial Dominance in Britain's Democracy,' *Democracy Audit*, 2011; Stephen Wilks, *The Political Power of the Business Corporation* (Edward Elgar Publishing, 2013).

²⁷ Bellamy, *Political Constitutionalism*, 21-22.

²⁸ Waldron, *Law and Disagreement*, 153.

²⁹ Sheldon Wolin, 'The Liberal/Democratic Divide. On Rawl's Political Liberalism', *Political Theory*, Vol. 24, No.1, (1996), 107.

inequality and injustice. Part of the strength of the discourse of moral rights in these circumstances is that those denied them may urge their recognition with immediacy and authority as a wrong in the here and now; furthermore, as a wrong against a particular individual, done to them, because the duty is owed to them, and it is particularly appropriate therefore that they protest about it.

In situations marked by inequalities of power, it may be more effective to claim rights in an insistent, rather than a deliberative manner, through a politics of protest, civil disobedience and direct action. Such means are often necessary to overcome the systematic barriers to democratic inclusion faced by groups and classes and at the lower end of the social hierarchy. As Iris Marion Young describes it, a commitment to democratic inclusion requires that ‘the normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes and have had the opportunity to influence the outcome’.³⁰ Barriers to democratic inclusion are of both the formal and the informal kind. Formal barriers to inclusion are those laws and regulations that deny equal access to democratic fora, as with groups such as refugees, prisoners, and (as we shall) the homeless who either lack formal voting rights or else face substantial legal obstacles to their effective exercise.

Informal obstacles to inclusion are encountered by those who lack the social standing or economic resources to participate on equal terms with others. In societies marked by historical patterns of injustice, significant communicative barriers to participation are faced by those who lack the political capital that comes with education and access to privileged social networks and whose socially ascribed group identity leads their contribution to be ignored or devalued. Typically, disadvantage attaches itself to class, gender, race, ethnicity, nationality, religion, sexual status, immigrant status, language or disability. It is reproduced through dominant ideologies and belief systems that legitimize social hierarchy, along with entrenched discriminatory norms perpetuated at the level of unconscious thought and behaviour. These ideologies, beliefs and norms are hard to dislodge because public discourse itself is structured to place a heavy cost of entry on those perspectives that diverge from a given spectrum of

³⁰ Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2002), 5–6.

political opinion.³¹ This is especially true of those perspectives that challenge the interests of privileged economic classes who are able to use their wealth to buy political influence through lobbying, campaign finance and media ownership.³² Matters are made worse by the fact the disadvantaged themselves often internalize hierarchical and discriminatory norms and so come to think of themselves as not entitled to speak and be heard in democratic dialogue.

While some of the most egregious violations of political equality are as a result of formal barriers to democratic inclusion, informal barriers to inclusion can be equally (if not more) pernicious given their more clandestine mode of operation. Where either formal or informal obstacles to democratic inclusion exist, politics is not merely an argumentative exchange but also a political struggle to be recognised as a legitimate political subject – that is, one normatively authorized to give reasons worthy of consideration and response within democratic debate. Historically, a key contribution of social movements has been to challenge democratic exclusion by redefining those areas of human life previously considered as ‘private’, ‘social’ and ‘natural’ as political, inserting previously unheard groups and classes into the discussions about justice from which they were excluded. Often this will involve the transgression of existing norms of civility and polite exchange so as to interrupt entrenched understandings over who is entitled to speak and what counts as a legitimate topic of discussion. The political constitutionalist prescription of patient, reasoned argument within an electoral framework, alongside an emphasis on the burdensome complexity of rights issues, will privilege the status quo and disempower people from vigorously asserting their moral rights where these are denied.

Section III, Citizenship beyond the law

It is striking how, in the various writings by political constitutionalists on the subject of rights, disagreement and law, there is little discussion of what a citizen who disagrees with the law on the basis of rights and cannot influence the ordinary political process

³¹ For discussion of how communicative asymmetries operate in practice to violate equal democratic standing, see: Elizabeth S. Anderson, “What Is the Point of Equality?,” *Ethics* 109, no. 2 (1999): 287–337; Lynn M. Sanders, “Against Deliberation,” *Political Theory*, 1997, 347–76; Iris Marion Young, “Activist Challenges to Deliberative Democracy,” *Political Theory*, 2001, 670–90.

³² Winters, *Oligarchy*; Crouch, *The Strange Non-Death of Neo-Liberalism*.

should do. The political constitutionalist account is near-silent on forms of political action outside formal channels of participation. Although the struggles of women and workers to gain the vote are celebrated by Waldron and Bellamy, it is their destination that is important - the fact that, they 'did these things to secure a voice on the matters of political principle that confronted their community' - rather than the political means they used to get there and the role of rights as a vocabulary of protest within these struggles.³³ In their determination to protect the integrity of laws by parliament from the counter-majoritarian difficulty of judicial review, they fail to appreciate the role of rights as asserted against the law despite the vital role civil disobedience has played in the achievement of rights through an appeal to fundamental moral principles claimed to over-ride parliamentary law-making. This ought be an important focus since the very people who stand most in need of rights are very often those individuals and groups who face formal and informal obstacles to political participation.

Waldron's *Law and Disagreement* contains only one (disapproving) reference to civil disobedience. He discusses the Clay Cross councillors in Britain in the 1970s who refused to implement the Tory raising of public housing rents as an example of 'not enough respect for the law'. The councillors did not show the necessary respect for legislation that is the outcome of parliamentary decision-making, in which 'a large group of people act together in common concern'.³⁴ Some comments by Waldron elsewhere suggests he doesn't think too highly of politics that takes place outside of formal structures and procedures, regarding it as a 'glamorous politics of self-expression' that is potentially dangerous and undemocratic.³⁵ There is a notable tendency in Waldron's work to focus on constitutions, parliaments, and courts, as though these constituted the entire domain of the political.³⁶ Bellamy's notion of constitutive citizenship allows a greater role for social movements in the construction of electoral alliances. However, his account cannot explain how excluded groups

³³ Waldron, *Law and Disagreement*, 15.

³⁴ Waldron, *Law and Disagreement*, 101-102

³⁵ Waldron, 'Arendt's Constitutional Politics', in Dana Villa (ed.), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press, 2000), 215.

³⁶ This is most conspicuous in Waldron's recent methodological proposals for a more 'political' mode of theorizing, 'Political Political Theory: An Inaugural Lecture,' *Journal of Political Philosophy*, Vol. 21, Issue 1, (2013).

challenge the make-up of the polity from outside its boundaries.³⁷ Bellamy argues that rights to the democratic process were won ‘within existing, normal democratic politics’. Women and workers obtained the vote through ‘ordinary legislation within the legislature’, which is the appropriate ‘sphere of constitutional politics’.³⁸ In reality, the legislation of equal votes for women and workers was the culmination of a long and bitter historical struggle outside parliament involving sustained contestation, disruption and law-breaking. Excluded social groups and classes did not overcome barriers to citizenship through the exercise of the very political powers they were struggling to attain.

While political constitutionalists allow for the existence of moral rights outside the law, they tend to blur the distinction between the moral justification of a right and the political legitimacy of the procedure through which it is decided. This makes it seem as though rights are justified by a democratic process - not in the ideal-theoretical sense of discourse ethics, but by real-world elections and parliamentary procedures. We should not however confuse the moral justification of rights with the legitimacy of the political procedures through which they are decided and enforced. The fact a right was decided by a democratic political procedure counts towards the legitimacy of enforcing that right, but it is the moral principles that ground the right that count towards its justification. This distinction renders coherent the anti-positivist position that moral rights may be held against legitimate political institutions that do not recognize and enforce those rights, including democratic majoritarian institutions, as favoured by political constitutionalist, insofar as these are legitimate.

This does not imply that justice always over-rides legitimacy, permitting disobedience in any circumstances in the name of a valid moral right. If a political procedure is both illegitimate and it fails to recognize a morally justified right there may be strong reasons to resist it. On the other hand, if a legitimate political procedure fails to enforce a morally justified right, then there is a clash of moral reasons between obedience to a morally justified procedure and one’s own view of justice. The fact the

³⁷ While I go onto highlight this difficulty with respect to the homeless and housing, Marco Goldoni identifies a parallel problem for Bellamy’s theory with respect to prisoner voting rights, ‘Constitutional reasoning according to political constitutionalism’. *German Law Journal*, 14 (8). (2013).

³⁸ Bellamy, *Political Constitutionalism*, 139

procedure is legitimate provides reasons to abide by it, though if the injustice is severe there may be strong reasons to disobey it. I discuss civil disobedience in greater depth in the next chapter. I underline the distinction between a legitimate procedure and a justified right here only to show that a commitment to democratic legitimacy does not preclude citizens from formulating and acting on their own considered views of justice against the law. Equal respect for individuals as authors of valid and binding moral claims requires that we acknowledge this capacity to challenge law on the basis of justice as an aspect of political equality properly construed.

Section IV, Two interpretations of the ‘right to have rights’

In arguing for the primacy of electoral participation and an active public culture of rights, both Bellamy and Waldron invoke Arendt’s writings on the fundamental importance of political participation.³⁹ Arendt famously highlighted the plight of stateless refugees to call attention to a tension at the heart of human rights stemming from the fact that those stripped of all but their humanity proved most vulnerable to violence and abuse since they lacked the security and recognition afforded by the status of political membership. Arendt’s ‘right to have rights’ consists in the right to ‘live in a framework where one is judged by one’s actions and opinions, the right to belong to some kind of organized community’. It thus involves two types of right in expressing the primary moral importance of a *moral right* to membership of a political community where one has *political rights* to be seen and heard as a citizen among equals.⁴⁰ The political constitutionalist view understands this second form of right as the formal rights of constitutional citizenship. The creative power of rights is ultimately expressed in the ‘acts’ of our elected representatives; legislation that is the outcome of political processes culminating in a majoritarian vote in parliament. The legislative act is thought to reflect the interests and opinions of the community as a whole, bringing to a close a process of disagreement and argumentation.

³⁹ See e.g. Waldron, “The Core of the Case against Judicial Review,” (2006), 1392; Richard Bellamy, “The ‘Right to Have Rights’: Citizenship Practice and the Political Constitution of the EU,” *Citizenship and Governance in the European Union*, 2001.

⁴⁰ Hannah Arendt, *The Origins of Totalitarianism*, vol. 1 (Mariner Books, 1973), 290; and the helpful discussion in Ingram, ‘What Is a ‘right to Have Rights’?.’

The right to have rights, as I interpret it, is not the package of formal political rights tied with official citizenship, but the right to political action in a much broader sense. There is a need for activist citizenship to supplement, and even substitute for, constitutional citizenship where the formal channels of political participation are unavailable or unreliable. In this model, rights claimants are not conceived just as equal citizens within ordered processes of electoral negotiation and persuasion, but also as self-assertive individuals purposefully demanding recognition of what they take to be their rights by exercising them directly regardless of their official recognition through appeal to fundamental moral principles that are thought to over-ride democratic law-making. This interpretation reflects the emphasis in Arendt on the creative, unpredictable nature of political action, realising the human capacity to make something new and unexpected out of what had been before in a wider political community, defined not by formal institutional structures, but the 'space of appearance in the widest sense of the word, namely the space where I appear to others as others appear to me'.⁴¹

Conclusion

The political constitutionalist account of rights portrays a more realist view of rights politics than Dworkin, which sees a central role for disagreement and conflict. It is clear from the writings of Waldron and Bellamy that the emphasis they place on political participation is based not only on a normative concern with democratic legitimacy, but a political concern that an elitist regime of judicially-enforced negative rights will entrench inegalitarian regimes of private property and the related concern that such a regime favors those already privileged groups who can afford the costs of litigation to defend their private interests. These are important concerns. Yet we must equally be wary of construing rights politics in such a way that overlooks their rebellious deployment against authority through practices of opposition in multiple spheres. A theory of rights-based citizenship based on the equal respect owed to the opinions and interests of democratic citizens and open to the transformative claiming of rights cannot afford to ignore the importance of activist citizenship. Once we accept the political constitutionalist insight that rights are contestable and that plurality,

⁴¹ Arendt, *The Human Condition*, 198-199.

dissent and disagreement are integral to their creation, definition and enforcement, our understanding of principled political contestation should be broadened beyond voting and parliamentary law-making. This chapter established that rights function in politics not simply as weighty electoral interests traded among legislators and voters, but as claims that interrupt the ordinary flow of debate and empower marginalized groups to enter the political arena and force new critical perspectives into public discourse. They may not automatically ‘win’ the political game in the manner of a trump in a game of cards, but the assertion of a justified moral right may nonetheless appeal to norms that over-ride democratic law-making and require extraordinary political intervention to overcome unresponsive political structures or else to compel majorities to confront their own assumptions and prejudices. Having touched on the topic of civil disobedience in my examination of both legal and political constitutionalism, I turn in the next chapter to critically examine Rawls’s influential theory of the practice with the intention of highlighting key differences between an activist citizenship of rights and the classic liberal model of disobedience.

Chapter 6: Rights as dissident speech: The liberal civil disobedience model

‘If you want a quality, act as though you already had it’.

- *William James*

John Rawls’s discussion of civil disobedience in his *Theory of Justice* offers the pre-eminent liberal statement of the practice within the philosophical literature.¹ His analysis has provided a framework for much of the subsequent debate on the nature of political action by citizens outside official channels of participation and the grounds of its legitimacy.² I have, by this stage of the thesis, elucidated the features of an activist politics of rights principally by way of contrast with official forms of citizenship. The purpose of this chapter is to highlight the particular characteristics of an activist politics of rights considered as a distinctive form of oppositional politics by way of critical contrast with Rawls’s theory. In the first section I situate Rawls’s account within the broader literature on disobedience, highlighting the motivations and presuppositions of this literature in relation to my own. In the second section, which makes up by far the greater part of this chapter, I draw out the particular characteristics of an activist citizenship of rights through a critical contrast with six features Rawls identifies with civil disobedience.

Rawls claims that civil disobedience is: i) in violation of the law and intended to be so; ii) nonviolent; iii) public; iv) accompanied by a willingness to accept the legal consequences; v) usually performed to bring about a change in the laws or policies of the government and; vi) addressed to the majority’s sense of justice. As with Dworkin’s writings on disobedience, Rawls’s discussion is shaped by a distinctively liberal historical interpretation of the protest movements in the US at the time he was writing, which treats these movements principally in symbolic communicative terms as a form of moral speech aimed at bringing a wayward political majority to its

¹ Rawls, *A Theory of Justice*, Ch 6.

² See for instance the essays collected in Bedau, *Civil Disobedience in Focus*.

senses. He fails to see that disobedience is a legitimate response to the deficiencies of the democratic system with a necessary function in securing the equal respect due to the political views and interests of democratic citizens. I further note the overly restrictive effects of Rawls's prescriptions on the permissible forms of disobedience and fault his preoccupation with the legal-institutional dimension of movement politics at the expense of its social influence on norms, behaviours and attitudes within civil society.

Section I, Disobedience and dissent

Much of the canonical philosophical literature on civil disobedience comes from the US during the 1960s and 1970s at the time of the civil rights movement, student protests against undemocratic university administration and wide-scale resistance to the military draft for the war in Vietnam. Many of the features taken to be definitive of civil disobedience in the most influential liberal accounts, as provided by John Rawls, Carl Cohen and (as we have seen) Ronald Dworkin, are heavily influenced by these movements and their particular characteristics.³ At that time, the normative theorisation of civil disobedience as a distinct political practice was relatively new and philosophers wished to explain and defend it against the conservative charge – echoing the arguments of Socrates in his prison cell to Crito - that it is morally wrong to disobey the law and that disobedience will encourage a general breakdown in law and order.⁴ In response, liberal political philosophers were concerned to clarify what separates civil disobedience as a legitimate domain of political activity with its own norms and understandings that constrain its potentially dangerous effects and mark it out from revolutionary activity aimed at the overthrow of the state and from ordinary law-breaking in pursuit of private gain. Civil disobedients are said to be distinguished from these categories of law-breakers by their commitment to the constitutional regime and the principle of majority rule, as evidenced by their nonviolence and willingness to accept criminal punishment for their actions. Civil disobedience, under

³ For Carl Cohen, see *Civil Disobedience: Conscience, Tactics, and the Law*, vol. 117 (Columbia University Press New York, 1971).

⁴ In contrast with the philosophical theory, the practice of civil disobedience is not so new and arguably played a historical role in the genesis of the American polity itself through the actions of the US colonists, most famously the 'Boston Tea Party' of 1773, see Howard Zinn, *A People's History of the United States: 1492-Present* (Pearson Education, 2003), 67.

this standard liberal picture, is interpreted as a form of persuasion addressed to political majorities who exercise power through state institutions.

Later scholars have challenged the narrowness of this interpretation. They have questioned the underlying assumption within the orthodox liberal literature that there is a moral obligation to obey the laws of an oppressive polity and the related claim that civil disobedients regard the political regime as nearly just, interpreting their appeals to the law and acceptance of punishment as a strategic calculation rather than a sign of their political moderation.⁵ Some philosophers have countered the orthodox view of civil disobedience with more inclusive definitions able to account for movements of labour activists, pacifists, animal rights protesters, environmentalists and the like; movements which frequently employ more obviously coercive methods that cannot plausibly be interpreted as a form of speech.⁶ These revisionist writings have helpfully undermined the binary between disciplined and well-behaved civil disobedients on the one hand and other forms of dissent that fall outside the sphere of acceptability, drawing attention to the breadth and variety of different ways in which the law is challenged, re-defined and disregarded by a variety of forms of political action.

I make use of these critiques here in drawing a critical contrast with Rawls's work, though my concern with protest and disobedience as a dimension of rights politics gives my work a different focus. Theories of civil disobedience typically begin with an account of its distinctive nature as a category of political action and then consider what aims it might justifiably be deployed in pursuit of.⁷ My principal aim in this chapter is not to propose a new definition of civil disobedience, or to define a wholly new category of political action, but to show how activist citizenship forms of citizenship in pursuit of rights span the existing categories. I provide good reasons to expand and rethink the Rawlsian category of disobedience so as to account for some

⁵ David Lyons, 'Moral Judgment, Historical Reality, and Civil Disobedience,' *Philosophy & Public Affairs* 27, no. 1 (1998).

⁶ See e.g. Stears, *Demanding Democracy*; Humphrey and Stears, 'Animal Rights Protest'; Jennifer Welchman, 'Is Ecosabotage Civil Disobedience?,' *Philosophy & Geography* 4, no. 1 (2001).

⁷ Rawls talks of a 'right' to civil disobedience. Likewise, David Lefkowitz and Kimberley Brownee have both defended a right to civil disobedience. Joseph Raz denies that there is such a right in liberal regimes and that civil disobedience is justified insofar as its ends are justified. See David Lefkowitz, 'On a Moral Right to Civil Disobedience,' *Ethics* 117, no. 2 (2007); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009), Ch. 14.

of the forms of political action I discuss, though to include all of them would almost certainly stretch the term beyond use. Activist citizenship overlaps with and encompasses the principal categories of unofficial political action without being reducible to any of them. In particular, I draw attention to how it embodies strategies of re-imagination in which individuals enact alternative ideals and modes of life directly without appeal to higher authority. In bypassing authority, there are important commonalities with a politics of direct action as found in the anarchist tradition, though this rejection of authority may be selective and does not necessarily involve a radical rejection of all political authority as such. Activist claim-making may proceed from radical political assumptions and hostility to the existing order, or from a general commitment to constitutional principles associated with civil disobedience.

Section II: Rawls's account of civil disobedience

Rawls defines civil disobedience as a 'a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government' by addressing the 'sense of justice of the majority' of the community, to which he adds the proviso that it involves 'acceptance of the legal consequences of one's act'.⁸ As a first step, it is important to understand the place of civil disobedience within Rawls's wider theory. The discussion of civil disobedience and conscientious refusal belong to what Rawls calls the 'partial compliance part of non-ideal theory' (alongside punishment, compensatory justice, and militant resistance). The precise conditions of partial compliance theory are left somewhat vague, but Rawls tells us it is a 'state of near justice, that is, one in which the basic structure of society is nearly just, making due allowance for what it is reasonable to expect in the circumstances'.⁹ The society has a democratic constitution, which operates according to majority rule, and citizens possess a 'sense of justice' and are thus capable of being swayed by moral arguments by civil disobedients that appeal to their conscience. It would appear from the course of the discussion that Rawls regards his theory as applicable to the contemporary US and other contemporary societies,

⁸ Rawls, *A Theory of Justice*, 335.

⁹ Rawls, *A Theory of Justice*, 309

which we must assume are in a 'state of near justice'.¹⁰

Rawls frames his discussion of civil disobedience, not with a discussion of our obligations to political authority based on acceptance of benefits, which is the common starting point for theorists within the social contract tradition, but with an account of the natural duty to support and comply with just institutions agreed to by parties in the original position in order to secure the stability of such institutions.¹¹ This natural duty is activated in relation to the institutions we live under when we accept the benefits they provide due to the 'principle of fairness', which is chosen by parties in the original position as a way to secure mutually advantageous co-operative ventures. Our natural duty requires us to 'comply with and to do our share in just institutions when they exist and apply to us' and 'to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves'.¹² In normal circumstances, these requirements entail that citizens or legislators 'support the party or favour that statute which best conforms to the two principles of justice', but in certain circumstances of injustice civil disobedience is required. The problem of civil disobedience is therefore understood as a conflict between the duty to comply with laws enacted by a legislative majority (or an executive supported by such a majority) and on the other hand the right to defend one's liberties and the duty to oppose injustice.¹³ It is also understood, by Rawls, as an expression of the appropriate sensibility and forms of conduct of democratic citizens who have obligations to one another and the political community as a whole to promote justice. Having set out the place of disobedience within Rawls's theory, I shall now examine each of the elements he identifies within his account of civil disobedience in turn.¹⁴

¹⁰ Brian Barry notes this tacit assumption in Rawls, *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in A Theory of Justice by John Rawls* (Clarendon Press Oxford, 1973), 140-141.

¹¹ Rawls, *A Theory of Justice*, 99. I am indebted to Brian Smart's contribution in Ch 12, 'Defining Civil Disobedience'

¹² Rawls, *A Theory of Justice*, 293-294

¹³ Rawls, *A Theory of Justice*, 319.

¹⁴ I am indebted to Brian Smart's helpful analysis of Rawls in 'Defining Civil Disobedience' in Bedau *Civil Disobedience in Focus*.

i) 'In violation of the law, and intended to be so'

Rawls identifies civil disobedience with the known violation of a law in common with nearly all other philosophers of civil disobedience. Violation of the law must be intentional in that it is not done as a test case to challenge the constitutionality of a statute in the belief one is acting legally, nor is it done out of ignorance or by accident, but with definite aims that mark civil disobedience out as a purposeful political activity. This marks the first points of contrast with activist citizenship: non-institutional forms of claim-making need not necessarily involve transgression of any law and may even generate new claims of right contingently as an unpredictable consequence of concerted political action.

In some cases, a right is politically exercised not to challenge the law but to challenge social behaviours and attitudes that comprise our conventional morality and call for the law's support. One such example is the reappropriation of public space on behalf of non-mainstream sexual identities through the activism of LGBT movements. Whereas the initial decriminalization of homosexuality focused on the removal of laws against 'private' matters, subsequent activism focused on the right to be gay in public: through hand-holding, kissing and other public displays, non-mainstream sexuality was made visible and celebrated, evolving into the annual gay pride marches through cities worldwide. No laws were violated (public displays of homosexuality are not illegal) but these protests functioned as a re-imaginative strategy that posed a symbolic challenge to society's norms and expectations about the sexual ordering of public space.¹⁵ In addition to this cultural challenge to social norms and behaviour, such actions drew attention to the need for better state protection for LGBT people in the form of specific laws against abuse and harassment by private citizens. They thus served a dual purpose of both 'institutional' political influence and 'cultural' transformation by confronting fellow citizens with their own attitudes and prejudices. In other cases, a formal right enshrined in law, but not enforced due to persistent violation or neglect by the authorities, is politically exercised in a collective act of defiance in order to make the letter of the law effective. For example, a protest to take photos in public places is called in response to the police stopping photographers

¹⁵ Plummer, 'Rights Work', (2006).

under anti-terror legislation. In such cases, no law is disobeyed, but instead a pattern of authority whereby the law is violated is confronted. New rights may come to be established and defined contingently without direct political intention as a byproduct of other political aims. An interesting historical example is given by the protest march in which protesters walk together through public areas, with banners and chants to communicate a political message and visibly demonstrate the popular support they enjoy. The protest march is now taken to be an archetypal manifestation of the fundamental right to political association, but it originated almost by accident. In Britain, radical groups such as the Chartists marched to hold open-air meetings in fields, having been refused meeting rooms on account of their subversive views.¹⁶ A similar story can be told of other unofficial political strategies, such as strikes and boycotts, which have by now become well established in the repertoire of legitimate methods available to citizens to politically contest injustices. Thus, movement activism functions not only instrumentally to achieve pre-existing rights claims, but has the potential to itself expand the range and forms of legitimate participatory politics in contingent and unforeseen ways.

ii) *'Nonviolent'*

Rawls maintains that civil disobedience ought to be non-violent. This is because the significance of civil disobedience as a form of moral persuasion, addressed to the majority's sense of justice, would be undermined by violent acts. Violence involves interference with the civil liberties of others, as Rawls puts it, and this 'tends to obscure the civilly disobedient quality of one's act'. Although more forceful resistance may be justified in response to injustice later on, this is distinct from civil disobedience which though 'it may warn and admonish, it is not itself a threat'.¹⁷ This stipulation is one of the more controversial parts of Rawls's definition. While some dispute Rawls in arguing that nonviolence is a contingent and strategic consideration rather than a reflection of moderation,¹⁸ others eschew any strict insistence on nonviolence altogether as part of a broader rejection of the idea that civil disobedience achieves its

¹⁶ Tilly, *Social Movements*, 1768-2012, 54.

¹⁷ Rawls, *A Theory of Justice*, 321-322.

¹⁸ Lyons, 'Moral Judgment, Historical Reality, and Civil Disobedience'; Andrew Sabl, 'Looking Forward to Justice: Rawlsian Civil Disobedience and Its Non-Rawlsian Lessons,' *Journal of Political Philosophy* 9, no. 3 (2001); Stears, *Demanding Democracy*.

aims by being non-coercive.¹⁹

In reflecting on the issue of violence, it is imprudent to stipulate more than very general principles: the nature of the oppression suffered and the opportunities for redress will vary greatly by circumstance and it is important to avoid unrealistic moralising from a position of relative security and privilege. Broadly, defensive violence will be justified in some instances, though setting out with the deliberate intention to cause violence is rarely likely to be justified.²⁰ It is difficult to think of a situation in which rights claimants ought to initiate violence against others. I have discussed how the appeal to rights carries a form of respect to the addressee who is asked, in the first instance, to change their behaviour through their own will. It follows that the form of protest to achieve a right should embody this norm of respect in treating others as human beings, with their own ideas, values and interests, who are capable of acknowledging and responding to moral reasons. To act out of violent retaliation in response to the denial of a right is to exchange one form of disrespect for another, in a potentially escalating cycle of retaliatory aggression. In cases of severe injustice, no doubt, offensive violence may be justified, but there are also strategic reasons that count against it given the dangers of sparking reprisals that marginalize activist groups and undermine the possibility of future democratic co-operation with political opponents.

A more difficult question concerns defensive violence. When we approach the question of violence from the perspective of a justified moral right being claimed, the question is viewed from a distinct perspective. Nearly all philosophers accept that it is in the nature of rights that some measure of coercion is justified for their enforcement. This enforcement is generally assumed to be by the state but there is a long tradition within liberal rights theory, which says that an individual may have to coercively enforce their own rights in resistance to domination, which arises from an individual's

¹⁹ Barry, *The Liberal Theory of Justice* (1973); Michael Walzer, *Obligations: Essays on Disobedience, War and Citizenship* (Harvard University Press, 1970); Zinn, *Disobedience and Democracy*. If we understand coercion as any behaviour that seeks to influence an agent's behaviour by imposing a cost on a course of action, then the category of political coercion includes not only violence, but forms of non-violent direct action based on disruption and non-compliance. See Gene Sharp, *The Politics of Nonviolent Action*, 3 Vols, Boston: Porter Sargent, 1973).

²⁰ There are competing definitions of what counts as violence, with one key area of disagreement concerning whether property damage should count as such. I reserve the term here for the intentional use of physical force against persons.

right to self-ownership.²¹ Even Thomas Hobbes - whose theory was centrally concerned with political obedience even to the most tyrannical state - allowed resistance on the part of individuals if the sovereign condemned a man to die or a fate worse than death.²² Defensive violence may be necessary to ensure the continued legitimate exercise of a justified moral right. Moreover, defensive violence may serve as a powerful vindication of self-respect and autonomy. In the famous Stonewall riots in New York in 1969, the frequenters of a gay bar routinely raided by police violently resisted one such intrusion through rioting. This dramatic display of defensive self-assertion expressed a demand for equal treatment and respect that helped launch the gay liberation movement of subsequent decades.²³

Walzer discusses the sit-down strikes by workers in automobile factories in the US in the 1930s, which had to be defended against incursions against the police with the use of barricades and weapons.²⁴ Unionists justified the actions in terms of the right to work:

The laws of the state and nation recognize, in a hundred ways, that the worker has a definite claim upon his job; more fundamentally, it is recognized that every workman has a moral right to continue on his job unless some definite misconduct justifies his discharge. These sit-down strikers are staying at their work-places; no one has a better right to be there than have these men themselves.²⁵

In this case, violence was used defensively here to ensure the continued, visible effects of a particular political action and demonstrate the strength of conviction and determination of the actors. The public appeal to wider society through reference to a claimed 'right to work' allows for the possibility that moral reason will convince through an appeal to shared values. This manifests respect for others and so preserves the possibility of future democratic exchange, negotiation and compromise without capitulation to superior force and intimidation. Activist citizenship can therefore be distinguished from terroristic acts of violence precipitated by clandestine groups, such

²¹ I discuss this in the next chapter in relation to Locke and the Levellers

²² Thomas Hobbes, *Hobbes: Leviathan*, (Cambridge, Cambridge University Press, 1996), 148.

²³ Plummer, "Rights Work".

²⁴ Walzer, *Obligations*, Ch. 2.

²⁵ Wyndham Mortimer, vice-president of the United Automobile Workers, quoted in Joel Isaac Seidman, *Sit-down*, (League, 1937).

as the Weather Underground. These groups set out with the intention of a violent illegal struggle to change government policy not through forceful persuasion, but through unlegitimated and unilateral compulsion. The practical effects of these tactics, for the Weather Underground, were counter-productive. The group isolated themselves from participation within public debate and the wider movement suffered division and decline following their abandonment of democratic values.²⁶

iii) 'Public'

Rawls says that civil disobedience must be public-facing and addressed to the community at large, going so far as to claim that disobedients should give 'fair notice' of their acts of transgression. For Rawls, publicity is closely linked to the political nature of civil disobedience: the act is public in addressing public principles of justice and in being done openly in the public forum. Rawls contrasts this with 'conscientious refusal', which he defines as a private act in response to a legal or administrative order, which is not addressed to the majority, has no expectation of political influence and may be based on religious or other non-political principles at variance with the constitutional order.²⁷ Although few philosophers have followed Rawls to the extent of requiring fair notice for civil disobedience (which will almost certainly compromise the effectiveness of the action by allowing the authorities time to prepare), they nonetheless agree that publicity in some form is a central requirement which distinguishes civil disobedience from other forms of law-breaking, such as 'criminality' aimed at private gain by breaking the law without detection and revolutionary 'conspiracy' aimed at overthrowing the government by force through clandestine organisation.²⁸ A defining feature of civil disobedience, then, is that it courts public attention in support of a cause with the accompanying risk involved in openly violating the law demonstrating the strength of moral conviction. It follows that civil disobedients must carefully choose the place and timing of their acts of transgression

²⁶ See the account in Jeremy Varon, *Bringing the War Home: The Weather Underground, the Red Army Faction, and Revolutionary Violence in the Sixties and Seventies* (Univ of California Press, 2004).

²⁷ Rawls, *A Theory of Justice*, 331-332.

²⁸ Publicity is also a requirement for Jürgen Habermas, 'Civil Disobedience: Litmus Test for the Democratic Constitutional State,' *Berkeley Journal of Sociology* 30 (January 1, 1985); Hannah Arendt, 'Civil Disobedience,' *Crises of the Republic*, (1972); and Peter Singer, 'Disobedience as a Plea for Reconsideration,' in Bedau, *Civil Disobedience in Focus*.

in order to achieve the maximum amount of publicity.

The difficulty with the Rawlsian approach is its binary conception of publicity: an act is public (or ‘political’) when openly addressed to public institutions and private (or ‘personal’) when it does not court attention in this way. This binary approach overlooks more indirect and discrete forms of political action within civil society, which exert a more horizontal form of influence. Some rights are claimed and acted upon without the aim of maximizing attention, in some cases precisely in order to avoid detection. The primary purpose of disobedience may be to meet the object of the right directly, with indirect political influence over friends, family and fellow-citizens a secondary effect that is welcome but not vital. This contrast is clearest when we consider those rights, most notably those of sexuality and bodily autonomy, the personal nature of which militates against their being publicly claimed. The eventual legal recognition of rights to same-sex relationships, contraception and abortion, for example, were in many ways *de jure* affirmation of rights that existed *de facto* already through the widespread transgression of prohibitive laws. Prior to the US Supreme Court ruling in *Roe v Wade* that decriminalised abortion nationwide, up to 1 million illegal abortions are estimated to have taken place annually in the US. While the Court’s decision had an important role in permitting access to safer, legal abortions for women in the US, formal decriminalization in 1973 had little overall effect on these figures. These illegal abortions were performed clandestinely to avoid detection and therefore were not political in the sense of Rawlsian disobedience. Nonetheless, they were often conducted through the assistance of organized political networks of women in civil society who combined this work with political campaigning to reform the law.²⁹ The cumulative effect of widespread and flagrant transgression was to corrode anti-abortion laws, showing it to be unworkable and unenforceable. This contributed to a climate of public opinion that ultimately influenced politicians and judges.

While such acts may involve refusal of authority, it is not in Rawls’s individualized sense of conscientious refusal, understood as a defensive posture aimed at maintaining

²⁹ Rosenberg, *The Hollow Hope*, 442-443.

moral integrity (as with the Jehovah's witnesses who refused to salute the American flag). Those who exercise their claimed rights politically commit a deliberate action, rather than simply omitting to act in a way they believe to be unjust. This need not involve a wholesale rejection of authority: it can be limited to a rejection of interference by authority within the particular domain of the exercise of the claimed right. Individuals and groups refuse to recognise a particular law governing their personal conduct as legitimate and withdraw their support for it, exercising their capacities for self-determination themselves outside legal and formal structures.

These practices, embodying re-imaginative strategies of political change, represent a challenge to the state's legitimate claim to be the authoritative originator and interpreter of rights. The justification of the transgressive exercise of a justified moral right need not be in the form of accompanying words and rhetoric put into the public domain, but it still has a communicative dimension insofar as civil society is a channel of political influence. Although these acts may be motivated by personal reasons, they are different from breaking the law in a purely self-interested criminal manner, as with the jumping of a red light: there is an underlying appeal to rights, which means the claim is generalizable as one that bears on collective arrangements - the *res publica* - can hence justifiable to fellow citizens.

The direct political exercise of rights, in this way, proliferates alternative social practices and norms within civil society and so extends the range of political alternatives. Consider, for example, the practice of electronic file-sharing. The systematic violation of intellectual property rights by those who copy and sell cultural objects, such as music films and books, in the name of an allegedly more important right to cultural participation and enjoyment may one day be viewed as criminal 'pirates' as the cultural industries today would have it. Alternatively, they may be seen as pioneers of a new right to cultural participation that checks the presumptions of private property rights holders. The existing regime of property rights, in which cultural access is controlled in order that cultural industries turn profits, may become seen as redundant in retrospect.³⁰ We cannot say. However, the enactment of

³⁰ If so, we may come to look back upon the current intellectual property regime much like the pre-1940s regime of property rights in the US, in which landowners were said to own all the above their

alternative modes of relation and association has a communicative dimension even when not accompanied by the list of rhetorical demands through which acts of civil disobedience are conventionally decoded: they afford instead a practical glimpse of an alternative possible world, along with its threats and opportunities.

Some practices may prove successful and become widely adopted, leading to political change, while others may be abandoned and rejected. I discuss this practical form of experimentation in terms of moral innovation, which I understand on broadly Millian lines as an optimistic outlook towards the relationship between social diversity and progress. The idea of moral innovation does not presuppose any teleological conception of progress based on the transformative moral power of the demos, the working class, or some other historical agent. It is, rather, a more modest epistemic idea that relates to the contribution of movement activism to the quality of democratic reflection and judgment.

iv) 'Acceptance of the legal consequences'

Rawls argues that civil disobedients should accept legal punishment for their actions in line with his view that the practice takes place within the 'limits of fidelity to law'. Along with nonviolence and publicity, this distinguishes civil disobedience from 'organised forcible resistance' and 'militant action', which reflect a 'more profound opposition to the legal order'.³¹ Other philosophers are divided on this question. Some insist that it is a moral requirement that disobedients accept punishment from the authorities in order to show their moral seriousness and their commitment to the principles of law and order. For Carl Cohen, civil disobedience must involve 'personal sacrifice', with disobedients' acceptance of 'humiliation and probably mistreatment' a marker of conviction and respect for law that distinguishes legal transgressions aimed at meeting of 'personal, selfish interests'.³² By contrast, Dworkin takes the more

plot of land, stretching into the heavens. This particular conception of the legitimate scope of private property quickly became redundant in the era of mass aviation given society's strong interest in travelling by plane without the cost and complexity of compensating each individual landowner when a plane flew over their land. See John Naughton, *From Gutenberg to Zuckerberg: What You Really Need to Know About the Internet* (Quercus, 2011), Ch. 8.

³¹ Rawls, *A Theory of Justice*, 322-323.

³² Cohen, 'Defending Civil Disobedience' Bedau, *Civil Disobedience in Focus*, 476.

radical view that it is better, if possible, for disobedients to avoid criminal punishment for their actions.³³

The notion of a general moral requirement to submit to punishment for disobedience is confused and should be rejected. Part of the confusion arises from the idea that disobedience is primarily symbolic and directed at authority. Where it functions in the manner of direct action to meet important needs independent of authority, avoidance of punishment is vital to the ongoing security of a right. The doctor who performs illegal abortions for women would severely compromise her ability to do so in future were she to willingly embrace criminal punishment for her actions.³⁴ In cases of injustice, it is far from clear that the law is owed respect at all. Needless submission to it may invite a lengthy prison sentence that is self-defeating and aggravates the initial injustice.³⁵

The strategic question regarding submission to punishment is more open and complex. Significantly, the requirement that legal punishment be willingly accepted is often accompanied by an emphasis on certain passive moral virtues. The sacrificial side of civil disobedience is often taken to reflect the virtues of humility, patience and submission, which emerge so clearly in some of the religious-inspired writings and speeches of Gandhi and Martin Luther King. The acceptance of punishment can serve as a marker of self-control, calmness and composure, which are ideals linked to a dignified and upright standing. These virtues may provoke respect and support from sympathetic third parties who had hitherto been passive in the face of injustice. Rawls is correct to note this feature. In itself, however, such sympathy is unlikely to convert political opponents who are driven by righteous ideological fundamentalism or whose self-interests are fundamentally threatened. While Gandhi himself always insisted his campaign of ‘satyagrahi’ against the British functioned purely by non-coercive means through the transformative effects of self-suffering, the strategy of boycotts and strikes

³³ Dworkin, ‘Civil Disobedience and Nuclear Protest’, 116.

³⁴ Kent Greenwalt makes this point with respect to those who disobeyed the law in the US in the mid-19th century to help escaped slaves seek refuge: for them to submit to punishment would compromise their ability to continue helping other slaves in the future and so be self-defeating, ‘Justifying Non-Violent Disobedience’ in Bedau, *Civil Disobedience in Focus*.

³⁵ While admirable, a Gandhian strategy of sacrificial non-resistance is too demanding to function as a viable political strategy for all but the most heroic of individuals. Asked in the late 1930’s what the Jews should do against Hitler, Gandhi proposed that they should commit collective suicide so as to arouse the moral conscience of the world. See George Orwell, “Reflections on Gandhi,” *Partisan Review* 16, no. 1 (1949), 85–92.

was centrally aimed at disrupting the economic and political interests of the British. It was coercive in that it functioned by a form of compulsion and not by moral reason or spiritual example alone: it placed an economic cost on continued British rule of India so as to significantly lessen the attractiveness of that political option for the British government relative to independence.³⁶

In some circumstances, the idea of submission to punishment might reinforce the idea that rights claimants are needy and vulnerable victims – an image in tension with the political ethos of rights as one in which citizens are empowered to stand upright with self-respect and defend their interests as moral equals.³⁷ In Walzer's discussion of the sit-down strikes, he points out that the autoworkers took a decision not to mount passive disobedience to the police by bodily submitting and allowing themselves to be arrested, but instead fought back against the police. They did so on the basis that passive submission was not within the working class tradition of protest and ran counter to their inclinations to defend themselves.³⁸

v) *'Usually performed to bring about a change in the law or in policies of the government'*

Rawls understands the political effects of disobedience in terms of its influence over a majority of voters or legislators whose political power is derived through their influence over the coercive machinery of the state. In common with other liberal philosophers of disobedience, he does not envision a role for the practice as a means to challenge unjust power relations as they exist independently of the state in wider society.³⁹ This follows from Rawls's conception of the basic structure as the primary subject of justice. Rawls tells us that the basic structure consists in the 'major social institutions' that distribute rights and obligations, which includes the 'political

³⁶ In his more candid moments, Gandhi acknowledged his strategy was one of 'open rebellion'. See the discussion in Norman G. Finkelstein, *What Gandhi Says: About Nonviolence, Resistance and Courage* (OR Books, 2012).

³⁷ Bryan S Turner for examples constructs a whole theory of human rights on the basis of vulnerability; see *Vulnerability and Human Rights* (University Park, Pa.: Pennsylvania State University Press, 2006).

³⁸ Walzer, *Obligations*.

³⁹ Walzer's examination of the sit-down strikes at General Motors in 1936-7 is one of the few philosophical discussions of civil disobedience that touches on its role in the 'private' realm. In challenging corporate power, the workers were exercising their rights against a nondemocratic form of association with its own internal relations of power defined in a system of rules and regulations overseen by corporate managers. Walzer, *Obligations*, 44.

constitution and the principal economic and social arrangements'. Although there is some ambiguity as to the precise contours of the basic structure within Rawls beyond this specification, his basic view is that principles of justice exist to regulate coercive institutions and not the individual choices of citizens.⁴⁰

Critics of Rawls have noted that the reasons he gives for making the basic structure the primary subject of justice, in terms of its profound effects on individuals, also apply to patterns of social relations in the family, the workplace and wider society insofar as these relations limit the choices of individuals and pressure them into subordinate social roles.⁴¹ The norms, habits, relations and practices that maintain economic deprivation, racism, sexism and homophobia reproduce injustice without the threat of legal sanction. It is not the case that Rawls completely overlooks civil society as a domain of justice. As I have noted, he says that society ought to have an ethos of justice, with citizens under natural obligations to bring about and support just arrangements. Yet this obligation is to be discharged institutionally by voting for just parties and supporting just laws and institutions: not through deliberate enactment of more just social relations and norms in civil society.

In addition to issuing legal demands, movements such as the LGBT movement and the feminist movement, have been fundamentally concerned with asserting a right of access to the public sphere through a positive affirmation of group identity. It is not purely in their capacity as voters that the public is engaged by activist citizenship of this kind, but as obligation-bearers who may perpetuate domination at home, in the street, the workplace and other domains of social life. The claim of these groups was that they should enjoy equal respect within public space without being denigrated, insulted or otherwise abused. They did not necessarily demand the heavy instrument of state enforcement for this right, which is often better upheld through the informal sanction of public opinion. In some cases, state institutions are bypassed entirely as part of a deliberate political strategy to call their legitimacy into question. The claims of indigenous groups to sovereignty and self-determination, for example, are often

⁴⁰ Samuel Scheffler, "Is the Basic Structure Basic?," 2006, Retrieved 20 November 2014 from <http://philpapers.org/rec/SCHITB>.

⁴¹ G. A. Cohen, "Where the Action Is: On the Site of Distributive Justice," *Philosophy & Public Affairs* 26, no. 1 (January 1, 1997); Susan Moller Okin, *Justice, Gender, and the Family* (Basic books, 2008).

framed in the language of rights without being translatable into legal, institutional rights.⁴² Since the annexation of their lands took place under law, and it is precisely the sovereignty of the state that they are disputing, it would be self-refuting to petition the state for legal recognition. This does not equate to a naïve, ostrich-like strategy of wishing away the state's existence. Instead, the intention is to withdraw legitimacy and authority from its institutions, refusing it the power to decide over the distribution of rights and obligations in the territory under dispute.

vi) *'Addressed to the majority's sense of justice'*

There are two ways in which injustice that justifies civil disobedience can arise for Rawls: i) When laws and institutions depart from publicly accepted standards that are more or less just ii) When a society's conception of justice, or that of the dominant class, is itself unreasonable and manifestly unjust. His discussion focuses almost entirely on the first instance. Civil disobedience is appropriate within a 'nearly just' society in which the constitution and social institutions incorporate a commitment to the two principles of justice or to an approximate 'reasonable' conception that might have been chosen in the original position. Crucially, there is a commitment to the basic liberties and so political majorities are open to persuasion by civilly disobedient acts.⁴³

The primary audience of civil disobedience in Rawls is thus the political majority who have erred through self-interest or moral blindness (understood as the political majority of citizens, but sometimes also the legislature). Rawls points out that there is no perfect procedural justice in political affairs and 'majorities (or coalitions of minorities) are bound to make mistakes, if not from a lack of knowledge and judgment, then as a result of partial and self-interested views'. Some level of injustice, then, is an unavoidable consequence of the imperfections of majority rule, which we

⁴² Shannon Speed notes that the indigenous movement of Zapatistas in Mexico make use of the language of rights in establishing their autonomous communities yet without appealing to the state. As she writes, this 'does not mean that the state is irrelevant – Zapatista autonomy, even when completely disengaged from interaction with the state, is still in silent dialogue with the state. However, by refusing to grant the state the power to designate who are rights-bearers and what rights they may enjoy, the Zapatistas articulate a radically distinct discourse of rights', "Exercising Rights and Reconfiguring Resistance in the Zapatista Juntas de Buen Gobierno," in Goodale and Merry Engle, *The Practice of Human Right*, 184.

⁴³ Rawls, *A Theory of Justice*, 309.

submit to ‘in order to gain the advantages of an effective legislative procedure’. So long as burdens are more or less evenly distributed across society and there are no violations of basic liberties we are to acquiesce to some level of injustice, but may resort to civil disobedience when a certain threshold of injustice is met.⁴⁴

There are two main problems with this account that render it overly restrictive: i) It does not countenance disobedience in response to the deficiencies of the democratic system; ii) It restricts disobedience to the restoration of principles of justice society is already notionally committed to. With respect to the first of these, Rawls’s theoretical approach assumes that the political system is well functioning so that political equality is effectively guaranteed, with a majority’s views translated into law and policy, under a system of one person, one vote in which the basic liberties are secure. In common with Dworkinian disobedience, the underlying justification for political acts of law-breaking under the Rawlsian approach is justice and not democratic legitimacy. It would therefore exclude those disobedient acts carried out in the plausible belief that a law or policy had not been subject to proper democratic scrutiny or that political structures had become unresponsive as a result of being corrupt or captured. Citizens would either have to resign themselves to working within unresponsive political institutions or else countenance open insurrection, which Rawls reserves for cases of extreme injustice. As I have noted, this classic liberal model of disobedience is sharply at odds with the self-understandings of many movements, whose participants see their actions as a response to an exclusionary political system. The Rawlsian view misleads with respect to the nature of civil disobedience. It regards political equality as secured by majoritarian voting where basic liberties are secure, without considering the inequalities of wealth and influence that generate unequal access to these liberties. Although Rawls acknowledges that injustice may arise when a particular class dominates society, he does not explain how movement activism in these circumstances might function to exert influence over this class or mobilise others against it. The lines of political communication are primarily vertical between citizens and their institutions and not among citizens themselves.

In addition, any international dimension is missing in Rawls’s theory. He intends his

⁴⁴ Rawls, *A Theory of Justice*, 312.

discussion for a bounded domestic society where the principles of justice appealed to are those contained within a domestic constitution. As I go on to discuss in Chapter 8 with respect to housing activism, political struggles for rights often have an international component in being addressed to international organisations, campaigns and even other states as part of wider cosmopolitan movements. Such struggles frequently make reference to the norms within international human rights documents, such as the Universal Declaration and the Two Covenants, or more generally, to the normative ideal of a global human community expressed in the global discourse of human rights. This cosmopolitan dimension was present in the US civil rights movement – a paradigm case for both Rawls and Dworkin – to the extent that the movement exerted pressure on the US for its moral hypocrisy in tolerating racial discrimination within the context of the Cold War and its purported concern for human rights. This appeal to international norms and actors not only strengthens the argumentative position of activists by invoking an authority above domestic law, but may lead to action in the international arena by other states and their citizens, in the form of boycotts, disinvestment, trade sanctions and the like.

What kinds of substantive claims about justice does Rawls's theory permit? Rawls restricts the range of claims about justice that can legitimately give rise to it, both in his definition of the practice (in which he restricts it to society's existing conception of justice) and his accounts of its justification (in which he further limits it to violations of basic liberties and equality of opportunity). Philosophers have criticized the conservative implications of this view. While sharing Rawls's basic conception of disobedience as an appeal to the moral conscience of political majorities, Peter Singer argues that Rawls's restrictions are a '...a serious limitation on the grounds on which disobedience can be justified' that would prohibit civil disobedience based on alternative conceptions of justice and moral principles.⁴⁵ The restriction of claim-making to the existing 'conception' of justice of the majority of representatives in the legislature would prevent groups from articulating new rights in response to unforeseen circumstances, Singer argues.

⁴⁵ Singer, 'Disobedience'; for a similar criticism see Cohen and Arato, *Civil Society and Political Theory*, Ch. 11.

In contrast to Singer's 'top-down' institutional reading, a more 'bottom up' civic interpretation is proposed by Andrew Sabl who focuses on Rawls's references to the disobedients' appeal to the 'sense of justice' among citizens. This civic sense, Sabl argues, is best interpreted dynamically as a capacity to act justly, even when one does so inconsistently, as demonstrated by members of a ruling 'in' group treating each other equally, but acting in a discriminatory way towards outsiders. If we interpret Rawlsian disobedience, along these lines, as an appeal to a sense of justice of the sovereign citizenry, rather than the sense of justice legally encoded in social institutions, then there is more scope for transformation and criticism.⁴⁶ The civic interpretation of Rawlsian disobedience is more in line with the Dworkinian idea that citizens can create new claims through their own interpretations of the moral rights in the constitution. The more permissive civic reading gains credence from passages where Rawls stresses the final court of appeal is 'the electorate as a whole' and that the civilly disobedient makes 'appeal in a special way to this body'.⁴⁷ Here, disobedience does not simply alert officials to deviations from already institutionalised norms, but has the potential to generate new norms by broadening the scope of justice to cover previously excluded groups.

Nonetheless, even under the more permissive civic reading, it would still be the case that civil disobedience is restricted to the realisation of principles already instantiated in society within the relations of the dominant group. It allows for claims that can be understood as the extension of benefits enjoyed by an 'in' group to outsiders, but not for claims that challenge, negate and transform existing understandings of justice. Rawls sees civil disobedience as a strategy of reform. He prefers to limit ruptural political action to the domain of militant resistance 'aimed at overturning an unjust and corrupt system'. This reflects what Brian Barry describes as Rawls's 'heaven-and-hell' conception where society has either 'clearly unjust institutions' that do not give rise to obligations, but act as a 'kind of extortion, even violence', and 'nearly just' regimes. In the former, militant acts of disruption and resistance can 'attack the prevalent view of justice or force a movement in the right direction' but in the latter

⁴⁶ Sabl, "Looking Forward to Justice".

⁴⁷ Rawls, *A Theory of Justice*, 342.

only persuasion is permitted.⁴⁸

Rawls's theory thus neglects the democratic function of disobedience as a potentially transformative appeal to fellow citizens, conceived as political agents with their own ideas and opinions about justice worthy of equal respect and consideration. He adds further constraints on its permissibility when he notes that there is a 'presumption' in favour of restricting the practice to 'serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second principle, the principle of fair opportunity'.⁴⁹ Rawls regards disobedience on economic grounds as presumptively impermissible because violations of basic liberties are said to be clear to ascertain, unlike infractions of the difference principle the evaluation of which depends on theoretical and speculative beliefs and statistics on economic matters. Here, Rawls simultaneously overstates the simplicity of identifying violations of basic liberties and the complexity of identifying economic injustice. He takes the violation of religious liberties to be the most clear-cut example of an infraction justifying violation of the law, yet there are manifold complexities even in these cases, as can be seen in the controversy over the prohibition of religious drug use.⁵⁰ Economic injustice, meanwhile, often strikes us as morally clear-cut and easy to ascertain. We do not, in general, need any deep knowledge of macro-economic policy to appreciate the injustice of more severe forms of inequality that deviate from the difference principle: deprivation amidst affluence is one of the more socially visible injustices.

Even if we were to concede that Rawls is in fact correct and that injustice on economic matters is too difficult for citizens to ascertain, this may in fact count as a reason for *more* disobedience on such matters, according to Rawls's own understanding of disobedience as a device to draw attention to neglected injustices. The argument for disobedience on economic matters is strengthened when we consider that those who suffer from economic injustice are often those groups with least political power. Rawls's concern for the fair value of political liberty leads him to argue that campaign donations should not be treated - as the US Supreme Court currently holds - a matter of free speech and hence of self-respect. This would help

⁴⁸ Barry, *The Liberal Theory of Justice*, 140-141.

⁴⁹ Rawls, *A Theory of Justice*, 326.

⁵⁰ This is Singer's example, 'Disobedience as a Plea for Reconsideration'.

curb some of the most blatant forms of oligarchic influence. Yet the potential for elite manipulation of political outcomes remains even with limits on private campaign finance given the opportunities for lobbying, manipulation through the media and mass cultural institutions, in addition to the decision-making powers that firms and corporate managers have over capital investment flows, which amount to an effective veto over policies that harm their financial interests.⁵¹ The Rawlsian picture looks doubly skewed when we consider that, under the political system he envisions, the basic liberties are to enjoy protection by judicial review and yet not social and economic rights: whereas civil and political rights would enjoy two levels of oversight (both institutional and civic), economic and social rights would lack even one.

Conclusion

I have drawn some key distinctions in this chapter between Rawls's theory of civil disobedience and activist citizenship considered as a distinct domain of rights politics. Insofar as Rawls is concerned exclusively with disobedience to the law - considered as a 'problem' for non-ideal theory - my discussion might be thought of as less critical than supplementary. These omissions nonetheless relate to some more fundamental criticisms I have made of his entire theoretical approach in treating disobedience as a form of moral speech aimed at awakening the conscience of political majorities of legislators and voters. Rawls provides an implausible and unrealistic account of disobedience in three principal ways. First, this approach presents a naïve picture of how popular power is exercised: some measure of disruption, coercion, and at times even violence, are invariably necessary to force marginal issues into public attention and impose a cost on the pursuit of unjust measures. Second, it cannot account for the role of disobedience as a form of direct democratic participation where official institutions are unresponsive or unavailable. Third, it limits political action to instrumental reform of laws and institutions (the Rawlsian basic structure) to the neglect of social relations, norms and behaviours in perpetuating injustice. In addition to misconceiving the fundamental role of disobedience, Rawls unjustifiably restricts its

⁵¹ Adam Przeworski and Michael Wallerstein, "Structural Dependence of the State on Capital," *American Political Science Review* 82, No. 01 (1988).

legitimate object and purpose in a way that is inconsistent with the respect owed to the democratic citizens as makers of claims. In comparison to Dworkin, there is less scope for disagreement about rights within Rawls's theory. The role of disobedience is essentially one of stabilizing and securing just institutions in a manner comparable to constitutional devices such as judicial review and free and fair elections. At most, his theory allows disobedience motivated by the extension of egalitarian norms of just treatment to social groups marginalized by the political system. Under Rawls's framework, although citizens are capable of judging and responding to injustice of their own initiative, they lack the respect that comes with the status of being authors of new rights in response to new threats and circumstances. Having now discussed three broadly 'optimistic' models of rights politics so far in Part II, in the next chapter, I consider a long-standing theoretical critique that casts rights as instruments of domination with the potential to block the ambitions of political struggles for justice.

Chapter 7: Rights as a tool of oppression: Radical scepticism towards rights

Therefore from hence is conveyed to all men in general, and to every man in particular, an undoubted principle of reason, by all rational and just ways and means possibly he may, to save, defend and deliver himself from all oppression, violence and cruelty whatsoever.

- Richard Overton, An Appeal from the Degenerate Representative Body.

This chapter engages with a tradition of critique that is sceptical of the very concept of rights with particular focus on a recent body of critical literature that aims to uncover the ideological role of human rights discourse in legitimizing domination. Since the early origins of modern rights discourse, critics from across the political spectrum have objected to what they see as the overly abstract and ahistorical nature of the idea. While there are common themes in the objections raised, these radical critiques are of special interest since they are often levelled internally within movements for social justice. While socialists, anarchists, feminists and radicals of various stripes have played a critical role in historical struggles for the rights of workers, women, racial minorities, and other disenfranchised groups, many retain a sceptical attitude towards what they regard as a politically timid and often conservative discourse that fails to challenge powerful institutions and structures in any fundamental sense. Modern critics combine insights into the ideological partiality of rights discourse, first articulated by Karl Marx, with a Foucauldian analysis of how power relations shape submissive subjects through a variety of discursive mechanisms that go beyond the coercive application of law. Working within the tradition of ideology critique, authors such as Wendy Brown, Costas Douzinas, Slavoj Žižek and Bonnie Honig seek to analyse the role of rights within contemporary strategies of power and draw attention to their limits as a language of emancipation, raising important questions about the role the concept plays in fixing dominant categories of identity, strengthening state institutions and legitimating self-

interested military intervention and the coercive spread of free market globalisation.¹ The primary focus of rights sceptics is not with the abstract theoretical ideals that concern normative philosophers of rights, but on rights as a living discourse; as a set of meanings manifest in current institutions and practices. This approach supposes that to properly understand rights we cannot limit ourselves to an abstract evaluation of their moral aspirations, but must pay attention to how the language of rights is deployed in concrete historical circumstances to discern whether these aspirations are realised or whether the discourse functions as a vehicle for other more sinister projects.² Sceptics do not reject rights entirely then: they admit the concept may serve emancipatory goals in certain contexts. Sceptics therefore speak of the paradox of rights, as simultaneously a discourse of struggle, which empowers injured and oppressed groups to challenge authorities from below; and a discourse of subordination, which bolsters the power of those same authorities.

Faced with the sceptical challenge, a defender of rights might be tempted to respond that the hypocritical and deceitful deployment of the discourse by the powerful need not trouble us since this nefarious usage involves a straightforward misapplication of the concept disallowed under a correct interpretation. Significantly, however, the sceptical challenge goes beyond the charge of mere hypocrisy to show how the theoretical logic of rights is itself problematic, generating political consequences not intended by those that invoke them even in a well-motivated way. There need be no deceit or hypocrisy involved, since the logical structure of rights permits their use to promote a partial and circumscribed conception of freedom in the name of a universalistic concern. The aim of this chapter, then, is not a straightforward

¹ The main works I focus on here are Wendy Brown, *States of Injury: Power and Freedom in Late Modernity*, vol. 120 (Princeton University Press Princeton, NJ, 1995); Brown, 'The Most We Can Hope For..'; Douzinas, *The End of Human Rights*; Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton University Press, 2009); Slavoj Žižek, "Against Human Rights," *New Left Review*, II, no. 34 (August 2005). While less outrightly critical, some of Honig's analyses have affinities with this critical literature. Giorgio Agamben is another prominent contemporary critic of human rights, though his critique is much more far-reaching amounting to a philosophical rejection of the idea of rights as such on the basis that it is irredeemably implicated in sovereign violence. See Agamben, *Homo Sacer*, (Pre-textos Valencia, 1998). For a careful counter-response to Agamben's approach, see Paul Patton, 'Agamben and Foucault on Biopower and Biopolitics,' 2007. Retrieved 1 December 2014 from <http://philpapers.org/rec/PATAAF>, 18.

² As Brown puts it, 'it is in the nature of every significant political project to ripple beyond the project's avowed target and action, for the simple reason that all such projects are situated in political, historical, social, and economic contexts with which they dynamically engage', 'The Most We Can Hope For...', 453–454.

refutation of sceptical objections based on an abstract defence of the moral value of rights. Instead, I show how the activist account offers a theoretical model of rights amenable to the sceptical concern in resisting domination. Part of the chapter is historical: I link the activist model to a democratic and egalitarian tradition of rights as exemplified by popular groups such as the English Levellers and the Haitian revolutionaries in a way that should add to the attractiveness and plausibility of the theory as a whole. Underlying my approach is the conciliatory methodological view that the critical approach of sceptics can play a valuable diagnostic role that can aid constructive theorizing. Sceptical critiques draw attention to the practical obstacles any theory of rights must face when deployed by political actors and institutions, orientating our inquiry towards specific historical questions of power, legitimation and agency in the manner that the realism test requires.

In Section I, I map the history and methodology of radical critique. This tradition of critique draws heavily on Marx and so it is important to clarify the precise nature of his analysis. I find that Marx does not reject the concept of rights as such but rather their particular theory and practice within bourgeois society, leaving open the possibility that rights might yet be used for emancipatory ends. In the next part of the paper (Sections 2 to 5) I unpack the various elements that make up the sceptical critique as it applies to modern rights discourse and formulate them as four distinct objections: *individualism*; *statism*; *moralism* and *conservatism*. Though interrelated, I disaggregate these theoretical challenges here for the sake of clarifying with some precision the substance of sceptical worries. I argue that sceptics usefully problematize a particular moralistic strand of liberal rights politics focused exclusively on the achievement of legal entitlements through the state. Their critiques alert us to the wider set of social relations that sustain inequalities even where legal rights are recognised and hence the need for ongoing political activism and scrutiny. They are likewise correct to point out that rights are not a comprehensive language of social justice. Nonetheless, in treating rights as ideological, with reference to official regimes of economically liberal 'negative' liberties, their writings may appear to foreclose the possibility of more egalitarian conceptualisations that relate to the dignified moral standing of individuals empowered to contest unjust relations of power and inequality.

Section I, The history and methodology of radical critique

Marx's most systematic analysis of rights is found in 'On the Jewish Question'. In this, one of his earlier works, Marx argues that the French Declaration of the Rights of Man's list of formal civil and political freedoms, protecting a private sphere of autonomy, corresponded to the rights of 'egoistic' man separated from the community as an 'isolated monad'; an anti-social conception in line with the bourgeois view of civil society as an arena for the unbridled pursuit of individual self-interest.³ The abstract nature of the Declaration's formal rights, for Marx, served to mask the substantive social and economic inequalities of capitalist society and the unequal enjoyment of political rights in practice due to the differential levels of power that wealth affords. These objections to the mystifying role of formal rights were accompanied by a general suspicion of abstract moral ideals. Although Marx's own views were more complex than the crude equation between rights and domination drawn by some of his followers, a dismissive attitude to rights was encouraged within classical Marxism thanks to a set of teleological commitments that obviated the need to formulate a systematic moral critique of the social order.

This was a conscious break from the ideas of earlier radicals, such as Thomas Paine and Charles Fourier, who had proposed social rights to work and a minimum income. For classical Marxists, there was little need to think about moral ideals like rights and justice because their 'scientific' form of socialism, centered on a historical analysis of exploitation through the extraction of surplus value, led them to suppose that the capitalist system was destined to be overthrown by the industrial proletariat whose social position as the majority class of exploited producers gave them both a material interest and strategic capacity to do so.⁴ Although Marxist critiques of exploitation and alienation involved at least implicit appeals to ideals of equality and dignity, there was little need to formulate these as a distinct set of moral and political principles in order to persuade others: the increasing exploitation of the proletariat and their growing numbers could be relied upon to bring about social

³ K. Marx, 'On the Jewish Question', 60.

⁴ I am indebted in this section to the exposition in GA Cohen, *Self-ownership, Freedom, and Equality*, (Cambridge, Cambridge University Press, 1995

transformation.⁵ Although there was a need for political strategy and education to bring about revolution, moral condemnations were largely superfluous. In any case, such condemnations could not escape the prevailing conditions of intellectual production and attain a sufficiently critical vantage point on existing society. Talk of ‘rights’ and ‘justice’ in capitalist society invariably operated within a set of ideological assumptions that reproduced underlying property relations and the class prejudices of the bourgeoisie.

These theoretical commitments meant classical Marxists gave little thought to the principles of right that would animate a liberated society post-revolution: technological developments in the productive process could be relied upon to generate a society of abundance, ending social and political inequalities and the class conflicts that they produce. Communism would provide emancipation from necessity, allowing individuals to achieve a perfectionist form of freedom, not as private autonomy, but as self-actualisation in community with others. In contrast to the competitive egotistical bearer of bourgeois rights, the fully-socialised individual of the future sees in others the conditions for his own fulfillment in a society in which ‘the free development of each is the free development of all’.⁶ Marx was not the first to fault the French Declaration for its ahistorical abstraction. The first notable critique of this kind came from the conservative right in the polemical writings of Edmund Burke.⁷ Yet while Burke was concerned with how the abstract formalism of rights would loosen the social bonds of deference and allegiance that preserve the institutions a society inherits from its past, Marx’s worry was in the precise opposite direction: he worried that abstraction conferred an air of permanence on those institutions that frustrated society’s progress towards a far more promising future.

Marx’s historical assumptions about the dynamics of capitalist development and the nature of communist society account for some of the more polemical denunciations of rights we find in his writings on the Gotha Programme in which he contrasts his own

⁵ The question of whether or not Marx thought capitalism unjust has divided philosophical interpreters of his work. There is a good deal of normative ambiguity within Marx; something the analytical Marxist tradition has attempted to address. A useful overview is contained in Steven Lukes, *Marxism and Morality* (Clarendon Press, 1985).

⁶ Karl Marx and Friedrich Engels, *The Communist Manifesto: A Modern Edition* (Verso, 1998), 28.

⁷ Burke, *Reflections*.

‘scientific’ and ‘realistic’ outlook, grounded in historical materialism, with the ‘ideological nonsense about right and other trash so common among the democrats and French socialists’.⁸ This treatment led many of Marx’s followers to conclude that rights were mere mystification, reducing them to their ideological function in supporting domination. Lenin argued forcefully against Karl Kautsky that there would be no place for bourgeois liberties in the transition to socialism.⁹ According to this purely strategic outlook, rights were at best a short-term tactical instrument and not a principled component of socialist struggle. This dismissive attitude predominated on large parts of the socialist left until the 1970s and 80s and the dramatic revelations about the brutalities of the gulags by Soviet dissidents who articulated their opposition to totalitarianism in the language of human rights.¹⁰

While nonetheless critical, there are strong reasons to think that Marx’s own attitudes towards rights were always more sympathetic and nuanced than a crude equation between rights and domination. In ‘On the Jewish Question’, he notes that the French Declaration, representing the dissolution of the old feudal hierarchies of rank and privilege, was far from worthless. It was, he argued, a necessary though incomplete form of ‘political’ emancipation, which is a ‘great progress’ and the final form of emancipation within the framework of the prevailing social order prior to ‘universal human emancipation’ where man experiences his relations with others in a concrete form unmediated by the abstract legal categories of bourgeois citizenship.¹¹ It was, then, the bourgeois application of rights, which naturalised a historically specific configuration of social power to which Marx objected.

In certain of his writings, Marx himself recognised the role of rights in political struggle. He urged communists to win the ‘battle of democracy’ and regarded movements by workers for the 10-hour day and other social rights as an important form of progress. In his analysis of the 1848 revolutions, he criticised the popular slogan of ‘the right to work’ as an ‘absurdity, a miserable pious wish’, but noted that

⁸ ‘Critique of the Gotha Programme’, Karl Marx, Friedrich Engels, and Robert C. Tucker, *The Marx-Engels Reader* (Norton, 1972), 388.

⁹ Vladimir Ilich Lenin, *The Proletarian Revolution and the Renegade Kautsky* (Foreign Languages Press, 1975).

¹⁰ See Robert Horvath, “‘The Solzhenitsyn Effect’: East European Dissidents and the Demise of the Revolutionary Privilege,” *Human Rights Quarterly* 29, no. 4 (2007): 879–907.

¹¹ Marx, ‘On the Jewish Question’, 50-54.

‘behind the right to work stands the power over capital; behind the power over capital, the appropriation of the means of production, their subjection to the associated working class, and therefore the abolition of wage labour, of capital, and of their mutual relations’.¹² The limited bourgeois content of rights was here the issue, not the concept itself.

Thus, while he was not always clear about the moral basis of his own critique of capitalism, Marx nonetheless saw a role for rights in confronting injustice. He did not draw the link between the ‘power’ of rights and the empowering role of equal moral respect as a central element of rights discourse. Yet he nonetheless valued the way rights were used by workers to demand better treatment, allowing for the possibility that more radical articulations of rights could challenge the prerogatives of capitalist power. The fundamental insight of Marx’s historicist analysis of rights is not that they should be dispensed with altogether but that we should be sceptical of the universalism of rights as it features in official discourse and be alert to the particular historical interests that lie behind its dominant mode of articulation. I now turn to examine how the historicist method of critique has been applied to the contemporary discourse of rights, dealing with each objection thematically.

Section II, The charge of individualism

The first aspect of the radical critique concerns the individualism of rights. The term individualism is often used loosely to make a variety of claims about rights and so it is important to be precise about what is being objected to. Morally speaking, rights are individualistic in the sense that they serve the well-being of individuals. It is not however this fact about rights that sceptics object to: some form of commitment to the well-being of individuals is a basic feature of any minimally acceptable humanistic theory, including collectivist theories, such as socialism.¹³ Radical criticisms relate not

¹² Karl Marx, Friedrich Engels, and Clemens Palme Dutt, *The Class Struggles in France, 1848-1850* (Foreign Languages Publishing House, 1960), 63.

¹³ Despite his distaste for socialism, Nietzsche was arguably more accurate than many radicals who dismiss individualism out of hand when he noted that socialism with its ‘individualistic agitation’ aimed to ‘render many individuals possible’, raising them above their condition as instruments of labour and their herd-like relationship to their masters by recognising them as possessor of equal rights regardless

to moral individualism, of this form, but to the alleged ontological presuppositions of rights discourse: the particular conception of the rights-bearing individual.

Specifically, radicals object to the *atomistic* conception of the individual divorced from social ties and the understanding of their *psychological motivation* as basically selfish.

Insofar as the individualism of rights is morally undesirable, under this view, it is not because it treats individuals as units of moral concern but because it does so in a way that presupposes they are anti-social and selfish.

i) *The subject of rights - egoist or rebel?*

Marx, as we have seen, criticised the French Declaration for its selfish, anti-communal view of man as ‘an isolated monad and withdrawn into himself’, which led man ‘to see in other men not the realization, but the limitations of his own freedom’. The ‘practical application’ of these rights, he argued, is the right to private property, the right to accumulate, to enjoy possessions and dispose of them arbitrarily without regard to society.¹⁴ This strong analytical link between rights and an individualistic social ontology was influentially elaborated upon in the 20th century in the historical work of CB Macpherson. Macpherson theorizes the liberal rights-bearer in terms of the bourgeois ethos of ‘possessive individualism’, which he traces back to 17th century English thinkers, such as Hobbes, Locke, Harrington and the Levellers.¹⁵ These thinkers, he claims, encouraged a certain notion of natural, pre-social man congruent with capitalist accumulation; a fictional figure he traces to the theoretical device of the ‘state of nature’ in early natural rights theory. In projecting the imperatives of early modern commercial society back into this fictional world, these theorists naturalised the autonomous, self-reliant man independently pursuing his own interests protected by negative rights of non-interference against others. Crucial to this idea, for Macpherson, was the link between natural rights and self-ownership: ‘its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them’. In the possessive market society, to which this individual

of wealth, sex, race or other distinctions. On the basis of the opposite set of value commitments, Oscar Wilde wrote that ‘Individualism...is what through socialism we are trying to attain’. Both quoted in Domenico Losurdo, *Liberalism: A Counter-History*, (Verso Books, 2011), 203.

¹⁴ Marx, ‘On the Jewish Question’, 60.

¹⁵ CB. McPherson, *The Political Theory of Possessive Individualism*, (Oxford: Oxford University Press, 1962), 57.

corresponds, ‘all individuals are essentially related to each other as possessors of marketable commodities, including their own powers. All must continually offer commodities (in the broadest sense) in the market, in competition with others’.¹⁶

The essential elements of Macpherson’s analysis are reprised in Wendy Brown’s more recent critique of human rights discourse, which takes the work of Michael Ignatieff as its target. She argues that Ignatieff’s defence of a minimalist theory of human rights ‘is not an ontological account of what human beings need to enjoy life, but rather a political-economic account of what markets need to thrive’.¹⁷ Brown’s Foucauldian approach further draws attention to the institutional and social relations of power within which a right is embedded. According to the Foucauldian picture, power has a productive role in shaping the human subject around a particular image of the individual that underlies the right. As Brown puts it, rights are ‘not just defenses against social and political power but are, as an aspect of governmentality, a crucial aspect of power’s aperture. They are not simply rules and defenses against power, but can themselves be tactics and vehicles of governance and domination’.¹⁸

The overall effect of the current rights regime, Brown argues, is to coercively shape and condition individuals and their social relations, fixing a realm of ontological possibility around a particular conception of personhood congruent with neoliberal globalization. Douzinas and Žižek argue along similar lines that rights are tied up with the imperatives of Western consumer capitalism: they are fundamentally about the pursuit of ‘pleasures’ and insatiable ‘desires’, as demonstrated by the centrality of the idea of ‘choice’ to both rights and a consumerist ideology that works against collective projects.¹⁹

These sceptical accounts begin with a persuasive critique of the free market bias of a human rights ideology that accords primacy to private property and contract over material well-being, as represented by Ignatieff’s minimalism. Yet they err insofar as they imply that the strong analytical link they draw between rights and an atomistic,

¹⁶ McPherson, *The Political Theory of Possessive Individualism*, 57.

¹⁷ Brown, ‘The Most We Can Hope For..’, 457.

¹⁸ Brown, ‘The Most We Can Hope For..’, 459.

¹⁹ Žižek, ‘Against Human Rights’; Douzinas, ‘The End of Human Rights’.

selfish social ontology is a necessary rather than contingent one. The primacy they accord to natural rights theory as a lens through which to comprehend the character of contemporary human rights comes close to a genetic fallacy in implying the intellectual genesis of the concept fixes its meaning once and for all. Moreover, it is one particular reading of natural rights theory - as a form of proto-capitalist stage setting - that is presented as definitive in a manner that shuts off the possibility of a more immanent critique of the concept. Foucault's own writings on rights were less fatalistic than the views of some of his followers, allowing for the possibility of alternative configurations. For Foucault, his approach 'does not mean that we have to get rid of what we call human rights or freedom, but that we can't say that freedom or human rights has to be limited at certain frontiers'.²⁰ Foucault saw a role for appeals to specific rights in particular historical circumstances as part of a historically-minded and self-reflective humanism.²¹

There are ample resources for alternative more egalitarian theorisations within the history of rights discourse, which, since its beginning, has been much more internally diverse than sceptics imply. As well as a possessive conception of the rights-bearer linked to rights as a form of property, there has been within the liberal tradition a more active conception based on the moral agency of the rights bearer. The activist theory of rights traces its lineage to this agency-centred conception. It can be identified in the earliest popular articulations of rights within political movements, such as the English Levellers, who developed early notions of natural rights in opposition to authoritarian power within the English civil war. Macpherson sees the Levellers as possessive individualists thanks to their defence of a natural right to self-ownership and to property.²² Yet for the Levellers, property over the self was not simply about possessing things, but about the liberty of the person, which conferred a right to self-defence and a right to resistance against domination. These ideas were used to defend the extension of democratic participation and rebellion against oppression on the basis of man's innate capacity for judgment.²³ Richard Overton,

²⁰ Michel Foucault et al., *Technologies of the Self: a Seminar with Michel Foucault* (Amherst: University of Massachusetts Press, 1988), 15.

²¹ See Paul Patton, 'Foucault, Critique and Rights,' *Critical Horizons* 6 (2005): 267.

²² McPherson, *The Political Theory of Possessive Individualism*.

²³ See the discussion in Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from the Renaissance to Enlightenment* (Verso Books, 2012).

for example, argued that from God all men ‘receive an undoubted principle of reason’ and can use ‘all rational and just ways and means possible’ to ‘save, defend and deliver himself from all oppression, violence and cruelty whatsoever’.²⁴ Men had, he said, the right to take up arms to recover their ‘just rights and freedoms’.²⁵ Self-preservation was the most basic natural right, meaning that if a man’s person is violated he has the right to resist.

For these early proponents of natural rights, resistance to oppression was an instinctive and inherent feature of mankind; part of the natural order. In the hands of the Levellers, the idea of self-ownership is linked not solely with a theory of property accumulation but with a theory of agency grounded in an individual’s subjective capacity to apprehend injustice and to take political action. As a group, the Levellers were feared for taking direct action to prevent the privatisation of commons lands, which they viewed as ‘the greatest tyranny that was thought of in the world’. What matters in politics, they stressed, was not just ‘estates’ but ‘persons’.²⁶ This radical tradition of early natural rights emphasised that persons share a fundamentally equal moral status in the eyes of God, who was, as the saying went, ‘no respecter of persons’.²⁷ When the Leveller Colonel Rainsborough, speaking in support of the male franchise during the Putney debates, memorably remarked that ‘the poorest he that is in England has a life to live as the greatest he’, he provided a particularly resonant précis of the idea of recognition respect: while the poor may lack the outward markers of rank and distinction by which individual worth is appraised, they nonetheless have their own interests, values and purposes in life and it matters to them whether or not these are realised. It is in recognition of this marker of personhood – independent of all contingent social ascriptions - that they ought not to be subject to a government unresponsive to their claims that can arbitrarily interfere in their projects.

²⁴ Overton, ‘An Appeal from the Degenerate Representative Body’, in Charles Beard, *Leveller Manifestoes of the Puritan Revolution*, ed. Don Marion Wolfe, Facsimile Reprint edition (Frank Cass, 1967), 162-63.

²⁵ Overton, ‘The Commons, a New Despotism’ in Beard, *Leveller Manifestoes*, 160.

²⁶ Meiksins Wood, *Liberty and Property*, 271.

²⁷ Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Beacon Press, 2013), 84-86.

The Leveller view of a natural right to ‘self-proprietty’ was later used by John Locke to justify rights to property through the ‘mixing’ of one’s labour with raw materials. With the invention of money as a medium of exchange (which removed the caveats Locke placed on the limitless accumulation of raw goods), Locke’s theory justified endless accumulation of property, providing a powerful legitimation to the expansion of capitalist property relations. Yet even within Locke, this view of man as accumulative by disposition is accompanied by an emphasis on his rational capacity to protect himself through his own defensive agency. Locke’s emphasis on the fundamental right to self-preservation reflects his view that rights are most effectively controlled and exercised by rights-bearers themselves.²⁸ While man’s natural rights to exercise control ‘as he lists’ over his ‘Person, Actions and Possessions and his whole Property’ are alienated upon entry to civil society to better protect them and resolve conflicts, self-preservation cannot be alienated in this manner, which explains why an individual cannot sell himself into slavery or give the state power to kill him. This protective, remedial power of moral agency permitted rights-bearers to enforce their rights against encroachments by government. In extreme cases of interference with liberty, for Locke, the ‘whole body’ of society rises en masse to overthrow the ‘tyrannical power’ of their oppressors through an ‘appeal to heaven’.²⁹

The historical tradition of rights is more heterogeneous and subversive than sceptics suggest. Insofar as rights ‘subjectify’ individuals, it is not merely as consumers, workers, and capitalists, but as political agents entitled to protest and challenge power. The Lockean right to rebellion influenced the American colonists’ revolution against the British crown. It was even given constitutional recognition in the first draft of the French Declaration of the Rights of Man of 1789, which included alongside ‘freedom, property and security’, the right of ‘resistance to oppression’. The National Assembly in later versions of the Declaration removed this right and although it has made sense from the perspective of governments to deny constitutional recognition to

²⁸ Strictly speaking a right to self-defence would not count as a political right as I have defined it, because it is not claimed against another agent. It would be classified as a Hohfeldian ‘liberty’ right that entails the absence of a duty on its bearer to not defend themselves. This entails that an individual who did legitimately defend themselves from incursion would not be liable to moral criticism from others. Whether we flesh out this idea in terms of rights, freedom, or some other moral notion, it expresses a basic liberal principle that people are presumptively free to pursue their individual projects and desires without undue incursion.

²⁹ I am indebted to Alex Gourevitch’s account of Locke in “Are Human Rights Liberal?,” *Journal of Human Rights* 8, no. 4 (2009): 301–22.

practices of popular resistance, these practices remained of central importance in struggles for justice. The natural right to self-preservation provided inspiration to the first successful modern rebellion against slavery in Haiti. The ex-slave and leader of the insurrection, Toussaint L'Ouverture had read and studied the 1780 writings of Abbe Raynal who had proclaimed that 'Natural liberty is the right which nature has given to every one to dispose of himself according to his will'.³⁰ As the revolution unfolded in France, the Haitian rebels mobilised its ideas of natural equality and liberty far beyond the intentions of the drafters of the original 1789 Declaration in a movement 'which drew its militant, transformative energy from the spirit of voodoo' to overturn the plantation system of economic exploitation based on racial slavery.³¹

In this way, rights have been re-appropriated and refracted by other local political and cultural traditions for rebellious purposes in ways that subvert and over-turn the exclusions and naturalisations built into the ideal of rational personhood contained in their official enunciations. While it is important not to over-emphasise the democratic nature of this historical tradition (the Levellers, for example, denied political rights to those, such as women, servants and alms-takers, whose dependence on the arbitrary will of others made them 'unfree'), attention to this popular strand corrects the tendency – shared by Marxists and economic liberals alike - to present a monolithic version of early natural rights theory as a precursor to modern free market ideology. It demonstrates that alternative more popular conceptions of rights not only *might* exist in some abstract theoretical sense, but *do* exist and *are* effective in challenging political and economic domination.

ii) *The social dimension of rights*

The decoupling of rights discourse from any necessary connection with property accumulation goes some way to address the sceptic charge of individualism, but it might still be argued that rights are a selfish mode of political discourse. It is, as I have pointed out, typically true of rights that they both adversely affect the interests of duty-bearers and are generally claimed by their bearers for their own personal

³⁰ CLR James, *The Black Jacobins*, 91.

³¹ Paul Gilroy, *Darker Than Blue: On the Moral Economies of Black Atlantic Culture*, (Harvard University Press, 2010), 69.

benefit. There are several responses to this challenge. The first, analytical response, concerns the logical structure of rights. As I have noted, rights have an inherently political dimension in that they are claims against others within a community that presume a broadly shared moral ethos in addition to other agents who can aid with enforcement of the right. Furthermore, it is part of the logic of rights claims that although they place burdens on others they may also benefit others as well in furnishing them with rights. This egalitarian quality of rights is what marks them out as a properly political claim about the *res publica* or collective good and distinguishes them from pleading, demanding, asserting or any other formulation in which a sectional interest is expressed. There is a dualistic quality to rights: they have a co-operative quality alongside their conflictual side. This is not a point of logical contradiction, but simply reflects the way in which different agents are differentially positioned in relation to the claim. In politics, a right will often be asserted in a way that is simultaneously co-operative among the social group or class it benefits and conflictual against those on whom it imposes a cost. The notion that we might one day transcend the need for this form of individualism entirely (which is tacit in much sceptical criticism) is misguided. It trades off the distinctly non-realist and utopian hope or expectation that human beings might one day resolve - and even eradicate entirely - the enduring political problem of how to live together in a world of scarcity, disagreement and imperfect human reason.

The second, normative response to the charge of selfishness concerns the content of rights and the fact not all claims to one's own well-being can be construed as selfish. It would seem perverse, for example, to view the right against torture of someone languishing in a dictator's jail cell as 'selfish'. There is a difference between self-interest based on *due* concern for self and selfishness based on *undue* concern for self.³² Selfish rights are most plausibly those rights that unreasonably burden others in an exclusionary way. Rights to property (where these are exclusionary) are the most plausible example of a selfish right since it is often the question of a zero-sum game: one person's property rights over a piece of land necessarily involves a loss to others

³² Joel Feinberg makes this point effectively in "In Defence of Moral Rights," *Oxford J. Legal Stud.* 12 (1992).

who cannot access it.³³ Other rights, however, including the classical civil liberties in the French Declaration, are less plausibly viewed in exclusionary terms: they have a positive-sum structure according to which the benefits they confer on individuals rebound to the benefit of the community as a whole. As Claude Lefort put it, ‘the right of one individual to speak, to write, to print freely, implies the right of another to hear, to read, to keep and pass on the material printed’.³⁴ These civil and political freedoms empower people to criticise, interrogate, organise, protest, expose, mobilise and struggle against power. Not only are these activities non-egoistic; they encourage relations of solidarity and contribute to a collective political culture in which political power is to be held accountable. This social dimension to rights can be easily obscured if we focus solely on juridical forms of their articulation. Within courts, as we have seen, rights are articulated as the claims of private individuals within an adversarial process of adjudication. In the next section, I address the charge of statism as it is raised within sceptical writings.

Section II, The charge of statism

The second charge against rights by sceptics is that they bolster the power of the state by reinforcing dependence on its institutions as the ultimate interpreter and enforcer of moral claims. The proliferation of legal rights leads to increased decision-making powers for the state over ever more domains of social life. This encourages a stance of passivity and inertia among rights-bearers who alienate their capacities to safeguard their interests to state institutions with a consequential decline in autonomous political organisation. To the extent that legal rights are said to empower people, it is within the limits of juridically-codified constraints, which encourages a position of submission rather than active citizenship. Moreover, the formal neutrality of law masks the wide potential for abuse inherent in its discretionary application. As Brown writes, rights discourse ‘may trade one form of subjection for another’ in the form of

³³ I leave aside the controversial Lockean idea that the creation of money entails that property accumulation, including the privatization of land, contributes to the good of everyone by increasing the national wealth.

³⁴ Claude Lefort and John B. Thompson, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (MIT Press, 1986), 257.

‘an external agent or set of institutions that promises to protect individuals from abusive state power in part by replacing that power’.³⁵

As well as bolstering the power of state officials and legal professionals at the expense of autonomous political organisation, claims addressed to the state are invariably constrained into a conservative set of discourses and cannot expect to transform power structures in any fundamental sense. Thus, for Douzinas:

Right claims reinforce rather than challenge established arrangements. The claimant accepts the established power and distribution orders and transforms the political claim into a demand for admission to the law. The role of law is to transform social and political tensions into a set of solvable problems regulated by rules and hand them over to rule experts.³⁶

In this way, the language of rights translates potentially more radical and far-reaching demands into terms that official institutions understand and approve of. If the state grants a right, it does so on its own terms, modifying and diluting the claim according to existing rules and procedures. A powerful example offered by feminist theorists in this context is the right to abortion in the US. Following the victory of *Roe v Wade* in 1973, the women’s rights movement to a large extent demobilised, failing to sustain its earlier momentum. This invited a conservative political backlash against abortion led by religious groups who succeeded in undoing many of the gains made by removing public support for medical abortion clinics.³⁷ This practical limitation of the recently achieved right to abortion was enabled by the fact the right was articulated by the Supreme Court in the form of a right to ‘privacy’, the implication of which was that abortion was a personal issue as the women’s responsibility, and therefore not a legitimate object of public concern and funding.³⁸ As a result, there is meagre support for maternity and child-raising in the US and public funding of abortions, leaving ‘many women isolated in their privacy’.³⁹

³⁵ Brown, ‘The Most We Can Hope For..’, 455; a similar critique can be found in Honig, *Emergency Politics*, 66.

³⁶ Costas Douzinas, ‘The Paradoxes of Human Rights,’ *Constellations* 20, no. 1 (2013), 60.

³⁷ Rosenberg, *The Hollow Hope*.

³⁸ Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Cambridge, Mass.: Harvard University Press, 1987).

³⁹ As Mary Ann Glendon writes, ‘The judicially announced abortion right in 1973 brought to a virtual halt the process of legislative abortion reform that was already well on the way to producing in the US,

This case illustrates how the individualising pressure of judicially-enforced legal rights can obscure the political nature of a claim and dissolve the collective ‘we’ of the social movement that had achieved the right. It forms part of a wider historical pattern where social gains institutionalised following periods of large-scale civic mobilisation are then reversed at the point when those gains are seemingly secure. The steady dismantling of social democratic support systems across Western countries in recent decades, which has coincided with a decline in the size and assertiveness of trade unions, provides another striking example of the vulnerability that comes with entrusting claims to state institutions.⁴⁰ Where there is pressure to work through constitutional courts, political demands can become distorted and diluted. And where victory seems assured there is still a need for continuing organisation and activism to prevent rights from being undone. The formal recognition of legal entitlements in and of itself will often prove insufficient without attention to the underlying social relations, norms and attitudes that sustain injustice. This underlines the importance of an activist politics of rights that will have a cultural component to target underlying structural problems, defined in terms of racism, homophobia, patriarchy, and other forms of structural domination. In sum, while sceptics are correct to caution that institutionalization may represent a pyrrhic victory, the implication that this condemns the concept of rights as such is misguided in light of alternative modes of political articulation that do not defer to existing institutional rules and authority.

Section IV, The charge of moralism

The third charge against rights discourse is that of moralism. Modern sceptics share Marx’s worry that the resort to universal moral categories often has an ideological function in simplifying complex and controversial issues, removing them from political contestation while masking the powerful interests that invoke them. The charge of moralism does not appear in the form it did in classical Marxism, since few today defend the idea that capitalism can be relied upon to create its own grave-

as it did all over Europe, compromise statutes that gave very substantial protection to women’s interests without completely denying protection to developing life...privacy began to show the same thrust of absoluteness that had characterized property rights in an earlier era’. *Rights Talk*, 65.

⁴⁰ Frances Fox Piven, *Challenging Authority: How Ordinary People Change America*, (Rowman & Littlefield Publishers, 2006).

diggers with little need for normative critique. Rather, the language of rights is linked to a depoliticizing form of humanitarianism, casting those who are needy or abused as passive suffering victims and objects of pity in a way that elides their agency and justifies coercive interference from external agents.

The casting of claimants as victims can act as a form of silencing, which displaces the specificity of their historical experience and reinforces a paradigm of politics based on security, policing, coercive borders and military interventions. The concern is especially acute in modern critics' analysis of the way human rights discourse is used to legitimate Western imperialism, as with the military interventions by the US and the UK in Iraq justified, in part, under the rubric of 'human rights'.⁴¹ Brown and Žižek note this logic at work in Ignatieff who sees human rights activism as stopping 'beatings, killings, rape, and assault and to improve, as best we can, the security of ordinary people'.⁴² Here, the 'human rights activism' is something 'we' do in order to prevent the suffering of the 'victims'. The empowerment of rights Ignatieff envisages, Brown notes, is pre-scripted in advance, justified on the basis of the prevention of political violence, but with the aim of freeing the individual from politics entirely to define and pursue their ends in a capitalist free market. The mobilization of humanitarian concern erases history and context in order to legitimize self-interested forms of intervention.⁴³

What is the scope of this critique? The critique of moralism, I suggest, is a legitimate critique of contemporary human rights discourse where that discourse is tied up with depoliticizing ideas of human 'vulnerability' and the alleviation of 'suffering'. This discourse frequently requires rights claimants to present themselves in legal and political forums as ill, beaten, homeless, or otherwise helpless and powerless, in order to gain support. As Sally Merry Engle notes of the depiction of refugees of political violence in international forums:

⁴¹ Brown, 'The Most We Can Hope For..'; Žižek, 'Against Human Rights'.

⁴² Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001), 173.

⁴³ Most controversially with the invasion in Iraq by the US and the UK in 2003, which Ignatieff was a prominent liberal supporter of at the time.

They are represented visually far more than in voice, typically through images that are anonymous and focused on dead, starving or homeless bodies. The predominance of women and children in these depictions emphasizes their helplessness and neediness. They need protection and someone to speak for them, in this rendition, not the opportunity to tell their stories.⁴⁴

Merry Engle notes that this perspective translates into the legal terminology of the relevant human rights treaties and protocols, which depict women and children as vulnerable victims. Individuals are then seen as in need of external protection and someone to speak on their behalf. The role of representing rights-bearers in the international forums and conferences in which human rights laws and norms are drafted is often taken by professionalized NGO's. However well-motivated they may be, there are problems of political accountability when these groups decide on matters without being responsive to the relevant constituencies of interests.

There is some merit to this critique, but it is over-stated. The relevant concern of moralism is not with moral ideas as such, but with their deployment in a way that over-rides political agency and relevant contextual considerations that remove from the specificity of the situation and what needs to be done. Moral ideas, as we have seen, are a crucial component of political rights that support their role in the critique and reform of unjust laws and social practices. The correct response to the danger of moralism is not to reject moral terms to condemn violations of human rights, domestically or internationally, or even to rule out forms of humanitarian intervention, which may well be necessary in certain cases where the violation of rights is particularly egregious and there is the possibility of successful, impartial intervention.

Problems arise however when the morality of rights is seen as a trump over politics that can be disinterestedly applied by the relevant experts. The activist theory of rights is politicizing in the right way it: conceptualises rights-bearers not as vulnerable victims, but as maker of claims who ought to be heard and responded to. It corresponds to a form of politics based around accountability to the rights-bearer, which involves listening to and assisting the individuals and groups whose interests are

⁴⁴ Sally Merry Engle, 'Introduction: Conditions of Vulnerability', in Goodale and Merry Engle, *The Practice of Human Rights*, 196.

at stake in any decision-making process. This does not equate to a form of trumping, which entails that rights bearers' views should automatically triumph in relevant political decisions: it instead reflects the principle of democratic inclusion which mandates due responsiveness to their opinions and interests. Those whose rights are at stake have a unique vantage point from which to understand how the operation of institutions and social processes affect their interests and so their political inclusion is of central importance. If outside parties are not responsive to their concerns, they risk inadvertently harming them through paternalist interference. There is a good chance that top-down reform will also prove less durable. An important insight of the Marxian analysis is that those whose interests are affected by injustice not only have an incentive to overcome it; they are often best-placed strategically to do so. Successful emancipation necessarily involves self-emancipation, echoing Marx's introductory words of the 'Rules of the International', that 'The emancipation of the working class must be the act of the workers themselves'.⁴⁵

Although a justified moral right may not be recognised as such by agents capable of securing its authoritative enforcement immediately, through the persistent work of activism there is the hope that it one day will be. This puts a fresh perspective on what is perhaps Marx's most famous comment on rights in *Capital* where he scathingly notes that 'between equal rights, force decides'.⁴⁶ The realist perspective associated with this prognosis provides a worthwhile check on the abstract moralism of utopian theories of rights that pay little attention to the relations of power that block the achievement of those very rights for subordinate groups. Yet what the juxtaposition between impotent 'rights' and strategic 'force' misses is the way in which the political articulation of a right may itself be a form of power; a form of communicative power that can galvanize rights claimants and third parties into political action against their adversaries through appeal to shared moral principles. Sceptics provide a useful reminder that the moral ideas that underlie rights discourse ought to be invoked in a historical and self-reflective way, sensitive to the interests at stake. Their critique over-reaches however where it conflates the moralism of a certain strand of rights discourse with moral principles as such; principles that provide

⁴⁵ Marx, Engels, and Tucker, *The Marx-Engels Reader*, 389.

⁴⁶ Karl Marx, *Capital: A Critique of Political Economy* (Penguin Books Limited, 1976), 344.

a vital resource for political agents to challenge and overcome political oppression, destitution and discrimination.

Section V, The charge of conservatism

The fourth and final charge against rights I examine is that of conservatism. The concern here is that rights entrench, as a matter of legal priority, a particular set of political and economic arrangements that serves the status quo. Any appeal to new rights will be constrained by the discursive logic of dominant political understandings and so cannot play any significant role in the reconstruction of institutions and social structures.⁴⁷ Again, Marx's analysis proves relevant here insofar as rights are said to be theoretically implicated in preserving the liberal distinction between the 'public' sphere of the state and the 'private' sphere of social life by granting a measure of civil and political freedom in the former and placing off limits the inequalities in the latter in the home, the workplace and wider society. This partitioning of politics comes with the view that the principal threat to rights is the state and not private forms of power, such as corporations, wealthy individuals, and so on. The conservatism charge is pertinent in some respects and misleading in others.

First, it is correct to point out that rights are not a comprehensive language of social justice. It is possible to conceive of more ambitious 'socialist' rights, including both 'positive' rights, such as the right to a social income, and 'negative' rights, such as the right not to have one's labour commodified. Nonetheless, it is unlikely that a fully just society could be specified in terms of a list of individual rights without the addition of society-wide principles of distribution and regulation. Strategically, it is possible that rights cannot provide the sort of collective, structural challenge necessary to overturn dominant configurations of property and capitalist power, in the way radicals desire. There is an unavoidable tension between the minimalist logic of rights as weighty protections against insult and abuse, and their future-facing, utopian aspirations. We should be clear about what follows from this observation. The observation counts against the over-extension of rights in politics at the cost of other more appropriate

⁴⁷ See Žižek, 'Against Human Rights'; Brown, 'The Most We Can Hope For..'); Douzinas, 'Adikia: On Communism and Rights,' *Critical Legal Thinking*, (2011).

principles and ideals: it provides reasons to adopt a more reflective usage of the concept not to abandon the concept itself.

Second, it is possible to over-estimate the conservatism of rights by focusing on their precise formulation within legal documents. The idea of rights has a normative vitality that resists the attempt to fix them around a particular and partial vision of human nature.⁴⁸ While a legal strategy of rights has the potential to be constrained by a conservative logic, a more political appeal to moral principles that ought to guide an enlightened citizenry has the potential to express more transformative demands. Historically, struggles for rights have defied the compartmentalization of politics Marx criticized, radicalizing liberal commitments through the extension of the proper sphere of application of egalitarian norms beyond the ‘public’ institutions of the state to inegalitarian relations within the ‘private’ domains of the family and workplace. Today, the discourse of rights has been put to radical use in opposition to hegemonic forms of neoliberal capitalism, most especially in recent movements of poor, indigenous peoples in South America. In Bolivia, for example, classical Marxist categories are combined with a much more recent language of human rights in order to locate their ‘struggles over natural resources, land, and political representation within broader regional and transnational indigenous rights movements’.⁴⁹

An unjust state that recognizes merely empty formal rights will still open a political space for its subjects to lay claim to new rights by acting as if they were indeed equal. Universalism does not simply ‘mask’ inequality, but affords a basis for continual contestation as political subjects bring to attention the gap between an abstract formal equality and their own lived experience by claiming and acting upon rights they possess morally, but lack in practice. In the words of Jacques Rancière, excluded

⁴⁸ My discussion in this section is indebted to a ‘post-Marxist’ body of philosophical literature that emerged from the humanist reevaluation of socialism in the 1970s and 80s. This literature focuses on the dynamic quality of rights and their democratic content, which, it is shown, supports their dialectical deployment against a legal and political order nominally committed to the universal values they express. Within this tradition are French post-Marxists, such as Claude Lefort, Etienne Balibar and Jacques Rancière as well as theorists of ‘radical democracy’. See Lefort, *The Political Forms of Modern Society*, (1986); Jacques Rancière, *Disagreement: Politics and Philosophy* (University of Minnesota Press, 2004); Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics*, (London: Verso, 1985); Etienne Balibar and James Swenson, *Masses, Classes, Ideas: Studies on Politics and Philosophy before and after Marx*, (Cambridge University Press, 1994).

⁴⁹ Mark Goodale, ‘Locating Rights, Envisioning Law, Between the Global and the Local’ in Goodale and Merry Engle (eds.), *The Practice of Human Rights*, (2007).

groups ‘construct a dissensus against the denial of rights they suffer’ and in doing so ‘insert one world into another’.⁵⁰ The universal ideal of moral rights has allowed groups to instigate ongoing challenges to the liberal delineation of public and private realms, as excluded groups, previously thought to belong to an apolitical social realm, constitute themselves as subjects by laying claim to principles declared for all but denied to them in practice. The proleptic language of rights, which mediates between social facts of existence and value judgments of how things should be, makes them peculiarly suited to enacting this contradiction between the inequalities of the present and future possibilities. In sum, the appropriate response to the charge of conservatism is not to reject rights as inherently implicated in masking and sustaining the inequities of the status quo. Instead, we should be mindful that rights are not in themselves a comprehensive language of justice and that their logic of universalism can bring with it a dynamic of closure and exclusion unless subjected to ongoing political scrutiny and challenge.

Conclusion

Through a critical engagement with sceptical accounts of rights, this chapter has drawn attention to the dangers of an unreflective mobilisation of the concept, while challenging the more general objections sceptics make to its purportedly ideological role. Sceptics present a compelling realist challenge to rights as a political idea. They are right to highlight the inherent threats in any project of institutionalisation, which risks naturalising identities, enacting new exclusions and empowering the state in unforeseen ways at the cost of autonomous political organisation. Given the current hegemonic status of rights as a global *lingua franca*, it is important to remind ourselves that rights are not a universal language of justice. Nonetheless, a preoccupation with delegitimation, which treats rights in exclusively ideological terms loses the flexibility of the discourse, not least with how as it is used from below in the practices of egalitarian political movements. The sceptical concerns with individualism, statism, moralism and conservatism are not decisive against the theoretical account of the concept I have given focused on the political agency of rights-bearers. There is, as we

⁵⁰ Rancière, ‘Who Is the Subject of the Rights of Man?’, 305-306.

have seen, no necessary link between rights and a possessively individualist liberal ontology. Since the earliest articulations of natural rights theory, rights have also configured individuals as democratic agents capable of challenging social exclusion and domination by politicizing relations previously thought private and bringing new subjects into being through conflictual political action that appeals to the idealistic moral principles of rights. In the next chapter, I provide an illustration of activist practices of rights in the form of a contemporary squatting movement around the right to housing, Take Back the Land.

Part III: An activist citizenship of rights

In Part II I critically assessed four alternative models of rights politics. It will help to summarize the strengths and weaknesses of each before turning in Chapter 8 to a sustained discussion and examination of the activist model. Recall that each model was assessed according to its conceptual account of the nature of rights, and the theoretical principles and practical proposals that emerge from this account, along the dimensions of fidelity, equal respect and realism. I noted that while the legal constitutionalist model of trumping contributes an important explanation of how rights function as a tool to criticize the law and conventional morality on the basis of moral rights (especially with respect to minority entitlements), it does not adequately deal with the reality of political disagreement and the threat to rights from flawed and corrupt political institutions. The over-moralized picture of rights as trumps results in an anti-democratic account of the judicial role as the impartial interpreter of deep-lying consensual norms within society in a manner that violates the equal respect owed to democratic citizens. Political constitutionalism, by contrast, affords a central place to realist ideas of conflict and disagreement within a democratic system that aspires to treat the views of citizens on rights equally. Yet in its focus on voting and parliamentary law-making it overlooks the role of claim-making outside and against the law, which is crucial to secure democratic inclusion and hence the political equality of marginalised groups. The Rawlsian model of liberal disobedience brings into focus some of the strategies, motivations and virtues of extra-institutional activism, yet it fails to respect disagreement about justice among political equals by limiting claim-making to existing conceptions of justice. Furthermore, it paints a distinctly unrealistic picture of disobedience as a form of moral speech aimed at institutions overlooking its ruptural strategic logic and its re-imaginative cultural dimension. The sceptical writings on rights I examined brought into focus the practical dangers any theory must face when deployed in the context of real-world inequalities of power, wealth and violence. I showed that while sceptics are correct to caution against a naïve and unreflective invocation of rights discourse, their overall account is too pessimistic in focusing on a partial top-down domain of the practice to the neglect of more egalitarian configurations passed down by a venerable popular rights tradition. Having identified the strengths and weaknesses of these four theoretical accounts, I now provide a more substantial elaboration of the activist theory of rights that remedies their deficiencies.

Chapter 8: Activist citizenship and the right to housing

‘If you see a house, take it, and let the law do its darndest’.

- London squatters meeting, 1946

This chapter has two main aims: i) To illustrate the theoretical account of rights I have been developing through a sustained examination of the practices of political movements around the right to housing, elaborating upon key normative and theoretical features; ii) To show how this account offers a fresh perspective on existing philosophical debates about the practical achievement and implementation of social rights through attention to the political agency of rights claimants. Despite its authoritative articulation in the Universal Declaration of Human Rights and other international human rights documents, the right to housing is deeply controversial politically given its status as a ‘positive’ right that entails obligations of provision, potentially placing heavy burdens of taxation on states in a way that conflicts with prevailing ideological commitments to private property and reduced welfare provision in line with free market orthodoxies. In response to these controversies, philosophers have offered powerful moral justifications for the fundamental importance of decent accommodation to human dignity and well-being and the effective enjoyment of other rights, accompanied by sophisticated accounts of how the corresponding obligations are to be allocated and fulfilled. Although my discussion bears on these questions, my aim here is not to add support to what I take to be an already persuasive philosophical case for a right to housing, but rather to examine the means through which the right is contested with a focus on the claim-making strategies, objectives and self-understandings of a social movement for housing in the US, Take Back the Land. Attention to Take Back the Land’s claim-making practices, and the legal, financial and ideological obstacles to their success provides important insights into broader debates on the nature and realization of social rights. The ‘problem’ of housing is framed not simply in terms of inadequate state provision, but in society’s economic arrangements, in which absolutist conceptions of property rights buttress severe inequalities, supporting unhindered speculation on housing as a commodity,

exploitative mortgages, and forced evictions and repossessions.

In exercising the moral rights, for which they demand recognition, through the occupation and management of empty buildings, the movement exhibits an alternative conception of the right to housing than official interpretations based on a social understanding of property rights. The practice of organised groups of homeless actively *housing* themselves (making claims), rather than waiting to be *housed* (merely possessing claims) represents a decisive challenge to entrenched political understandings, casting the homeless as political subjects rather than passive recipients of aid. Although the example I focus on is taken from the US, the analysis has broader relevance to debates on housing elsewhere, including in poorer countries where squatting movements are often far larger and more established. In Section I, I set out the status of the right to housing in international and domestic law; the political and philosophical controversies it gives rise to, and discuss the moral plight of the homeless as one of social and political exclusion. Section II sketches the limits of existing philosophical debates on the realization of social rights focused on the institutionalization of obligations. I do not claim that these approaches to the realization of social rights are wrong, but they are partial. I examine the other side of the story: the role of rights claimants as agents of justice, the moral norms and understandings they generate and the barriers to their success. Section III gives an overview of the history and practice of popular housing activism. In Section IV, which forms the greater part of the chapter, I provide an interpretation of the political claim-making practices of Take Back the Land. The purpose of this analysis is to give colour and detail to some of the more abstract parts of the discussion in the thesis and identify where the theoretical account differs and improves upon the four alternative models of rights politics I have so far examined.

Section I, The precarious status of the right to housing

a) The right to housing in law and politics

The right to housing is one of a number of ‘second generation’ rights to social and economic goods that gained international recognition in the latter half of the twentieth century. Its moral justification derives from the fundamental importance of

secure, decent accommodation to human dignity and well-being. The right to housing receives authoritative legal expression in Article 25 of the Universal Declaration of Human Rights (UDHR), which declares that everyone ‘has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care’. This is reinforced by other international documents, most importantly Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as regional human rights instruments and the various international conventions dealing with specific categories of vulnerable social groups, including women, racial minorities, refugees and children.¹

The UN’s Committee on Economic, Social and Cultural Rights, which is the body mandated to monitor state compliance with the ICESCR, has done its best to address concerns the right is too ambiguous and open-ended by elaborating on its precise content in several general comments.² The right to housing is interpreted not only as the right to a roof over one’s head but the right to secure and adequate accommodation that supports a minimum level of well-being. It is said to embody the principle of interdependence as expressed in international human rights doctrine given its critical importance to health, privacy, education and the enjoyment of other rights. Much of the work of the UN and those campaign groups within the international human rights movement that concern themselves with social rights, such as Amnesty International, focuses on forced evictions, which constitute the most egregious example of a violation of the right to housing through forceful interference. At the domestic level, some states enshrine the right to housing in their constitution either as a directive goal to guide policy or, more exceptionally, as a justiciable right

¹ There are references to housing rights in provisions contained in a number of UN Treaties: Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women; Article 27 of the Convention on the Rights of the Child; Article 21 of the Convention relating to the Status of Refugees; Article 43 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Article 9 and 28 of the Convention of the Rights of Persons with Disabilities. All citations from international law can be found in Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010).

² Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), both reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

that can be enforced in courts, as in South Africa.³ Others states withhold constitutional recognition to housing rights, but nonetheless have domestic laws that bear on one or more aspects of the right to housing, such as laws relating to security of tenancy and protection from eviction.

In spite of this international legal recognition and the efforts of monitoring and campaigning bodies, the right to housing is violated on a large scale globally. Housing is a critical social issue in countries worldwide thanks to unemployment and insufficient wages which mean many people lack the income to meet the housing needs of them and their family in the private housing market while there is insufficient government-provided housing available to meet demand. It is estimated that 924 million people lack adequate shelter worldwide.⁴ The large majority of these are in the global south where mass homelessness remains one of the most pressing social problems with large numbers of rural migrants perched precariously in informal settlements on the peripheries of cities without access to basic amenities and with the threat of forced clearances by property developers, often with government support. While not of the same severity in terms of scale, in wealthier economies, the housing crisis has been greatly aggravated in recent years as a result of high unemployment and declining wages following an economic crash prompted in large part by reckless lending and speculation by banks in the property market.

There is no agreement over who (if anyone) is to be held responsible for this situation with deep-seated ideological differences generating conflicting judgments. Despite the best efforts of UN bodies and international human rights campaigners, there is no generally accepted understanding of who has obligations to fulfill the right to housing, what these obligations consist of and how they are to be enforced. Even among political officials who espouse a commitment to human rights principles, housing rights are apt to be treated with a degree of caution and suspicion relative to those civil and political rights that correspond to predominantly negative duties of non-interference.⁵ The dominant current of public political discourse in recent decades

³ Hirschl, *Towards Juristocracy*, Ch.1.

⁴ Cited by Thomas Pogge, 'Responses to the Critics' in Alison M. Jagger (ed.), *Thomas Pogge and His Critics*, (2009), 177.

⁵ I say 'predominantly' to reflect the fact (as we saw in Chapter 3) that a rigid binary distinction between 'negative' civil and political rights and 'positive' social and economic rights does not hold.

maintains that the redistributive policies required to fund public housing provision represent an illegitimate interference in the fundamental right to private property. Moreover, it is claimed that any such redistributive policies reward the irresponsible behaviour of a lazy and feckless underclass who live off welfare support. This moral discourse combines with the dominant orthodoxy of free market economics, which prescribes privatization, deregulation and the dismantling of social programmes in the name of global economic competitiveness.⁶ The result is that housing is conceived not as a vital human need, but as a commodity to be traded on the market like any other. Those who suffer from the absence of secure, decent accommodation are themselves held to blame for their position.

b) The plight of the homeless

The homeless are paradigmatic of a class of politically excluded persons, facing both formal and informal obstacles to their participation in the democratic process. At the level of formal exclusion, electoral registration and participation typically requires a fixed address of residence, which the homeless lack. In addition, the precarity and social stigma attached to homelessness renders effective political engagement extremely difficult. The category of the homeless includes both those who are housed in temporary, unstable accommodation and those who lack homes and sleep rough on the streets. Paradoxically, the latter are rendered all but ‘invisible’ as a class of persons within modern society, by which I mean that although they may be *perceived* as persons, they are not *recognised* as such. Those of us who live in large urban areas where poverty is widespread are typically conditioned by socially engrained patterns of thought and behaviour not to ‘see’ rough sleepers or ‘hear’ their pleas for help.⁷ In part, this follows from the regrettable practical fact that acting, as we might hope, with compassion and consistency in response to every homeless person we pass would make daily urban life all but impossible. In addition, moralised public political discourses around housing play an undoubted role in shaping social attitudes and behaviours, emphasising ‘personal responsibility’ at the expense of the structural

⁶ I draw here on the analysis of public political discourse around housing of Iris Marion Young who traces the connections between elite academic discourses around ‘personal responsibility’ originating in the 1970s and 1980s and popular attitudes to welfare; Young, *Responsibility for Justice*, Ch. 1–2.

⁷ Lynn M. Harter et al., “The Structuring of Invisibility Among the Hidden Homeless: The Politics of Space, Stigma, and Identity Construction,” *Journal of Applied Communication Research* 33, no. 4 (2005).

causes of deprivation and encouraging the view that the causes of poverty are rooted in the attributes and behaviour of the homeless themselves.⁸ This stigma unavoidably affects the self-conception and social confidence of the homeless and hence their willingness and ability to participate in democratic fora. When we additionally consider the adverse effects of homelessness on access to political information and education, alongside physical and mental well-being, it is clear that, as a class, the homeless face significant barriers to the registration of their opinions and interests in politics.

The condition of homelessness itself is one of acute unfreedom and criminalisation. This point is made very effectively by Jeremy Waldron in an incisive article written in the context of a new wave of regulations introduced in the US in the 1980's to cleanse urban areas for the benefit of wealthier city residents. The condition of homelessness, as he puts it, involves restrictions imposed by private property rules on the freedom of the homeless to 'be' and 'a person not free to be in any place is not free to do anything'.⁹ Lacking property of their own, homeless people often lack the freedom to carry out the most basic human functions needed to exist and survive, such as sleeping, washing and urinating. It follows that they are often compelled to plead for access to facilities from local businesses, placing them in a continual state of dependence on others. They will have to break laws daily simply in order to live, leaving them vulnerable to arbitrary police violence, harassment and imprisonment. In sum, not only do the homeless lack secure rights of formal citizenship and face severe informal obstacles to participation, but they are socially positioned to experience the legal system itself as a hostile imposition that daily blocks their freedom and degrades their dignity.

⁸ Young, *Responsibility for Justice*, Ch 1.

⁹ Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1993). 316. Waldron's argument about the unfree status of the homeless parallels a well-known argument made by GA Cohen on the concept of freedom. Cohen defends what he takes to be the 'overwhelmingly obvious truth' that lack of money, poverty, is a lack of freedom, given the poor are continually liable to interference, from police and private security, should they transgress the rules of private property. G. A. Cohen, *Freedom and Money. The Isaiah Berlin Memorial Lecture, Delivered at the University of Haifa, Israel*, (1998).

Section II, Existing approaches to realising the right to housing

The mainstream of philosophical thinking on human rights accepts the importance and legitimacy of a right to housing, alongside other social rights, with debate increasingly focused on questions of practical implementation over moral justification.¹⁰ Philosophical supporters of social rights have approached the issue of implementation in relation to three problems in particular: i) the budgetary problem of feasibility in the context of the limited economic resources many states have at their disposal; ii) the allocation of obligations for social rights among states and citizens; iii) the legitimacy and practicality of such rights being recognised and enforced by courts (their justiciability). I do not pretend to offer any definitive resolution to these specific controversies here. The aim instead is to draw attention to the partial nature of the theoretical debate over implementation and show how the activist conception of rights highlights different problems and possibilities.

With respect to feasibility, the principal focus has been on the ‘resource problem’ of a state’s budget. Some aspects of social rights, such as provisions against discrimination against minority groups in housing policy, are not controversial and may be achieved immediately. Yet there is no agreed answer to the question of which steps must be taken to fulfill the costlier elements given the financial constraints all states face and the deep-seated ideological differences over the relative role of the market and the state.¹¹ As we saw in Chapter 3, defenders of social rights have sought to defend their legitimate application to situations where limitations of resources mean they are clearly not practical by pointing to their morally aspirational role in setting standards for states to strive towards. The focus here is top-down and statist, based on a moralized conception of rights as a guiding ideal: states will be pressured to fulfill their obligations as set out in international law through moral exhortation and pressure.

¹⁰ I do not engage in these arguments over the justification and categorization of social rights here, though see: Shue, *Basic Rights*; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003); Pogge, *World Poverty and Human Rights*.

¹¹ Robert E. Robertson, ‘Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social, and Cultural Rights,’ *Hum. Rts. Q.* 16 (1994): 693.

A further response to the question of feasibility in such situations has been to distribute responsibility for the realisation of social rights to wealthier states and their citizens. An influential cosmopolitan view, set out by Thomas Pogge, argues that Western states and their citizens have moral obligations to work towards institutional reform and provide resources towards securing the right to housing in poorer countries due to their violation of a negative duty through participation in a global institutional order that avoidably imposes harms on the world's poor.¹² This argument is intended to convince liberals and political moderates who favour 'negative' liberty and remain sceptical about the cosmopolitan case for positive duties of provision.¹³

Within this debate, there is an (often implicit) categorization at work between 'we' the rich citizens of wealthier economies, and 'they' the deprived needy inhabitants of poorer economies: the former are treated as the political agents through which the rights will be realised and the latter feature in the background as passive recipients of aid. Pogge's philosophical project is explicitly focused on convincing citizens of affluent Western states to mobilize support for a global political regime that will secure social rights. In response to the criticism that his theory is Western-centric, Pogge says that it is addressed to 'affluent people everywhere', including wealthy elites in poorer countries who also have obligations to work towards institutional reform. It is Western citizens and domestic elites, as obligation-holders, that are the ones with political agency under this picture. Pogge mentions the poor as active participants in the enforcement of rights – but only in some future time once empowered by the institutional reforms he proposes. As he puts it:

The global poor should also play a role in the realization of human rights, but their capacity to do so is severely diminished by the harms inflicted on them. This is why I have been working on a number of institutional reforms which could empower them. If I mostly address the world's affluent, it is not because I see the poor as passive subjects rather than as agents, but because I don't take myself to have any standing to advise them. I do have standing vis-a-vis citizens of affluent countries, which derives from the moral values they profess and massively violate. With respect to the poor, I want them to have more time and

¹² Pogge, *World Poverty and Human Rights*.

¹³ Pogge's argument has drawn responses from philosophers who argue that the diffuse nature of the harms imposed by the global economic system negates the precise specification of obligations for human rights violations in the way he hopes, see Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?', (2009); others have reasserted the fundamental moral importance of positive duties of provision, which citizens are said to possess regardless of their culpability for global poverty, see Caney, "Global Poverty and Human Rights".

money and power so that they can effectively defend their own interests as they conceive of them...ideally they would speak for themselves.¹⁴

To be clear, there is nothing *prima facie* objectionable about a philosophical project aimed at alerting wealthy individuals to the contradiction between their own professed moral ideals and the political reality of severe poverty and inequality under a shared global economic order. Pogge's proposals for institutional reforms to politically empower those suffering the burdens of global poverty are likewise a worthwhile contribution to thinking about these issues.

The point I wish to make is that this strategy, and the philosophical debate it has given rise to, reflects only one possible approach to the question of social change, which will orientate us to certain issues and encourage us to conceptualise them in certain ways, overlooking other sources of moral innovation and political transformation. Pogge's attempt in this passage to reverse the paternalism objection on to those who would 'advise' the poor is not persuasive. The point of devoting theoretical analysis to the political agency of the impoverished, is not to tell them how to act in the *future*, but rather to pay attention to forms of political action through which they are claiming their rights in the *here and now*. Top-down assistance that fails to be responsive to these claims risks creating new and unforeseen problems. A perspective from below casts the obstacles to the realisation of housing as a human right not primarily in terms of the moral myopia of individual citizens of Western states, but as an issue of structural inequalities generated by processes of privatization and dispossession tied to exploitative relations of class, race and gender that stretch across state boundaries. The bottom-up perspective identifies the homeless as political agents with their own concrete understandings of rights to which we relate as third parties in relations of solidarity and not top-down provision. It further identifies innovative, and potentially more attractive conceptualisations of rights to those found in the official regime of human rights law upon which Pogge bases his theory.

Those theorists who have examined the actions available to the deprived themselves to improve their situation have focused entirely on legal remedies, arguing for the

¹⁴ Pogge, ed. Alison M. Jagger, *Thomas Pogge and His Critics*, 209.

constitutional entrenchment of a right to housing against critics of justiciable economic rights who question the competence and legitimacy of courts to rule on these matters. Sandra Fredman, for example, argues that social rights ought to be justiciable on the basis that they strengthen the values of autonomy and democratic participation that together provide the moral basis of rights as an ideal.¹⁵ Without doubt, in many countries, legal and constitutional recognition of a right to housing would represent an improvement in the situation of the deprived. Yet there are very few legal cases worldwide that proponents of judicial remedies can point to that have been successful. Fredman devotes much of her attention to the example of South Africa where courts have taken the rare step of ruling on housing rights. Even in the most celebrated case of *Grootboom* in 2001 however which found that the state had a positive duty to provide housing to the dispossessed, she concedes that little action was taken in response to the court's decision.¹⁶ The South African court has remained timid on housing rights in keeping with an established international pattern, already discussed, in which judges are unwilling to intervene in the economic sphere, preferring to limit themselves to upholding civil and political rights.¹⁷

Fredman concedes that courts are not a substitute for 'political action' - and indeed that they regularly frustrate the achievement of social rights through rulings that support private property - but she does not dwell on what forms political action might be appropriate and effective in the pursuit of social rights. Her discussion is representative in acknowledging the importance of social activism, but only briefly in relation to its instrumental influence over the formal institutions of the state. The implication is that such activism exists to secure through state institutions the recognition of rights as articulated in international law.¹⁸

This brief overview shows how the theoretical debate on housing is limited by a preoccupation with the moral position of wealthy westerners and a statist focus on judicial remedies through the application of international human rights law. In the next section, I present an overview of popular housing activism, as a prior step to

¹⁵ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

¹⁶ Fredman, *Human Rights Transformed*, 118-120.

¹⁷ Hirschl, *Towards Juristocracy*, Ch. 1.

¹⁸ Fredman, *Human Rights Transformed*, 148-149.

reflection on an alternative theoretical approach, illustrated via Take Back the Land.

Section IV, Popular activism around housing

The right to housing is typically claimed by popular movements as part of a struggle over property rights in circumstances where land and buildings stand vacant and economic arrangements entail that these are not made available to those in need. Popular housing activism frequently takes the form of squatting, in which vacant land and buildings are lived in or otherwise used by individuals and groups without the permission of the owner. In many jurisdictions squatting is treated as a crime, while in others it is a civil conflict between the owner and squatters who have certain rights as dwellers. Political action may also take the form of rent strikes (where tenants collectively refuse to pay the level of rent demanded by the landlord) and eviction resistance (where tenants actively resist bailiffs sent by the legal property owner to remove them from their dwelling). Practices such as these have deep roots in countries across the world, reflecting stubborn traditional beliefs about common ownership of the land and rights to shelter and subsistence. As we have seen, egalitarian ideals of common ownership were a key part of Leveller thinking, energizing their opposition to enclosure by landlords and giving the movement its name. As Colin Ward, a historian of squatting puts it, ‘in many human societies there is a belief that access to land, regardless of the kings, conquerors, robber barons or bureaucrats of the past, must be a natural right for the current generation of humanity’.¹⁹

At certain points in history there have been eruptions of mainstream grassroots housing movements that have succeeded not only in providing accommodation for their participants but in forcing housing issues on to the political agenda and bringing about changes in government policy. Ward discusses successful rent strikes in Glasgow in 1915 and London in the 1930s, leading to laws capping rent, and documents at length the achievements of a widespread national squatting movement in Britain following World War Two, composed primarily of ex-servicemen and their families²⁰

¹⁹ Colin Ward, *Cotters and Squatters: Housing's Hidden History* (Nottingham [England]: Five Leaves, 2002), 11.

²⁰ In response to the failure of central housing provision, thousands of homeless families occupied

Squatting has been a means through which individuals and groups suffering formal and informal barriers to democratic exclusion have ‘responded to their positions of material need and inequality, rooted in those housing policies and practices of which unmet housing needs, disadvantage and exclusion are a consequence’.²¹

In developing countries, large informal settlements of shanty-towns cluster on the edges of industrial cities full of recent arrivals from the countryside who have migrated to find work or else escape land grabs by speculators or the consequences of drought and climate change. In some cases, there have been large-scale movements of dispossessed squatters who have defended the autonomy of their communities from incursions and successfully asserted a claim over the land they occupy. In Brazil, the Movement of Landless Workers, formed in the 1980s, even succeeded in obtaining legal property rights over occupied land and eventual constitutional recognition of a ‘right to the city’.²² In wealthier countries, the recent economic crisis and subsequent increase in homelessness has made housing a major issue of popular contention, with squatting, eviction resistance and rent strikes reappearing once again as central elements in the political repertoire of rights claimants. In Europe and the US, squatting has been adopted as a political strategy by the ‘Occupy’ movement of public square encampments that emerged from 2011 to protest economic injustice.²³ These movements have joined forces with existing grass-roots groups fighting the problem of housing at a local level. It is to the practices of one of these groups in the US, Take Back the Land, to which I now turn.

vacant army barracks and later occupied vacant holiday homes and luxury flats, pressuring the Labour government - which had previously declared itself ‘not interested’ - to find housing, and ultimately leading to a law that allowed the requisitioning of unused properties. There were similar successes for squatting movements in the UK in the 1960s and 70s in response to the failure of local council provision. See Ward, *The Hidden History of Housing; Cotters and Squatters*.

²¹ Kasia Reeve, “Squatting Since 1945: The Enduring Relevance of Material Need,” in Peter Somerville and Nigel Sprigings, (eds.), *Housing and Social Policy: Contemporary Themes and Critical Perspectives* (London ; New York: Routledge, 2005), 197.

²² In Brazil, squatter communities known as ‘Favelas’, which emerged from the invasion of public or private land, have in some cases been converted into legal property rights. Brazil eventually incorporated the ‘right to the city’ within its constitution and passed national legislation to support significant changes in its planning and property laws. This has brought some measure of security to squatter communities, though many remain vulnerable to clearances on behalf of property developers. See: Ngai Pindell, ‘Finding a Right to the City: Exploring Property and Community in Brazil and in the United States,’ *Scholarly Works* (January 1, 2006).

²³ See Squatting Europe Kollektive, *Squatting in Europe: Radical Spaces, Urban Struggles*, (2012).

Section V, Take Back the Land

In the US, the housing crisis has been particularly severe.²⁴ Prior to the economic crisis of 2008, millions of low-income Americans were encouraged by unscrupulous lenders to sign ‘toxic’ mortgages (many of them fraudulent) with high rates of repayment they had no hope of meeting. When the property bubble eventually burst, this prompted a wave of foreclosures across the country with banks taking possession of homes the inhabitants could no longer afford to meet the payments on.²⁵ These repossessed homes are frequently left vacant and derelict whilst their previous owners must battle with homelessness. Grassroots organisations have responded to the crisis in homelessness with a combination of political campaigning and direct action on behalf of the affected communities. Take Back the Land, which originally began in Florida in 2006, is one such group. In the remainder of this chapter, I demonstrate how their claim-making practices illustrate key features of an activist politics of rights.

a) *A political claim*

Max Rameau, one of the originators of the campaign, states their claim in the following terms:

I think what’s happening is we’re having a real clash between two rights, or at least perceived rights. One is the right of human beings to have housing, and the other is the right of corporations to make a profit. And there’s a clash going on between these two rights, or perceived rights, and society is starting to work out which one it thinks is the most important right. And we are asserting that the right of human beings to housing supersedes the right of corporations to make a profit. And I think people are starting to come to that same conclusion.²⁶

²⁴ This discussion focuses on the US, but there have been comparable housing struggles taking place across wealthier economies as finance-driven gentrification processes combine with austerity measures to cleanse poorer areas. See e.g. Kwei, Sarah. "Focus E15 Mums Have Fought for the Right to a Home. This Is Only the Start." *The Guardian*. October 5, 2014. Accessed October 23, 2014. <http://www.theguardian.com/commentisfree/2014/oct/05/focus-e15-mums-fight-for-right-to-home>; Jacobo Abellán, Jorge Sequera, and Michael Janoschka, “Occupying The# Hotelmadrid: A Laboratory for Urban Resistance,” *Social Movement Studies* 11, no. 3–4 (2012): 320–26; Marie Loison, “The Implementation of an Enforceable Right to Housing in France,” *European Journal of Homelessness* 1 (2007): 185–97.

²⁵ The story of how this this happened is set out in Joseph Stiglitz, *Freefall: Free Markets and the Sinking of the Global Economy* (London: Penguin, 2010).

²⁶ Max Rameau. (2008). *Take Back the Land: Miami Grassroots Group Moves Struggling Families into Vacant Homes*. Available:

Notably, the group's claim is articulated on behalf of a collective 'we' that consists of the poor and dispossessed class of homeless. Their claim is not that of atomised individuals, but a distinctively political one that reflects an underlying appreciation of the social implications of a right to housing in terms of the benefits it confers on a whole class of materially deprived persons and the moral obligations it places on the banks and corporations. This contrasts with legal avenues of redress in which entitlements may be asserted with little thought for who has the corresponding obligations and how they are to be delivered. The banks are identified, along with state authorities, as the bearers of moral obligations due to their strategic capability to fulfill the right to housing (thanks to their vast wealth and resources) and their relationship to the claimants (through their role in the sub-prime mortgage crisis).

Charging the banks with obligations in this way unsettles conventional understandings of where politics takes place, identifying a relation of power - which the banks wield arbitrarily over the occupants through their power of eviction - that may otherwise have been overlooked.²⁷ In the first instance, the claim of Take Back the Land expects these agents to refrain from forceful evictions, and secondly, to either renegotiate more mortgage repayments or else turn over the property to community land trusts (the ideal outcome from the group's perspective). The demand is that they change their behaviour directly without awaiting governmental laws or regulations.

The language of rights, as it is used here, is not one of passive victimhood, but centrally tied to political agency and judgment. The right to housing is not pleaded for or requested, but asserted in an adversarial sense 'against' the banks, corporations and their supporters in government, reflecting the fundamental conflict of interests between the pursuit of 'profit' over the 'right of human beings' to accommodation. It is important to the ethos of the group that is led by those who suffer from

http://www.democracynow.org/2008/12/19/take_back_the_land_miami_grassroots. Last accessed 10 March 2014

²⁷ While international human rights law is statist in its application, philosophers are less clear over whether human right ought to apply to private agents like corporations. Charles Beitz and James Nickel focus on governments and public institutions, while James Griffin leaves open the possibility that private agents may violate human rights. Pogge initially said that only states may violate human rights, but later conceded that a 'large corporation' might conceivably do so as well. Pogge, *World Poverty and Human Rights*, (2008), 63-64; Griffin, *On Human Rights*, (2009); Beitz, *The Idea of Human Rights*, (2009); Nickel, *Making Sense of Human Rights*, (2007).

homelessness, especially poor, black women. As makers of claims, they speak with a standing of equal respect that confers entitlement to be heard and responded to, challenging the informal exclusions of class, race and gender they associate with official forms of citizenship. This reflects a key aspect of rights that I have drawn attention to: it is those whose rights have been affected that are best placed to press their claims, since their experience, which includes the practical knowledge of their situation and the moral authority which comes from their plight, gives them a certain entitlement to be listened to. Were the individualism of rights solely connected to a politics of competitive egotism, we would expect these homeless individuals to have internalized the entire burden of personal responsibility for their status, viewing individual action in the market as their only route of escape. On the contrary, individualism is valuable here, precisely because it refers us to the democratic demands of the homeless and empowering them as agents with self-respect to protest their unjust condition in concert with others. And while the claim is not atomistic in nature, neither is it egoistic in content: the claim for communal control over housing reflects an appreciation for the social bonds of community and reciprocity that contribute to individual well-being.

There is a ruptural strategic logic to the activities of **Take Back the Land** based around coercion and disruption. The use of a militaristic vocabulary of ‘occupation’ and ‘liberation’ reflects this conflictual politics. Avenues of reasonable negotiation and persuasion with the banks have been tried and failed: the banks have ignored requests for mitigation in mortgage repayments and now seek to evict people from homes that are then kept vacant. The group therefore takes the view that families without homes ought to be housed in these empty properties in open defiance of the banks’ legal property rights. The group’s claim is presented as a morally clear-cut one based on the affront to human ‘dignity’ inflicted on the homeless due to the ‘greed’ of a wealthy few.²⁸ This stark polarization of the issue may raise democratic worries of simplification and distortion, while the personalised focus on bankers may trouble radicals concerned to identify the structural source of housing injustice. The group’s moral rhetoric however does not preclude a later more balanced consideration of the

²⁸ Max Rameau, *Take Back the Land: Land, Gentrification and the Umoja Village Shantytown* (Nia Press, 2008), 78-83.

complex, far-reaching implications recognition of the claimed right to housing would entail, involving the role of private finance in mortgage lending and construction, the nature and limits of private property rights, the distribution of land ownership, the racial and class politics of gentrification, and so on. Rather, such ‘shock tactics’ are seen as a necessary precondition for the consideration of these more fundamental systemic issues given the formal and informal obstacles to democratic inclusion the group faces.²⁹

b) *Activism and the law*

Take Back the Land uses the language of rights in a critical, moral sense that does not follow the official script of rights in domestic or international law. The US constitution itself contains no reference to social and economic rights. The Supreme Court has ruled that housing is not a right under the constitution and has upheld various statutes aimed at the criminalization of homelessness in keeping with judicial hostility to rights of provision and the country’s strong protection for property rights.³⁰ Rather than searching for a right to housing within the country’s constitutional tradition, Take Back the Land make a straight-forward appeal to the moral importance of decent, secure accommodation, based on principles of dignity and freedom, and the obligations this places on the state and the banks in a situation where large numbers of houses remain empty. The international human right to housing is invoked politically, but its authority derives from its embodiment of basic moral values. The abstract nature of the right’s content in international law has the practically utopian virtues I identified in allowing the group to develop their own distinct interpretation and thus express the transformative nature of their goals of not only securing housing but fundamentally transforming land relationships in society along communal lines.

c) *Activism and elections*

²⁹ The ‘surface’ issue of housing cannot help but raise these ‘root’ issues, as Rameau puts it, *Take Back the Land*, 68-69. The term ‘shock tactics’ comes from Stears and Humphrey, ‘Animal Rights Protest’, 411.

³⁰ While various Housing Acts state the goal of affordable housing in the US, they do not have the status of a right, see Maria Foscarinis, ‘Advocating for the Human Right to Housing: Notes from the United States,’ *NYU Rev. L. & Soc. Change* 30 (2005), 447.

Although Take Back the Land does not disavow engagement with the state entirely and would welcome public provision of housing, it is not constrained in its politics by submission to the rules and timetable of representative institutions. The formal channels of electoral participation cannot be relied upon, for Rameau, since the ‘job of local government is not to serve the interests of regular people, much less poor black women’, but to ‘serve the interests of big business, such as wealthy developers’.³¹ The aim for the group, instead, is to achieve a critical mass of squatted houses, on the basis that the government will only be pressured to take action on housing in response to a social threat to property rights. The group’s political power and leverage, then, comes not from electoral negotiation, in the manner of political constitutionalism, but from their physical occupation of housing and land.³² The tactic has proven effective for the group with authorities offering land and accommodation to the homeless where previous requests had been ignored.

The proleptic language of moral rights, with its immediacy and authority, lends itself to this form of claim-making: the homeless cannot wait upon the cycle of elections and constitutional decision-making given the urgency of their condition. Take Back the Land present the injustice of homelessness as a morally clear-cut one that ‘shocks the moral conscience’. In this context, arguments about the complexity of the issues surrounding the economy and the crisis in housing, involving mortgage-lending, securitization, derivative-trading, and other financial practices ordinary citizens are not expected to understand, are the same arguments used by the banks and their political supporters to obscure the injustice of the dispossession of the poor to the benefit of wealthy property speculators. A central part of the strategy of Take Back the Land is to cut through this supposed complexity, posing the housing problem in stark moral terms so as to force it on to the political agenda.

Yet while there is an insurrectional logic to the occupation of vacant properties, Take Back the Land do not reject the demand for democratic justification. Their actions embody a forceful politics nonetheless consistent with egalitarian relations of respect

³¹ Rameau, *Take Back the Land*, 29.

³² Michael Walzer has even suggested that the disruptive political power wielded by ‘insurrections’ forms part of an ‘informal bargaining process’, enjoying widespread acceptance within democracies for its capacity to keep inequalities in check, ‘Should We Reclaim Political Utopianism?’, *European Journal of Political Theory*, Vol. 12, No. 1 (2012), 29.

for the opinions of others in allowing for the ongoing possibility of dialogue and potential agreement with adversaries. Their appeal to moral principles of rights ostensibly shared with the banks and state authorities calls on these agents in the first instance to change their behaviour voluntarily and so marks their claim as distinct from insurrectionary acts of violence or theft. Far from being depoliticizing, the use of moral principles in this context is quintessentially political as an appeal to persuade others and legitimate one's actions, distinguishing it from the unilateral assertion of a moral truth in the manner of 'trumps' that over-ride majority opinion.³³

The appeal to moral principles, then, is not a block on democratic politics. Rather, the claim functions as an appeal to a third part in the form of 'society', which is beginning to 'work out', as Rameau puts it, that the right of human beings to housing is weightier than corporate profits. The public in this case is appealed to as third party political agents, with the capacities to think, judge and act as a counter-weight to corporate power. They can do this by joining movement activities of boycotting banks, morally pressuring them through social media and other public platforms and supporting eviction resistance. They may also intervene by contacting their representatives and voting for candidates who will support housing provision and take a tougher line on regulation of the banks. Notably, the state, under this picture, is not a neutral terrain for the resolution of disagreements about rights, but one (though arguably the most important) third party who may either take the role of adversary in evicting occupants on behalf of the banks or the role of ally in either refusing to evict them or providing alternative accommodation.³⁴

Although the claimed right to housing may not achieve immediate recognition as a valid claim by a critical number of relevant third parties who can secure its enforcement, the hope is that with ongoing political activism and mobilization it will. Naturally, third parties may find the justifications unconvincing and ignore the call for

³³ The accompanying rhetoric of the '99%' versus the '1%' explicitly places the claimants on the side of the majority and understands the threat to rights in terms of the self-interested rule of an oligarchic elite. See Matt Sledge. "Occupy Our Homes: Take Back the Land Has Lessons For Home 'Liberators'" *Huffington Post*, June 12, 2011. Accessed May 4, 2014. http://www.huffingtonpost.com/2011/12/05/occupy-our-homes-occupy-wall-street_n_1130583.html.

³⁴ Historically, states have even passed laws to encourage squatting in order to discourage land being held unproductive, through laws of adverse possession.

support. They may even intervene against the occupiers, perhaps by public denunciation of squatting in the media or the organisation of a counter protest in support of consumer rights of access to an unregulated housing market. In this way, activist citizenship is part of an ongoing process of contestation through which citizens exercise their capacities for judgment and political action beyond the institutional and temporal boundaries of the official channels of political participation.

c) *Activism and liberal disobedience*

The group's actions have more in common with radical strategies of direct action than with civil disobedience as traditionally conceived in liberal political philosophy, since the action is not reducible to a form of moral persuasion aimed at influencing a democratic majority, either of legislators or voters. The meeting of material needs and political influence are not treated separately, but as two sides of the same coin: improving the material prospects of occupiers is thought to improve the housing situation as a whole. Recall that nonviolence, publicity and acceptance of criminal punishment are typically understood by liberal theorists of disobedience as important in establishing the 'civil' nature of disobedient acts and demonstrating a commitment to the rule of law.

How does the popular housing activism of Take Back the Land fit in relation to this picture? The resistance of the group to eviction is non-violent (with occupiers and their sympathisers linking arms to prevent evictions), though it is not clear that this is a defining moral commitment or more strategic, based on the over-whelming force they face and the need to maintain public sympathy. Further, it is not part of the philosophy of the group that they should necessarily welcome criminal punishment for their actions. Although there may be some publicity benefits from media coverage of arrests, in more routine cases such a posture would be inconsistent with the objective of securing accommodation for families on an ongoing basis, which requires some measure of privacy.

Significantly, in pursuing an economic aim through principled law-breaking, Take Back the Land would fall foul of the prescriptions of classical theories of liberal disobedience. It is conceivable that the disobedience of Take Back the Land would be permitted under a Rawlsian view. It might be argued that the banks had acted in a

discriminatory way through predatory mortgage lending practices targeting the black community, with the state's failure to regulate these practices amounting to a violation of equality of opportunity. Dworkinian disobedience, too, might potentially countenance such disobedience as a matter of justice if it could be shown that government housing policy was decided on the basis of a discriminatory view of the homeless and destitute as morally unworthy. The justificatory reasoning of liberal disobedience has some plausibility to it with respect to housing policy in relation to the black community, but it is shakier when we consider the category of the homeless as a whole, which is more permeable by nature.

Rather than being grounded in opposition to discriminatory economic policies, the group's claim refers to the moral urgency of their material need on the one hand and the corrupt and exclusionary nature of the political system on the other. A political side-effect of this strategy is to help extend the range of participatory democratic action through which the democratic sovereignty of the people is expressed. It is notable that the occupation of public squares, which are turned into temporary autonomous communities of citizens, has become one of the principal means by which contemporary movements worldwide confront the authorities, air political grievances and explore alternative modes of politics and communal living. The tactic of squatting as used by Take Back the Land and other housing movements is thus part of a historical trend through which the repertoire of participatory politics is deepened and expanded to include new tactics.³⁵

d) *Activism and radical scepticism*

The group's objective of 'community control over land' is a transformative one. It claims that the solution to the housing crisis is not simply for people to be provided top-down with housing that is not theirs, but social ownership of land according to a conception of property based on usage not profit. This is an outright challenge to the Lukesian third dimension of power as entrenched in ideological structures of capitalist property relations. In expressing their transformative objectives, the group acts on the

³⁵ In Spain, following campaigns around a 'right to housing', Abellán, Sequera, and Janoschka suggest that a wider consensus developed in Spanish society that squatting (initially a marginalised activity) is a legitimate potential response to exclusion and eviction in contemporary socio-economic context, "Occupying The# Hotelmadrid".

pre-figurative politics of ‘as if’, acting as though the right they wish to bring about exists already. The group’s interpretation of the right to housing is manifest in the alternative worlds they temporarily create through their occupations. In common with other squatting communities, they actively take charge of the vacant property and manage it themselves, taking responsibility for the upkeep and maintenance of the community. The actions have a civic educational benefit as an experiment in democratic self-rule through which the skills and habits of democratic citizenship are learned and internalized. For Gandhi this constructive pre-figurative component was part of a self-conscious political strategy. Gandhi always maintained that the ‘strategy of non-cooperation had to be twinned with a positive programme of constructing nonviolent forms of rule, authority, and association...as political preparation for independence’.³⁶

This ‘lived’ pre-figurative element of re-imagining social relations and modes of association by living them directly is overlooked when the focus is purely on the instrumental legal objectives of movement activism. Rameau describes the first Take Back the Land occupation in ‘Umoja Village’ in the following terms:

Not only did it provide food and shelter, but it allowed, through a kind of utopian order, an autonomy for its residents that was otherwise well out of reach...People who lived there made decisions about the rules of the place...For many people, for the first time, they had some level of control over their lives. They were actually participating in a democratic process in a way that had some meaning. That was the real thing that happened there, people were given some real level of dignity.³⁷

As Rameau describes it, the occupied space comes to function as a sort of micro-polis; a democratic forum and workshop through which skills of practical organization, discussion, and decision-making are learned and practiced. Beyond the formal structures of constitutional citizenship, these internal movement practices foster a democratic ethos of equal respect: participants not only demand respectful treatment from society, they practice it among themselves in listening and responding to one another as makers of claims. . In Arendtian terms, the occupied space marks the

³⁶ Karuna Mantena, “Another Realism: The Politics of Gandhian Nonviolence,” *American Political Science Review* 106, No. 02 (2012), 466.

³⁷ Quoted in Paul Reyes. "Opportunity Knocks." VQR. October 1, 2009. Accessed January 26, 2014. <http://www.vqronline.org/reporting-articles/2009/09/opportunity-knocks>.

‘space of ... where I appear to others as others appear to me’.³⁸ Accordingly, the notion of ‘dignity’, as Rameau invokes it in this context, refers not to the argumentative moral foundation of their claimed rights, but to the real-world status of the occupiers who enjoy their first experience as democratic equals. Each relates to the other as an agent with a dignified status; as a co-participant in forging their shared living arrangements and political commitments. Through forms of decision-making modelled on deliberative and participatory principles, participants develop their own self-confidence and identity as citizens along with a civic sensibility to the opinions and interests of others. In virtue of their participation in activist forms of citizenship, socially stigmatized groups (predominantly poor black women in this case) are thus able to challenge and overcome the informal barriers to democratic inclusion that disempower them relative to more privileged sections of society.

In addition to civic education, movement practices serve to develop new norms and understandings about justice that feed into programmatic political demands. The act of occupation gives content to the right to housing as the democratic self-management of one’s accommodation in community with others, reflecting principle of dweller’s control, as described by Colin Ward.³⁹ As self-consciously practical experiments in living, occupations remain open to the generation of new ideas and objectives in response to practical contingency and the lived experience of unfamiliar social relations.⁴⁰ This entails possibilities for innovation typically unavailable to those within official legal and political fora. Notably, the group’s claimed right to housing has a distinctively non-egotistic dimension to its content and justification. The interests that figure in the justification of the right are not merely those of private individuals isolated from one another in their own separate properties, but those of social individuals implicated in mutual relations of care and reciprocity under shared living arrangements. In this way, the claimed right challenges more absolutist understandings of property rights as enshrined in law based on private usage and exchange.

³⁸ Arendt, *The Human Condition*, 198-199.

³⁹ See Stuart White, ‘Making Anarchism Respectable? The Social Philosophy of Colin Ward,’ *Journal of Political Ideologies* 12, no. 1 (2007).

⁴⁰ I have previously discussed this feature of occupations in Guy Aitchison, “Reform, Rupture or Re-Imagination: Understanding the Purpose of an Occupation,” *Social Movement Studies* 10, no. 4 (2011): 431–39.

It is of course an open question as to whether communal forms of housing are a desirable or feasible alternative over longer time periods given the predictable tension with demands for individual autonomy. Alongside the experience of community and empowerment, there were also moments of stress and conflict for the group. Nonetheless, this utopian component of activist citizenship serves an important epistemic role, generating new norms and practical understandings with which to evaluate dominant arrangements. Dworkin's conception of a historical social morality that advances closer towards an ideal of justice by trial and error comes closest to capturing this idea. Yet, for Dworkin, the process is understood as a haphazard and cumulative social process, ultimately conceived in relation to judicial decision-making. Here, it is part of a deliberate political strategy. Movement activists do not feed norms and practical evidence upwards into a 'forum of principle'; they enact such a forum themselves and so influence wider civil society in its attitudes, behaviours and political decisions. An evolutionary metaphor is apt to describe this process.⁴¹ Those understandings of rights that embody a morally attractive and practically feasible ideal of social relations out-compete and displace others. Diversity in the political ecosystem is to be prized since it makes it likely - though never guaranteed - that society will progress towards a more just regime of political rights.

It is worth being clear about the practical limitations of independent political associations of this kind. Political associations that have advocated a total withdrawal from the state in the name of self-determination have generally not been successful over a sustained time period, with the possible exception of traditional collectives of indigenous peoples, such as the Zapatistas in Mexico.⁴² In modern societies, state institutions are generally best placed to oversee the sort of large-scale programmes that can provide secure and reliable access to basic goods thanks to their unique capacity to raise and redistribute resources and plan and administer schemes of delivery. They are likewise best placed to promote and enforce respect for rights once a scheme of institutionalisation is in place. If and when the time comes to 'do business' with political officials, a total refusal to bargain and negotiate may well be counter-

⁴¹ I borrow this metaphor from Erik Olin Wright who talks of 'interstitial' social transformation, *Envisioning Real Utopias* (London ; New York: Verso, 2010), Ch. 11.

⁴² Speed, "Exercising Rights and Reconfiguring Resistance in the Zapatista Juntas de Buen Gobierno".

productive for social movements. In recognition of this basic reality, activist forms of political claim-making will often be strategically pluralistic by nature: they will combine strategies of rupture and re-imagination that meet basic needs through an antagonistic challenge to property rights and public space while remaining open to pursuing their objectives through more conventional channels where possible.

I have refrained from any attempt to elaborate a precise set of conditions under which activist citizenship is justified. It is doubtful that any such attempt would generate more than a set of very general principles the weight and significance of which could not be stated with any useful degree of precision in advance of concrete, real-world judgments.⁴³ My discussion nonetheless suggests that a complex set of considerations are likely to be involved based on the moral urgency of the claim; the political power and resources available to the claimants; the responsiveness of formal political institutions to their interests, and the extent to which the claim threatens the interests of powerful groups with powers over the formal political agenda. It follows that not everyone has licence to go around aggressively demanding rights in any circumstances. Furthermore, it is reasonable to suggest that the means of political action chosen should be proportionate to the aims, so that while the physical occupation of vacant homes may be justified for the homeless, for example, their wanton destruction will almost certainly not be.

Acceptance of the demand for moral justification is another important factor. Although there is a clear adversarial logic to activist citizenship, it is recognisably distinct from unlegitimated strategies of revolutionary rupture in its basic appeal to a shared moral ethos. Contrary to the sceptical view, this radical form of direct activism, as used by Take Back the Land, is not seen by the group as inconsistent with the discourse of rights, but rather as an uncorrupted expression of its moral idealism. It would be patronizing to suggest that, in using the language of rights, Take Back the Land are ideological dupes, fooled by capitalist strategies of legitimation. The group's political decision-making processes are themselves testament to the fact that the language of rights has been reflexively endorsed as expressing the group's deepest

⁴³ A useful discussion can be found in Archon Fung, "Deliberation before the Revolution Toward an Ethics of Deliberative Democracy in an Unjust World," *Political Theory* 33, No. 3 (2005).

moral and political commitments.

Conclusion

This chapter has examined dissident political action around housing in order to illuminate and deepen the activist account of rights politics. I showed how the right to housing functions in politics not simply in providing states with a moral standard to aspire to; as a legal tool; or electoral preference, but as a form of political action aimed at both instrumental political change and the direct meeting of material needs. I showed how Take Back the Land's form of political claim-making exemplifies the characteristics of activist citizenship by which groups facing formal and informal obstacles to participation press their grievances against authorities and powerful private actors. I further demonstrated how the model has the potential to re-orientate theoretical debate on the realisation of social rights through attention to how right-holders pursue their claims themselves from below, articulating in the process alternate, more transformative understandings of rights. Through attention to these practices, the feasibility question is more broadly understood, not simply as a resource problem of the state's lack of means to build housing, but as a question of whether there exists the political agency and capacity to fight for and achieve the claimed rights and the specific legal, financial and ideological obstacles political agents face in doing so.

Chapter 9: Conclusion

I introduced the core argument of this thesis with an epigraph taken from the lyrics of the 1973 classic by Bob Marley and the Wailers, ‘Get up, Stand Up’.¹ The song was composed by Marley during a trip to Haiti where he witnessed an impoverished people still suffering from the economic and political isolation the country endured following its initiation of the first successful revolt against racial slavery. It is as an impassioned call for the marginalized, oppressed and excluded everywhere to stand up and be counted; not to await ‘God’ for their salvation, as the powers-that-be would have it, but to wake up ‘see the light’ and fight for their free and equal status on earth in the here and now. The song resonates because it speaks to certain moral and political truths we feel instinctively. The rights to which each of us are morally entitled, it suggests, will not come as a gift of beneficence to those who patiently wait, but require action, determination and perseverance in combination with others for their achievement and maintenance.

In this thesis, I have set out a theoretical account of the value of rights, and the forms of political action, culture and citizenship through which they are realised that is faithful to this rebellious dimension of the discourse. I began by setting out three tests for the theory in the form of the fidelity test, the equal respect test and the realism test, with each formulated as a basic constraint on any theory and as an aspirational standard for the theory to meet. I then offered a general account of political rights building upon the writings of Feinberg and more recent conceptual work. I identified a political right as a claim to some good against another agent that is justified by authoritative moral principles and presumptively decisive in relation to other reasons for action. A political right is exercised at the discretion of its bearer (or their representative) who is normatively empowered to claim it against the obligation-bearer with the claim functioning as an appeal to third parties to aid enforcement where necessary. To be empowered in this way is to have a political status linked to the moral value of respect.

¹ See Gilroy, *Darker than Blue*.

From this basis, I elaborated upon key theoretical features of rights that account for the utility of rights in politics: the activist theory of rights. The theory shows how rights are not mere possessions, but tools of political action that constitute their bearers as doers and actors. In politics, rights empower individuals and groups to hold to account powerful agents who benefit from injustice through ongoing practices of adversarial claim-making. A rights claim will call for support from third parties who are to be understood not merely as legal or political officials, but fellow citizens with political responsibilities to support the claimant of a justified moral right through an array of political actions and interventions beyond the institutional and temporal boundaries of constitutional citizenship. I noted how the directed character of rights as claims against a specific agent is crucial to these ongoing practices of political accountability. Abstraction with respect to the content of rights meanwhile is not only logically coherent but has a sound political rationale in permitting the flexible deployment of the discourse according to new threats and circumstances. Within the activist account, we saw how the ideals of respect and self-respect relate to the status of persons within a practice who recognize one another as political agents and makers of claims with discretion over their rights and the judgment and capacity to author new ones in response to new threats and circumstances.

The second part of the thesis argued for the contribution of activist citizenship to the realization and enforcement of rights by way of critical engagement with four influential models of rights politics. We saw in Chapter 4 how Dworkin's juridical model offers a sophisticated account of how rights function as a tool to criticize laws and institutions (especially with respect to minority claims) thanks to his objectivist conception of moral rights. The idea of rights as trumps however is an overly moralized notion that fails the realism standard since it cannot account for the political threats to rights from authoritarian elites. Further, it leads to an undemocratic ideal of judicial authority inconsistent with equal respect for the political standing of democratic citizens. The political constitutionalist model of Waldron and Bellamy, by contrast, presents a more realist view of rights as claims to the distribution of benefits and burdens under shared collective arrangements. This view acknowledges the conflictual nature of rights politics and argues for a

democratic process modelled on political equality to decide the fundamental matters of principle raised by disagreements among citizens. However, political constitutionalists tend to run together the legitimacy of political processes and the moral justification of rights and therefore have difficulty in accounting for claim-making practices outside and against the law. Their narrow construal of politics in terms of elections and parliamentary law-making overlooks the necessity of activist citizenship for the achievement of political equality by groups subject to both formal and informal modes of political exclusion.

I showed how Rawls's theory of civil disobedience brings into focus the extra-institutional means of political remedy available to citizens when basic rights are violated. His view conceptualises principled law-breaking primarily as a (suitably constrained) corrective device the purpose of which is to remind wayward majorities of the principles of justice to which they are already nominally committed in a manner structurally parallel to the institution of judicial review. This account is too remote from the practice of actual civil disobedience to provide plausible guidance to political agents. Further, its restriction of disobedience to a restorative role in stabilizing just institutions prohibits the creation of new rights by citizens in response to new threats and circumstances. It therefore disempowers democratic citizens from authoring new claims and risks permitting serious injustices to persist unchecked. The justification of activist citizenship, I have argued, lies not in its capacity to restore an agreed account of justice, but in the way it renders political decision-making more equal and inclusive and thus opens society's understandings of justice to ongoing revision and contestation. In Chapter 7, I assessed the principal criticisms levelled at the idea of rights by modern-day sceptics who confront us with key realist concerns with respect to the coercive and deceitful use of rights as a form of ideological manipulation. I showed that sceptical writings helpfully draw attention to the dangers of an unreflective moralistic or legalistic mobilization of rights discourse and highlight the inherent limits of rights as a language of social justice. Nonetheless, the overall picture they present is unduly pessimistic since it neglects the possibility of a non-hegemonic egalitarian configuration of rights more amenable to sceptics' concern in resisting domination.

Through the analysis of these four alternative models, I constructed an overall argument in support of an activist citizenship of rights on the basis of democratic inclusion, moral innovation and civic education. The discussion of popular activism around housing in Chapter 8 was offered as a detailed illustration of the activist account that clarified key theoretical features of the model. The analysis in this chapter further enhances the model's appeal by offering a fresh perspective in ongoing philosophical debates about the realization of social rights through attention to the political agency of rights-bearers themselves; their understandings of rights and the legal, financial and ideological obstacles they face. The theory meets the three tests I initially set out.

i) The fidelity test

The theory is sufficiently faithful to common understandings of rights to explain how familiar elements of the concept relate to one another within an overall logical structure. It further sheds light on a neglected dimension of the practice by explaining the role of rights in oppositional practices of moral critique and political struggle.

ii) The equal respect test

The theory explains how respect and self-respect figure in relation to the dynamic interpersonal claiming practices of real-world politics. It shows how the egalitarian ethos of rights relates to the dignified standing of individuals empowered as moral agents to author, evaluate and enforce binding claims upon one another's conduct.

iii) The realism test

The theory provides a fresh perspective on the political nature of rights as conflictual claims against others that support insistent practices of adversarial politics in circumstances marked by inequalities of power and status. It further addresses key realist challenges to rights that fault the discourse for the potentially undemocratic and dangerous implications of its moral abstraction.

The thesis provides a new perspective on the nature and value of rights as a philosophical concept and can practically inform thinking about the forms of political culture that a society committed to rights should maintain; a society with a democratic egalitarian ethos in which we recognise and relate to each another not simply as objects of state concern and intervention, but as active citizens and claim-makers. As citizens, we are positioned not merely in vertical relationships with institutions but in horizontal relationships as potential third parties with a responsibility to support struggles for justified moral rights in a way that is politically responsive to the social interests and experience of their claimants. It follows from my argument that political institutions themselves should be inclusive and responsive to a wide range of democratic opinion, avoiding the urge to freeze any particular configuration of rights beyond future revision and contestation. To do so, would be to disrespect citizens; excluding future claims in new and unforeseen historical circumstances that challenge the status quo.

The law has an important role to play in making rights effective and secure through the institutionalisation of schemes of protection and provision and channels of official remedy in the event of rights violations. There are nonetheless reasons to be cautious of viewing institutionalisation as a definite sign of progress however and so alienating our capacities for critical moral thought and judgment to lawyers, judges and political officials. Even in liberal democratic states in which formal political equality is recognised, and there is a public culture of rights, the official institutions of constitutional participation through which rights are decided and enforced will not give voice to the breadth of democratic opinion in the absence of activist practices of citizenship to hold those institutions inclusive and accountable. Movement politics has an important role in encouraging critical moral innovation and in broadening political participation in ways that enhance the civic virtues and capacities of citizens and secures democratic inclusion for the interests and opinions of all those within the polity.

Typically, conflictual forms of movement politics of the sort I have described raise concerns that disruption may undermine the authority and effectiveness of democratic decision-making in a way that risks widespread disorder. There are legitimate prudential concerns about the threat of populist movements with

regressive agendas. These concerns should be balanced by the recognition that there are likewise regressive parties, politicians and judges. In fact, a more militant and active civil society may be the best hope today of defending democratic values against the growth of virulently nationalistic and intolerant political parties who enjoy ample support from wealthy media and business interests. By contrast, treating activist claim-making as a purely criminal matter may risk enflaming regressive grievances, pushing the aggrieved to adopt more pro-actively violent measures. There is no need to be frightened by a political process of ongoing debate and contestation over rights that includes contestatory forms of civic activism. Just as political approaches to rights are based on an understanding that there can be no transcendent external guarantee that a society's political institutions will arrive at the correct account of justice and rights, so we cannot guarantee that the ongoing practices of contestation through activist citizenship will necessarily deliver outcomes we regard as progressive. Nonetheless, the historical record of emancipation through such movements, along with a normative and empirical evaluation of the structural biases of political institutions, suggests they will continue to have an important role to play in the creation and achievement of rights.

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