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Towards a Politics for Human Rights: Ambiguous Humanity and Democratizing Rights¹

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Abstract

Human rights are a suspect project – this seems the only sensible starting point today. This suspicion, however, is not absolute and the desire to preserve and reform human rights persists for many of us. The most important contemporary critiques of human rights focus on the problematic consequences of the *desire* for universal rights. These criticisms are pursued with varying intensities, as some defenders of human rights are willing to accept elements of this critique in their reformulations, while staunch opponents remain wary of the desire to think and act in language of human rights because of the deep pathologies of rights-thinking as a political ethics. Yet, we hesitate to abandon human rights. In this paper, I look at the political critique of human rights in greater detail. I argue that an agonistic account drawing on the work of William Connolly and Bonnie Honig offers the best response to the most important contemporary critiques of human rights, and a clearer account of what it means to claim that human rights do valuable work. The key developments of this agonistic view of human rights are its focus on the ambiguity of “humanity” as a political identity, and the challenge to legitimate authority and membership that new rights claims make. In the end, human rights are defended as a universal political ethos focused on the pluralization and democratization of global politics.

Keywords

Agonism, Human Rights, Pluralism, Democracy, William E. Connolly, Bonnie Honig

Human rights are a suspect project – this seems the only sensible starting point today. This suspicion, however, is not absolute and the desire to preserve and reform human rights persists for many of us. As we move beyond debates over universalism and particularism, the most important contemporary critiques focus on the problematic consequences of the *desire* for universal human rights. This aspiration drives both the effort to develop an effective international human rights regime and the pursuit of philosophical justifications of universal moral rights. Contemporary critics of human rights, however, suggest that human rights justify the objectionable use of power by dominant political authorities. Slavoj Žižek puts it bluntly: “Man”, the bearer of human rights, is generated by a set of political practices which materialize citizenship; “human rights” are, as such, a false ideological universality, which masks and legitimizes a concrete politics of Western imperialism, military interventions and neo-colonialism.² Following on from this denunciation of the universalizing aspiration of human rights, critics have found fault with the political vision those rights support, of an increasingly integrated and legalized world politics defined by expanding international institutions and facilitated by the development of international law.³ The faults identified range from skepticism regarding the plausibility of such a transformation, to the charge that it reflects a disabling neo-imperial vision of world politics in which the human rights offered to the weak and suffering can only be protected by powerful Western states claiming an autopoietic right of intervention. These criticisms are pursued with varying intensities, as some defenders of human rights are willing to accept elements of this critique in their reformulations,⁴ while staunch opponents remain wary of the desire to think and act in language of human rights because of the deep pathologies of rights-thinking as a political ethics.⁵

Yet, we hesitate to abandon human rights. We worry that it is an ethical vernacular with some effective power, which even intransigent critics seek to preserve in some measure.⁶ In what follows, I look at the political critique of human rights in greater detail. The strong version of the critique goes beyond a claim that the de facto politics of human rights are objectionable and suggests that the impulse to legislate a singular conception of political legitimacy in terms of universal moral principle is corrosive. An important conclusion drawn from this argument is that human rights *necessarily* reinforce rather than constrain sovereignty. This is an especially damning conclusion as it suggests that the political vision of human rights is problematic beyond its tendency to reinforce the power of national authorities and Western states (who must be trusted to respect rights as a largely un-enforced condition of their legitimacy). Even if there were a successful transformation to a cosmopolitan politics that could offer fuller protection to individuals subject to state authority, sovereign power would be relocated to the global level rather than truly tamed or eliminated. A cosmopolitan transformation is presumed to guarantee fuller protection of individual rights, even as such a transformation would need to be underwritten by Western powers, as this partiality could be overcome through a moralization and legalization of world politics.⁷ However, criticisms suggesting that human rights depend upon exceptional sovereign authority upset this redemptive coda and raise the troubling possibility that human rights necessarily remain an exclusionary and violent project.

Responding to this critique requires a conceptual reconstruction of the relationship between morality and politics that human rights presume. Critics and supporters share an analysis of what human rights do, but differ on the desirability of their consequences. Moving away from a view of human rights as a limit upon the excesses of sovereign authority via universal moral principles, the reconstruction called for here favors an agonistic understanding of rights. This alternative focuses on the possibility of using human rights to make new and plural claims on authority, including calls for fundamental changes in the social order, through a distinct form of contestation enabled by the appeal to humanity.⁸ If we do not assume that the moral significance of humanity as a political identity is, or should be, singular or absolute then the act of claiming human rights has the potential to disrupt given accounts of the political subject, as well as the given boundaries of political community. The central insight pursued here is that when critics hesitate to disavow human rights completely, when they appeal to their potentially positive but often ambiguous, consequences, they are appealing to the contribution that human rights make to political struggles challenging established authority and increasing the democratic control people have over their own lives. Yet, when this claim is made it is not analyzed sufficiently, nor is its significance followed through in our understanding and judgment of human rights. In conclusion, I argue that an agonistic account not only offers the best response to the most important contemporary critiques of human rights, but also offers a clearer account of what it means to claim that human rights do valuable work and how such a claim might be evaluated critically rather than taken on faith.

The Politics of Human Rights

Today almost everyone accepts that human rights are political, but what that means is less clear. At their core human rights claim that there are protections, privileges and duties that apply to every human being, which must be respected by any political authority legitimately exercising power over people. On first hearing, to say that human rights are political seems to call into question their status as universal norms of social life. To admit that their force is neither written into the nature of things nor obvious to the minds of all right thinking human beings implies that they cannot be a neutral moral backstop protecting us from the vagaries of political power. In part, this is an expression of our post-metaphysical sensibility, in which the presumption that morality can be justified in a manner that transcends convention is always suspect. If we accept that human rights are social constructions, then it follows that they express the political order in which they have been created.

Our suspicion is also partly an expression of skepticism regarding the motives of authorities claiming to protect human rights, as the admission that human rights are only conventional gives weight to the view that they are an ideological expression of the interests of Western powers exercising a significant degree of control over weaker states and disempowered people. If we suspect that human rights might be unavoidably political, we are forced to consider whether those politics are objectionable – and it would seem that for many people they are.⁹ This forms the intellectual backdrop for much contemporary human rights thinking and has led both supporters and critics of human rights to discuss them in terms of whether the politics of human rights can be justified.

Redeeming Human Rights

The ubiquity of a political conception of human rights¹⁰ must be nearly incontestable if even Rawlsian liberalism has made a “political” turn. For a tradition described by Chantal Mouffe as resting ‘on the elimination of the very idea of the political’,¹¹ the move to a political conception of justice is significant. In Joshua Cohen’s work the nascent and minimalist account of human rights present in Rawls’ *Law of Peoples* is expanded and elaborated.¹² Rawls’ move to a political justification for rights is based on his concession that a philosophical consensus is impossible under conditions of diversity,¹³ and thus must be replaced by a more modest aspiration to a political consensus on the terms of justice based in public reason.¹⁴ Public reason is the form of address citizens use with each other within a liberal democracy, where the agreement on a common philosophical worldview is impossible and a political consensus is not only the best possible but also the proper justification for a theory of justice. In *Law of Peoples*, public reason at the international level (which for Rawls involves address between independent peoples) dictates minimalist rules for the interaction between states, as peoples are concerned primarily with toleration and limiting exceptions to the norm of non-intervention to the most severe violations of basic human rights.¹⁵ Cohen expands this narrow conception of international justice and argues for an account of *global* public reason that addresses the question of what any legitimate political authority owes to every person it exercises power over rather than the question of what sovereign peoples owe to each other. Reinterpreting the practical purpose of public reason in global terms leads to a revised role for, and a more substantive list of, human rights, which provide universal standards of membership in political community, defining the legitimacy of sovereign authorities in terms of their obligations to individual members.¹⁶

While this move to a political conception of rights takes us some way from the idea that human rights are moral principles inscribed in nature or demanded by reason, the function of human rights remains to limit political contestation, to articulate the list of what must and must not be done. The politics of human rights must be addressed, redeemed and made reasonable, but this process of justification renders the partially of human rights morally legitimate. The limit itself, however, is preserved as an uncontested given, defined by the purposes of political association revealed by the philosopher’s insight into the ideal of global public reason.¹⁷ The central worry among Rawlsians is how to redeem human rights by disassociating them from the interests of powerful political actors imposing their will on others. Public reason, whether understood to aim at minimal toleration between peoples or universal standards of political membership owed to every individual, is intended to provide a legitimate starting point for human rights outside of an illegitimate politics of coercion and imposition. Instead, human rights are justified by an unforced consensus around the dictates of public reason, which justifies human rights by alienating them from their origins. Yet, this alienation does little to address the legacy of human rights, both historical and conceptual, as instruments of discipline and control, as instruments of power. As Wendy Brown reminds us, human rights ‘are not simply rules and defenses against power, but can

themselves be tactics and vehicles of governance and domination,¹⁸ which undermines the too readily presumed existence of a consensus on the terms of legitimate authority.

The Rawlsian tradition, after making its political turn, rests precariously on an appeal to reasonable consensus and social convention. Public reason, while regulative, depends upon a sense of shared purpose presumed to be broadly accepted by those it applies to, which solves the problem of how to justify principles of justice and the demands of right, but at the cost of opening up the problems of politics. These problems include the questions of what the purpose of society should be, where the boundaries of political community should be drawn, how we know a consensus exists and who determines that a consensus is authoritative. In a move that irritates many of his former acolytes, but which is consistent philosophically, Rawls' own work provides no escape from these questions other than convention. The failure to address the politics of human rights within the Rawlsian tradition lies in its unwillingness to interrogate convention – in Rawls' case it is not clear why we should accept the conventional norms of international society, which entail a limited set of human rights that determine when intervention by the powerful is permissible; while in Cohen's case it's not clear why we should accept the liberal canon of international human rights that constructs membership in terms of individual citizens bound together in a national state and seeking protection and privilege from a singular and secular sovereign authority, even if such an account *could* be justified within other worldviews.¹⁹ Admitting that one starts with a political end in mind is a very limited acknowledgement of the politics of human rights, as the question of who determines our starting point is unaddressed, both in terms of who has that authority and whose starting point is determinate of our reasonable public ends.

The limits of this conception of human rights are created by the problem this revision is intended to address: skepticism about the possibility of justifying universal principles to all those affected, rather than a concern that determinate (if not absolute) universalized principles are an assault on difference as such. While starting with a Habermasian framework that identifies a similar challenge in the attempt to rationally justify moral principle, Seyla Benhabib's work more fully addresses the political problems opened up by abandoning faith in justifications that transcend convention, even as she seeks to preserve the force of the rational moral law as a way of constraining politics. Benhabib's understanding of human rights comes out of the paradoxical relationship between universal rights and democratic self-determination. She defends human rights as universal moral norms, which express the necessary conditions for seeking consensus on specific normative questions and define the equal concern and recognition due to every individual in that process of communicative reasoning.²⁰ These rights include individual entitlements that are necessary for autonomy and a guarantee of participation in the political life of the community. The legal expression of these norms is found in liberal and republican traditions – rights both protect individuals from the modern state and empower them as participants in a political community.²¹ There is, however, a tension here, as universal rights place limits on the self-determination of the political community. Some self-legislation is forbidden.²² Where moral principle fails and the will of the community or the sovereign violates the integrity of the individual, legitimate authority is lost. In political terms, this paradox is expressed in the conclusion that the spread of human rights norms requires the expansion of liberal and representative forms of government both to communities lacking appropriate domestic structures and in transnational forms of governance beyond the national state.

This conclusion generates two problems. First, universal human rights require the imposition of a political structure and an account of the universal individual upon existing communities and persons with potentially very different subjectivities. Benhabib is aware of this problem. Drawing on revisions to discourse ethics made in her earlier work,²³ she argues that legitimate human rights norms are worked out through democratic iterations in which culturally

specific human rights are re-made as ‘elements in the public culture of democratic peoples through their own process of interpretation articulation, and iteration.’²⁴ While human rights entail protections for individuals that trump the de facto authority of the community and communal authority requires guarantees of democratic participation, Benhabib suggests that the final form that human rights standards will take depends upon the context in which they are worked out. On this account the universal individual finds expression through an actual person, therefore a space for particularity must be preserved, even as it is disciplined by universal principles. The second problem Benhabib’s account of rights generates is that it undermines the priority given to the territorial state in favor of a more expansive democratic order, but without a clear guide to how the boundaries of legitimate political community should be established. If everyone has a right to participate in decisions that affect them, then potentially everyone has a right to participation everywhere. This has implications for international order, as it would appear that morality requires a cosmopolitan order in place of our current state-centric one. Benhabib addresses this issue by accepting the necessity of a form democratic sovereignty that extends beyond the nation-state to a form of global constitutionalism, but without seeking to eliminate or completely transcend the state. Instead the state must find its legitimacy in a cosmopolitan field with multiple levels of governance and participation, institutionalizing not a singular human community, but a community of humanity that enables and is legitimated by universal rights that protect individuals not only from excessive state violence, but also social and economic harms endemic to global capitalism, while also guarantying the sanctity of forms of community in which individual identity, ethical values and communal autonomy are protected from unjust intervention.²⁵ The community of humanity, then, is a diverse community of communities, the members of which preserve their distinctiveness even as morality requires they abide by universal principles of legitimacy.

There are many virtues in Benhabib’s justification of human rights. She allows for an important degree of contestation in the articulation of human rights through her ideas of democratic iterations and jurisgenerative politics.²⁶ First, the appeal to democratic iterations highlights the necessity of contextualization, as human rights norms are not simply accepted as they are articulated in international institutions, but must be re-made and applied in context through the democratic process. Second, the jurisgenerative nature of law, as she describes it, denies the capacity of powerful institutions and actors to authoritatively determine the social norms expressed through the law. The wider process of political contestation shapes the law, which allows human rights to remain critical and potentially subversive of established power. The degree of contestation and difference that is allowed, however, is still constrained, as it is only when universal moral principles are upheld that it can be said that there ‘is legitimate “unity and diversity” in human rights among well-ordered polities.’²⁷ So, even as democratic iterations lead to diversity, they also lead to convergence, because the moral principles that provide the foundation of rights cannot be contradictory or ambiguous.

Honig suggests that Benhabib and other Habermasians assume ‘a chrono-logic in relation to which they assess new rights: new rights-claims are judged in terms of the rights’ amenability to being subsumed under existing constitutional or universal categories.’²⁸ As she goes on to argue, Benhabib cannot ‘see how new rights-claims do not necessarily demand mere inclusion in a previously stabilized order. They may. But they may also demand a new world. They may unsettle previously existing categories of right.’²⁹ This approach to rights is required by the role that universal moral principles play in constraining politics by limiting contestation and imposing order. Even as Benhabib is sensitive to preserving difference, her framework must presuppose the universal moral subject and her place in the political community as an individual rights holder in a constitutional democracy. Kimberly Hutchings gets at the limits of this approach, saying that if ‘one accepts this, then clearly one has again returned to a version of liberal universalism which always already knows its moral superiority.’³⁰ The difficulties that both Rawlsian and Habermasian

traditions have in offering a political justification for moral universals that does not require placing some portion of their particular foundations beyond contestation – such as the presumed consensus on the purpose of public reason or the promise of the progressive realization of democratic individuality in a cosmopolitan community – highlights the difficulty of avoiding universalism’s essentializing tendencies, its potential to eliminate difference and preserve the given order. The troubling possibility raised by these difficulties is that an understanding of political ethics based on the redemption of sovereign power through its subordination to universal rights in a legal order might be unacceptable at the same time that it seems necessary.

Renouncing Human Rights?

While both Rawlsians and Habermasians attempt to reformulate the transformations of authority required by human rights in light of the difficulty of finding acceptable justifications, they remain committed to the desirability of such a transformation. At an unreflective level this imposition of universal standards of sovereign legitimacy and political inclusion seems praiseworthy. Yet, the difficulties we encounter in trying to justify rights with some measure of final authority generates anxiety that the legacy of universal rights, expressed in our contemporary human rights discourse, promises only a hollow emancipation – one that reinforces rather than restrains or reforms sovereign power. Human rights look very different from an anti-universalist perspective, as it is not the difficulty of justifying universality but the desire *for* universality that is the problem. The politics of human rights are problematic beyond their association with discredited or destructive ideological projects.³¹ As Wendy Brown shows in her critique of human rights, the transformation they promise may actually be both hollow and pernicious.

To illustrate the hollowness of the transformation promised by human rights, Brown returns to Marx’s critique of liberal rights in *On the Jewish Question*³² in order to argue that they provide only a formal transformation, one that is not intended to address the causes of social grievance and suffering.³³ This goes beyond a charge of hypocrisy, as it is a faith in the capacity of moral and legal rights to alleviate social misery that draws our focus away from the work of changing the structures of exploitation and oppression. It is this distraction that Marx characterized as the ideological limit of the liberal rights tradition.

The substitution of abstract political subjects for actual ones not only forfeits the project of emancipation but resubjugates us precisely by emancipating substitutes for us – by emancipating our abstracted representatives in the state and naming this process “freedom.” The subject is thus *ideally emancipated* through its anointing as an abstract person, a formally free and equal human being, and is *practically resubordinated* through his idealist disavowal of the material constituents of personhood, which constrain and contain our freedom.³⁴

Rights, then, may offer recognition, but their capacity to change the lived experience of rights-holders is limited to granting formal status within the given social world. This granting of status then pushes the individual into civil society where she is free but lacks substantive equality. Further, the formal emancipation offered by rights creates a dependence upon the power of the state, as social harms are redressed not through political struggle but inclusion in the regime of equal rights granted by the sovereign.³⁵

Marx, while critical of liberal rights, did see that formal emancipation was better than institutionalized inequality and could contribute to true human emancipation. Brown argues that rights do not simply fail to substantively liberate individuals from illegitimate forms power, but that liberal rights are part of a broader field of social power. Engaging Foucault’s work as an expansion

of Marx's critique, Brown traces the way that rights serve to construct subjects that internalize the limited emancipation offered to them. Rights are part of the discourse and practice of political life and their power construct the subjects of rights in particular ways, they 'pervasively configure a political culture (rather than merely occupying a niche within it) and discursively produce the political subject (rather than serving as the instrument of such a subject).'³⁶ The conventional rights discourse not only fails to recognize or address this form of power, but it also constructs its subjects as dependent and vulnerable, as isolated and disempowered in their relations with sovereign authority, as the 'disciplinary production of identity may become the site of rights struggles that naturalize and thus entrench the powers of which those identities are the effects.'³⁷ Thus vulnerable subjects must seek out the state – or alternative international authority – to provide for their well-being. The emancipatory promise of such rights is thus rendered as the preservation of vulnerable life, rather than the pursuit of substantive justice or political empowerment.

Responding to Michael Ignatieff's defense of human rights as a minimalist morality, Brown applies her general critique of rights to the specific discourse of international human rights. She begins by identifying the limited emancipation that human rights promise 'as a moral discourse centered on pain and suffering rather than [a] political discourse of comprehensive justice.' Rights, however, are more than protections that individuals claim against government authorities to ward off threats that are common to everyone; they produce 'political subjects and political possibilities' through the construction of the harms we are concerned with socially and the authorization of particular responses to them.³⁸ 'Human rights activism is a moral-political project and if it displaces, competes with, refuses, or rejects other political projects, including those also aimed at producing justice, then it is not merely a tactic but a particular form of political power carrying a particular image of justice.'³⁹ While Ignatieff argues that the moral-political project of human rights is not objectionable because it merely provides the basic requirements for any decent society, on closer inspection he is concerned with quite a lot more than protecting bodies. Human rights in Ignatieff's reading go hand in hand with the development of individual autonomy, provide the basis for social and economic security, and plant the seeds of toleration that can develop into a liberal political culture.⁴⁰

The fact that human rights are inevitably about more than the alleviation of suffering comes about because they address that suffering in terms of the formal legal equality of individuals before the state, who are free to act in competitive and unequal civil society. Brown concludes that Ignatieff's minimalism 'would seem to be as much a brief for capitalism as for human rights,' as the protection guaranteed to the autonomous individual (rather than merely the suffering body) he privileges is postulated as the cause of economic prosperity and legal representation. Brown objects to this, noting that it is 'a strange history of modernity, especially in its suggestion that national wealth is produced by rather than productive of civil liberties and constitutionalism and in its elision of the deformations of colonialism and a global economy in which the wealth of core states is predicated in part on the poverty of the periphery.'⁴¹ Rather than reflecting a distinctive personal failing on the part of Ignatieff, Brown's critique of rights suggests that it is the ideology of liberal constitutionalism that makes it difficult to see that rights are a feature of social power that 'does not only come in sovereign or juridical form' and as rights construct individuals in particular ways, they are 'not just defenses against social and political power but are, as an aspect of governmentality, a crucial aspect of power's aperture.'⁴² This also means that human rights will tend to co-opt or supersede alternative political-moral projects seeking more political and comprehensive visions of justice.

Brown's critique reveals how a concern to prevent certain forms of state violence and increase the autonomy of individuals supports 'liberal imperialism and global free trade', while missing the human suffering caused by 'the relatively unchecked globalization of capital,

postcolonial political deformations, and superpower imperialism combining to disenfranchise peoples in many parts of the first, second, and third worlds from the prospects of self-governance to a degree historically unparalleled in modernity'.⁴³ It is not only that those individuals and communities that do not recognize the universal standard are marginalized – the primary concern for both Cohen and Benhabib; it is that the unrecognized suffering of human beings is made invisible and the possibilities of eliminating such suffering are limited to those authorized within the given order, which enables the very harms in need of redress.⁴⁴ It is vital to liberal neo-imperial powers that they can claim to be acting in the name of human rights *and* to possess the moral authority to declare and interpret those rights. Brown's point is not that supporters of human rights want this, but that such political relations are written into the logic of human rights. For that reason, Brown's account of human rights carries a sense of betrayal that suggests that whatever the past value of human rights for emancipatory politics might have been, they have been badly compromised.

Nor, again, am I contesting the extent to which human rights campaigns may actually limit certain kinds of abuse and alter certain policies. Rather, the point is that there is no such thing as mere reduction of suffering or protection from abuse—the nature of the reduction or protection is itself productive of political subjects and political possibilities. Just as abuse itself is never generic but always has particular social and subjective content, so the matter of how it is relieved is consequential. Yes, the abuse must be stopped but by whom, with what techniques, with what unintended effects, and above all, unfolding what possible futures?⁴⁵

The full measure of the negative consequences of the neo-imperial politics of human rights is captured in the way those politics structure the relations between dominate and subordinate states in our postcolonial age. Human rights not only sanctify the interests of powerful liberal states with moral purpose, but they also justify the hierarchies that separate the civilized and capable north from the under-developed and incapable south.⁴⁶ As Gayatri Spivak notes, the presumption that one has a responsibility to define and protect the rights of others is built on a separation that not only assumes but also institutionally ensures that human rights “victims” cannot help themselves.⁴⁷ This hierarchical dynamic justifies interventions in the social, economic and political affairs of subordinate states, which is a relationship that persists even when individuals in subordinate states make use of human rights or participate in the interventions of dominant states and institutions. The human rights project claims to protect victims of violence from the worst harms by limiting state power and encouraging moral action by the international community – but a critical analysis of the consequences of the politics of human rights undermines any assumption of straightforward benevolence.

At one level, this analysis does not contradict what Cohen and Benhabib suggest is necessary for effective human rights – universal standards to limit and discipline politics – but it does suggest that the prospects of this are more problematic than those authors are willing to consider, as the account of the political consequences of human rights offered by Brown's critique speaks against the desirability of a universalizing political morality that seeks to constrain state power through protections of fundamental rights guaranteed by the very sovereign authority they are intended to limit. It is noteworthy that Brown is unwilling to completely reject the idea of human rights. She acknowledges that the universal concern that partly defines human rights is important, and that their contribution to emancipatory political struggles has been valuable. Yet she is hesitant to endorse a vision of human rights because of the limits it places on what justice can achieve, and beyond this more theoretical worry there is also an unwillingness to endorse an idea that she see as complicit in a anti-democratic and neo-imperial politics. While Brown shows the limits of conventional rights politics, it also raises an important question about where this leads. Do

rights always lead us to the abandonment of politics? More accurately, it leaves us with a limited politics where the terms of political discourse are set within an essentially liberal and capitalist order, which itself seeks to legalize politics and to reduce the transformative capacity of claims for liberty, equality, and justice. Kenneth Baynes challenges Brown's focus on the formal character of rights, which suggests that they may have transformative potential that she underemphasizes by ignoring their use in practical political reformations that renew democratic polities.⁴⁸ Nonetheless, getting beyond the limits of liberal constitutionalism, for Brown, requires something more revolutionary as she sees such practical rights politics as necessarily reinforcing the liberal state. Yet, by embracing the poststructuralist suspicion of narratives of a future and true emancipation there is a real risk of a retreat from politics and a difficulty in articulating new projects. While Brown is aware of this ambiguous and precarious position, she thinks rights are not particularly useful for escaping this predicament beyond offering broad ideals that inspire us to pursue political change.⁴⁹

Many critics share Brown's ambiguous rejection and partial endorsement of rights;⁵⁰ Giorgio Agamben, however, completes this anti-universalist line of critique by calling on us to abandon and go beyond human rights. While Agamben shares Brown's focus on the construction of subjects by human rights, he also incorporates Hannah Arendt's analysis. Arendt argued that human rights are meaningless because a person reduced to their bare humanity is an individual without political community, without the hope of having effective rights.⁵¹ The granting of legal personhood only completes the depoliticization of the individual as human, for the individual deprived of politics is only ever subject to the law, never its author. Arendt goes on to argue that the universal law, necessary to human rights, is ineffective in truly emancipating individuals – even if their human rights are protected, it is the pity of the powerful and not the power of right that protects the individual reduced to bare humanity. In Arendt's hands the only human right is the "right to have rights," which requires either inclusion in a nation-state or a new global polis not yet seen in human history.⁵² In either case, human rights only become effective rights when they are remade as the rights of citizens within a political community. As Andrew Schaap notes, for Arendt the struggle 'for the right to have rights can only be understood as a liberation that would establish the conditions of possibility for the actualization of freedom.'⁵³ Through this analysis we get to a human right to engage in politics. While this promises more than the formal recognition that Brown finds, the difficulty of actualizing such a right globally, much less within national states, suggests that the promise of human rights is limited at best.

Agamben pushes this critique even further by focusing on the way in which rights depend upon the distinction between those who have rights as members of the political community and those that are excluded – between *bios* and *zoē*. Human rights attempt to privilege the bare life of human beings without a place in the political world, which is why Agamben sees the displaced or stateless individual as the exemplary subject of human rights. However, it is the sovereign that has the power to make this distinction, the exclusion of some life from the political community, the creation of "bare life". As rights are supposed to attach to human beings as such, rather than as members of a particular nation, it seems that the law achieves justification beyond convention, beyond the shared sense of justice that makes a *People*, but in fact it reveals that the law depends upon the power of the sovereign who ultimately decides which human beings have their rights protected and which find themselves excluded totally, most tellingly in the *camp*. This critique of human rights depends upon Agamben's understanding of the sovereign as 'the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence.'⁵⁴ The pure bio-politics we find in the relationship between *Homo Sacer* and the sovereign, who decides whether bare human life is extinguished or preserved, reveals that the effort to remove rights from a given order (to transform civil right into human rights) renders those rights precarious, dependent on exceptional power of the sovereign rather than a universal law. On this

reading, human rights cannot constrain authority because they are dependent upon it, nor do they enable transformations of the legal and political order because they confirm rather than claim power. Agamben suggests that rights are not ambiguous in their support of authority and control, but rather central to it at the most fundamental level.

More troubling still, human rights are the logical development of the rights of the citizen, which seemed to be guaranteed by her membership in the political community, but this is revealed as a fiction through the plight of refugees whose human rights are ignored. Human rights depend on the willingness of the sovereign to grant them, and the stateless persons condition makes this act of power explicit, revealing the way in which the rights of citizens are just as precarious once the mythology of national belonging is stripped away.

Rights, in other words, are attributed to the human being only to the degree to which he or she is the immediately vanishing presupposition (and, in fact, the presupposition that must never come to light as such) of the citizen. If the refugee represents such a disquieting element in the order of the nation-state, this is so primarily because, by breaking the identity between the human and the citizen and that between nativity and nationality, it brings the originary fiction of sovereignty to crisis.⁵⁵

The ability of states to remove the rights of their citizens and the failure of the international community to protect the human rights of those stripped of nationality reveal the necessary dependence of rights upon the sovereign, such that they cannot moralise or constrain that power.

The separation between humanitarianism and politics that we are experiencing today is the extreme phase of the separation of the rights of man from the rights of the citizen. In the final analysis, however, humanitarian organizations – which today are more and more supported by international commissions – can only grasp human life in the figure of the bare or sacred life, and therefore, despite themselves, maintain a secret solidarity with the very powers they ought to fight.⁵⁶

It is this reading of human rights that leads Agamben to seek a political ethics beyond human rights. There are problems with this account. As Schaap notes, Agamben's invocation of a coming politics beyond human rights is 'more mystifying than the virtual "social contract" that Agamben dismisses. Underlying Agamben's profound pessimism and totalizing critique of human rights is a utopianism that does not afford an understanding of the conditions of possibility for social transformation.'⁵⁷ Similar to Brown, Agamben's critique of rights rests on a formal reading of how human rights function, rather than an engagement with the details of human rights practice. In both cases, however, it is not clear that this blindness is inherent to either Brown or Agamben's thought, which raises the question of why there is a lack of engagement with how human rights are used. As Ayten Gündoğdu argues,

Only within the confines of Agamben's stringent logic, can any politics organized around sovereignty and human rights not help but reinscribe the originary violence repeated since the beginning of Western political history. The imposition of such a logic, which ends up imputing a preordained trajectory to any politics organized around sovereignty and human rights, however, is at odds with Agamben's own efforts to understand time and history in terms of inexhaustible potentialities.⁵⁸

This paradox in critical accounts of human rights, in which the contingency of the world is affirmed but the formalism of rights is maintained, I argue, is based on two distinct but related failings. First, critics of human rights actually maintain the same relationship between politics and morality that

human rights supporters affirm, though in a pessimistic register. The reasons for this are largely conceptual, which I argue can be addressed by embracing a pluralistic and immanent political ethics as opposed to a legislative and transcendent one. The second failing has to do with the lack of engagement with how human rights are used in political struggles, which relates to the conceptual failing so far as it is the case that a legislative and transcendent account of ethics gives us little reason to attend to such details, but it also reflects an assumption of intellectual privilege that determines who can and cannot define the meaning of human rights.

However, the above objections aside, considered together, Brown and Agamben's criticisms suggest that once we abandon transcendent justifications we are left with a necessarily political conception of human rights, which is subject to a number of serious objections. Universal human rights are revealed as a project that cannot be justified in neutral terms, while they also require an appeal to a universal human identity that does violence to difference as it constructs individual subjectivities and the institutions of social life in the image of dominant social powers. This is especially problematic because it maintains the coercive power of the state and fails to address significant social harms endemic to global capitalism. Human rights are then seen to serve the interest of powerful actors, both in justifying their actions morally and enabling their dominance, including the privilege to determine the meaning of those rights. Further still, these negative consequences can be seen as necessary rather than contingent, as the idea of human rights reinforces the exceptional power of the sovereign, which is the power that decides which humans have full-rights, which have only their human rights, and which have no rights at all. Given the depth of this critique the desire to hold on to human rights is difficult to justify. The question that we are left with is: should we abandon the idea of human rights? In the following section I argue that *if* we do not want to abandon human rights, then understanding their value and justifying their prominence is best served by an agonistic account.

A Politics for Human Rights

Honig offers an important reason for defending human rights: democratic activists use them to fight for protections, inclusions and privileges denied by the existing order – and to change that order. If we start from this perspective our understanding shifts to focus on the ways that rights can be productive beyond offering broad ideals or simply affirming the existing order, on how a new claim 'transforms the entire economy of rights and identities, and establishes new relations and new realities, new promises and potentially new cruelties.'⁵⁹ Further, understanding rights claims as inherently plural and ambiguous allows us to carry forward a critical stance toward existing regimes without suggesting rights *necessarily* reinforce sovereign power. This agonistic and pluralist approach also opens up important connections to human rights practices, enabling us to make better sense of the claim that human rights do good work.

An agonistic approach to rights accepts that rights claims will remain political, which is to say partial and contestable, but it also embraces the conflict that those political claims generate rather than seeing it as an unfortunate condition to be overcome. While this approach offers an alternative kind of universalism, drawing attention to how the identity of "humanity" is used in rights politics and suggesting a democratizing ethos focused on extending agonistic respect and expressing care for the world in its complexity and plurality, it also generates new challenges. Any agonistic account of human rights needs to take account of Arendt's critique, which suggested that rights were meaningless if they did not have the force of political authority behind them. Arendt's insight deflates the idea of moral rights that apply to every individual as such, suggesting that the 'world found nothing sacred in the abstract nakedness of being human.'⁶⁰ This implies that rather than rights being compromised by politics, engaging in the activity of politics is a condition of claiming and having human rights. With this in mind we must consider who has political authority,

which has the power to make enforceable decisions. The quality of political authority becomes central and is revealed as a vital site of contestation, including what is required to render authority legitimate and how the political community that authority addresses is composed.

The agonistic account of rights I defend departs from Arendt's work because she carries forward a number of presumptions that hinder our thinking. Foremost, as Schaap notes, by locating the essence of politics in a type of speech, a form of address shared between equals, Arendt risks excluding those lacking full recognition, either because they are outside the polity or because they are marginal within it.⁶¹ Also Arendt's account of what is legitimately included in politics is too narrow, as it fails to address important spheres of social life, such as the economy and family, as subjects of political contestation, unnecessarily playing into the ideological limits of human rights identified by Brown. This is problematic if we are looking to further an account of rights where the agenda is not already set by the powerful but is instead open to contestation. The key developments that Connolly and Honig offer are a move away from thinking about sovereignty as an exceptional and singular power that must be constrained (successfully or unsuccessfully) by law, while also subverting the notion that membership in the political community can and should be determinate (whether it is imagined in national or cosmopolitan dimensions). In place of the conventional understanding of the sovereign we get a picture of sovereign power as diffuse and variegated, embedded in an expressive milieu that constrains institutional power. Further, in dissolving the seeming solidity of sovereignty, Connolly and Honig also suggest that political community should be recognized as always incomplete and transforming in complex ways that defy any ideal political geography we may try to impose. The contribution, then, of approaching human rights from an agonistic and pluralist perspective is that they are no longer universal principles that must both legitimize authority and secure universal recognition as expressions of the moral law. This in turn avoids the binds that a focus on the exceptional nature of sovereign power over the law creates. Human rights in an agonistic register are inherently plural (even contradictory) and contested claims that challenge the terms of legitimate authority and membership because the interrelation of morality and politics is embraced – so while it becomes impossible to use human rights as simply a moral constraint on political power or to see them only as an expression of the superiority of politics over the law, the ambiguity created pays dividends by opening up our understanding of the important and varied directions in which human rights politics can, and have, developed.

Reconstructing Human Rights

Sovereign power, the force that underwrites the efficacy of law, is a central but under examined reference point when thinking about human rights. Supporters of human rights see them as a tool for constraining the sovereign, using moral principles and legal institutions to bind the imagined hands of the executive force of government. Critics worry that human rights become a weapon in those same hands. In either case, however, we know that there is no singular sovereign and the political power that makes authority effective is more complicated and less unitary.⁶² Connolly emphasizes the plural nature of sovereignty by considering two of its dimensions separately.

Sovereign is *that* which decides an exception exists and how to decide it, with the *that* composed of a plurality of forces circulating through and under the positional sovereignty of the official arbitrating body. Such a result may discourage those who seek a tight explanation of the economic and political causes of legal action (the realists), a closed model of legal process (the idealists), or a tight model of legal paradox (the paradoxicalists). But it illuminates the complexity of sovereignty. It has another advantage, too: it points to strategic issues and sites to address for those who seek to introduce a robust pluralism into the ethos of sovereignty.⁶³

The positional sovereignty of officials identify the nodes of power within the structure of governance, which are in turn constituted and constrained by expressive sovereignty, which is made up of both broad social sensibilities (which are plural and contested) regarding what is and is not tolerable in the exercise of positional sovereignty, and the institutions of civil society that express and develop those sensibilities.

Importantly, even in its positional dimension sovereignty is plural and contested. Without succumbing to hyper-globalization fantasies, Connolly notes that with the continued development of global capitalism and the spread of international law, the conventional geography of national sovereignty is slowly reconfigured, leaving the state less powerful in some realms (economics) and more intent to express its authority in others (security).⁶⁴ For example, through developments in international trade law institutional sovereignty is increasingly located not with state officials but with authorities empowered to resolve disputes between investors and states.⁶⁵ Honig supplements this understanding of positional sovereignty by focusing on the role of bureaucrats, rather than judges and executives, whose powers lie in the everyday administration of government. These powers, however, are not only effective as conduits of sovereign decisions; they can challenge sovereign authority and exercise their own independent power.⁶⁶ This makes sovereignty both more difficult to constrain – which is part of Honig’s worry about Benhabib’s cosmopolitan project of global governance⁶⁷ – and less exceptional. Understanding the power exercised by political authorities in less dramatic terms enables us to see a more complex relationship between morality, law, and politics, in which human rights have an ambiguous role.

Looking to the expressive dimension of sovereign, however, does more to alter our understanding of the role that human rights play. To illustrate the concept, Connolly examines the 2000 US presidential election, in which the positional sovereignty of the US Supreme Court seemed decisive, to suggest that the official decision was enabled by the expressive sovereignty of the Republican party, which was able to demand a decisive resolution of the election through direct activism, institutional power within the Florida state government, and public pressure applied through the news media. He also considers the sorts of expressive sovereignty that could have opposed the authority of the court – forms of counter mobilization and protest in favor of a rigorous adherence to fair and accurate elections.⁶⁸ More broadly, the exercise of authority always takes place within a social milieu that enables and contests that authority, which Connolly begins to describe as an abstract machine – contrasting an anti-cosmopolitan global machine with a counter pluralist-cosmopolitan machine, in both cases these global resonance machines generate the social and moral conditions necessary to exercise authority effectively.⁶⁹

Human rights function differently within this understanding of sovereign power. First, they alter the institutional dimension of sovereignty by suggesting that certain privileges and duties must be enacted and protected by any legitimate authority. They also alter the composition of the political community because the appeal to “humanity” as a political identity exceeds established categories of membership, which means human rights either advocate for new people to be included or for existing members to be included in the political community in new ways. Institutionally, this means that human rights push in various directions, as they can reinforce citizenship rights by insisting that they be expanded to new categories of people, or they can demand new forms of authority beyond the national state. The vital conceptual point is that they do not necessarily serve as a fundamental justification for the state, nor do they underwrite a necessary cosmopolitan transformation.

The second way that human rights function is as claims on expressive sovereignty that carry forward a universal ethos. Human rights in an agonistic and pluralist register remain universal, but

their necessary universalism is formal rather than substantive, as the category of humanity is fundamentally ambiguous but formally maximally inclusive. Therefore, anyone can potentially affirm or join in human rights politics, but the meaning of “humanity” – the privileges and protections it justifies – is not agreed upon by everyone. Discussing Kantian-inspired universalism, Connolly justifies this turn to a contestable account:

Today the specific terms of that cosmopolitanism have not only become even more contestable, they carry with them elements of a dogmatic Western imperialism still in need of reconstruction. One key, in my judgment, is to relinquish the demand that all reasonable people in all cultures must actually or implicitly recognize the logic of morality in the same way Kant did. Or even as neo-Kantians do. Once this pivot of Kantian morality is treated as a contestable act of faith, it becomes possible to engage a late-modern world of speed and dense interdependencies in which cosmopolitanism involves the difficult task of coming to terms receptively and reciprocally with multiple and contending universals.⁷⁰

He argues for a double-entry universalism that is based on the contestability and multiplicity of universals, which arise as a consequence of the pluralism and uncertainty that defines our experience of the world. This provides a different ground for thinking about human rights, as a pluralizing human rights ideal would embrace rather than deny the contestability of humanity as a moral and political identity. In keeping the human identity open and contested, a reconstruction of human rights committed to pluralism presents unique opportunities for political action.

If we embrace a pluralizing human rights ethos, the normal function of universal morality is lost, as what we seek in human rights ceases to be a justification of the authority of law, but rather an alternative sensibility that guides human rights as a politics that seeks to be both inclusive and open. In his critique of conventional morality, epitomized in the figure of St Augustine, Connolly suggests that we need to move away from a legislative understanding of morality.⁷¹ Instead, Connolly suggests that politics can be guided by an ethos, which is a general sensibility attuned to the particular ends and values that we try to infuse into our actions, habits and institutions. This ethics of cultivation, aspires not to ‘a Law or categorical imperative, but possibilities of [an ethos] being imperfectly installed in established institutional practices.’⁷² Human rights as a political ethos would point towards expanding our moral concern as widely as possible, as well as pursuing openness towards difference. Such an ethos could be generated from numerous different orientations – what Connolly calls existential faiths⁷³ – and could be expressed in many different forms. While this fundamentally undermines the philosopher’s privilege as a law-giver, Connolly outlines two virtues that he thinks are important for a universal ethos that is pluralizing and democratizing in intent: agonistic respect and critical responsiveness. The pluralizing and democratizing ethos that I suggest can be developed as a human right ethos is itself contestable but, I argue, it responds to the key criticisms of human rights discussed thus far while also helping us to better see the political work that human rights do, especially in the hands of democratic activists.

The first virtue that Connolly defends, agonistic respect, responds to his extended argument that our individual and social identities are fragile and contingent, susceptible to challenge and alteration. This is so because human experience is defined by pluralism, of experiences, of core values, and of ways of living, such that when we seek certainty and security we do violence to the difference we find in others and ourselves. In order to overcome this tendency, Connolly advises that we develop agonistic respect, which requires that we recognize that our own ‘highest and most entrenched faith is legitimately contestable’ by others, and should guide how negotiations are carried out publically and dissuade anyone from presuming their final faith can be imposed upon others.⁷⁴ This virtue does not reduce to either a form of relativism or liberal tolerance, as the focus

is on how the necessary political contest between different views is conducted. Recognizing that one's own beliefs are contingent and contestable does not make judgment impossible or inadvisable, the question is rather how judgments of right and wrong are made, whether they demand exclusive recognition and security, or whether they admit their ambiguity and fragility. This also presents a more open ethos than liberal tolerance, which likewise lacks the imperative to self-interrogation and doubt.

The second virtue, critical responsiveness, responds to the blindness we each carry with us, to our privilege, to our habits, and to our ignorance. This virtue carries forward Connolly's concern with genealogy and deconstruction as methods of interrogating ethical and political ideals, which seek to bring to light the remainders generated by the values we endorse and to expose the hidden power relationships of our practices. He describes critical responsiveness as '*careful listening and presumptive generosity* to constituencies struggling to move from an obscure or degraded subsistence below the field of recognition, justice, obligation, rights, or legitimacy to a place on one or more of those registers.'⁷⁵ Working with agonistic respect, critical responsiveness is essentially a virtue of modesty for the powerful, calling upon those with privilege to seek to understand the claims of those marginalized by the given order, and to offer solidarity to their efforts to claim a place within the social order or to change it more profoundly. It is also this virtue that instills a political program of democratization in agnostic pluralism, as it seeks to include the excluded in the political arena, even so far as the excluded may seek to alter the very terms and institutions in which politics is conducted.

Embedding these virtues into an agonistic and pluralist ethos of human rights responds to the criticisms outlined above. No longer concerned with a legislative account of universalism, human rights can attend more effectively to difference. By basing human rights in a pluralizing ethos, we also acknowledge the politics of any particular articulation of human rights without justifying it as inherently more reasonable than others. Further, critical responsiveness encourages those who support existing human rights to remain mindful of the exclusions and remainder they generate, to attend to the harms they fail to address. And, most importantly, it focuses on the use of human rights as tools of creative political action that can fundamentally upset the social order.

Honig brings a number of Connolly's insights to an explicit consideration of human rights. She argues that when a human right is initially claimed it calls a new social world into being that has yet to be institutionalized. This reveals that the exercise of power is at the heart of emergent rights claims, as much as it is in established rights. Honig rejects the attempts by Rawlsians and Habermasians to resolve this paradox of politics, either confirming the legitimacy of authority in an achieved consensus or projecting it upon a future convergence yet to come.

Looking backward, we can say with satisfaction that the chrono-logic of rights required and therefore delivered the eventual inclusion of women, Africans, and native peoples into the schedule of formal rights. But what actually did the work? The impulsion of rights, their chrono-logic, or the political actors who won the battles they were variously motivated to fight and whose contingent victories were later credited not to the actors but to the independent trajectory of rights as such?⁷⁶

In contrast to this account, Honig suggests that human rights are a politics of enactment, which connects them to a democratic and activist orientation. Rather than pursuing a judicial model of human rights, where each successive iteration is interpreted and harmonized within the established right regime, Honig highlights the role human rights have in brining about new goods, putting degraded political identities on the register of recognition and respect, and encouraging a

democratic global politics that remains open to pluralism and unexpected newness generated by the interaction of difference on multiple registers.

This implies that human rights politics exceeds the legalized discourses and practices of the international human rights regime, reconnecting human rights claims with the political contestations and social movements that have led to the establishment of new rights. What this exposes is the always present power necessary in seeking to change the social order, such that the emergence of social and economic rights, or the women's human rights movement were not fulfillments of the human rights vision, complete from the start, but contests to reconstruct the legitimacy of social orders that sustained economic dependence and poverty, or the exclusion and abuse of women. What results from this reconstruction of rights is not an ever more magisterial international human rights regime institutionalized through cosmopolitan global governance, nor a state-centric order of minimal rights claims, but rather a human rights ethos. The end of human rights is not consensus, but instead the generation of a space for contesting existing identities and sites of political authority. Human rights, if imbued with a pluralizing and democratizing ethos, alter political practice at multiple levels and across communities because they are claims that can be made on behalf of a variety of political actors against a variety of political authorities. For example, individuals may claim rights of protection from state violence from international organizations, rather than their government; or indigenous groups may make claims upon corporations demanding a contribution towards, or even provision of, public services. The articulation of new rights claims in a global context serves to redefine the lines of political authority and community.

Because human rights upset the social order, new (or even reiterated) human rights claims can engender panic among established constituencies – giving rights to irregular migrants or extending human rights to include protections against the structural violence created by economic policies leading to inequality and deprivation, for example, are controversial and contested. Importantly, new rights claims are recognized as dangerous in an agonistic perspective, because they exert power and cannot be fully or finally justified, therefore they compel with force. However, contra both Brown and Agamben, the use of human rights to justify neo-conservative interventions or to provide moral justification for the expansion of competitive forms of neoliberal capitalism is not endemic to the idea as such, rather it is a form of human rights politics to be opposed and contested with a more generous and critical human rights ethos, and opposed through counter-claims that suggest new forms of authority and community. In the end, though, human rights also have a no special privilege as a universal ethos; we may yet find better ways of expressing universal aspirations and fighting for political change.

Re-envisioning Human Rights

While Connolly and Honig help us reconstruct human rights conceptually, the move to see human rights from an agonistic and pluralist perspective generates new challenges. First, the lack of sustained engagement with how human rights are actually used, which is endemic in philosophical reflections on rights, cannot be justified if we accept an agonistic understanding of rights. We must attend to what rights do – and while Connolly and Honig do this to a limited degree, notably looking at political movement defending homosexual rights, the right to die, and ecological rights concerned with animal welfare and food production, the frame of reference is limited. The same criticism applies to Cohen, Benhabib, Brown and Agamben – though they have perhaps more conceptual justification for the distance they retain from the multitude of ways that human rights are (and have been) used in global politics.

There is not space to engage in this deeper study of human rights practice here,⁷⁷ but I do want to highlight two important limits existing theoretical reflections continue to carry with them,

even among those inclined to appeal to the promising ambiguities of those practices. First, theorists of rights need to be attentive to who is visible in the historical and contemporary practice of human rights. The virtue of critical responsiveness calls on us to apply this orientation in our own work. Honig, for example, rightly criticizes the way Habermas references “Philadelphia” and “Paris” as key historical events that initiate the rights project, and whose reasonable trace we can appeal to in contemporary practice. Yet, in that criticism she does not reference alternative historical articulations of human rights that could provide even more critical purchase than her reference to the complex and unfinished projects inaugurated in Philadelphia and Paris. Where is “Port-au-Prince” as one of the great rights revolutions, in which enslaved peoples rebelled against their oppressors and declared their own rights in opposition to colonialism and racism? This not to question Honig’s choices, but to highlight the blindness theorists risk carrying forward through a lack of historical knowledge. If we consider rights in an agonistic and pluralist perspective, then surely the Haitian revolution, too often understood only as a slave revolt, presents a vital counter-example to universal narratives that end up privileging Western subjectivities and experiences.⁷⁸ This blindness also extends to contemporary rights practices. While the examples Connolly and Honig explore are important, they actually tend to focus on rights politics that do not challenge the existing order so much as make the case for inclusion of currently excluded groups. Other writers have focused on the claims of stateless peoples to have rights, which does more to highlight the way human rights can be used to upset the given boundaries of political membership. Yet, there are many more challenging human rights movements that theorists could look to in order to grasp the diversity of what human rights can achieve. For example, the global movement to claim a right to land and housing, which connects activists in Brazil occupying unused land to set up autonomous communities (the Landless Workers Movement) to communities in South Africa fighting illegal evictions (West Cape Anti-Eviction Campaign), and to political organizers in the United States seeking to occupy abandoned and foreclosed homes (Take Back the Land). These varied movements, articulated in terms of human rights, fundamentally challenges basic tenets of political and economic relations, for example basing land rights on social need, refusing the authority of the state to regulate property, and fighting for communal forms of ownership.⁷⁹ An agonistic and pluralist human rights theory must engage more broadly to understand the possibilities and limits of human rights as a universal political ethos.

The second limit that an agonistic human rights theory must attend to is the tendency of established authorities to capture and dominate the discourse of rights, to take emergent rights claims and mold them in ways that blunt their transformative power. Importantly, attending to this is not done through theoretical critique along (as in the case of Agamben’s, and to a lesser extent Brown’s, work) but rather in considering the political realities at work. Upendra Baxi, for example, traces the ways the right to development lost its critical edge as a discourse opposing the neo-imperial expansion of liberal models of economic development not only because of the theoretical limits of the rights discourse but because of the hierarchical power structures that define human rights within international institutions.⁸⁰ Makau Mutua also highlights the way Western states use their political power to stifle a substantive discussion about economic human rights that actually considers the deprivation and poverty of millions as crime for which individuals and institutions could be held accountable.⁸¹ Again, this insight is actually brought out by thinking of human rights in agonistic terms, but nonetheless a challenge remains to connect theoretical reflection to more robust understanding of human rights as a complex and contested practice.

Conclusion

In the end, human rights must prove their worth as a political ethos and an institutional project – that is the key insight gained by thinking agonistically about rights. This, I think, is an improvement over the tendency to see human rights as a moral universal that must be defended though ever more

sophisticated theoretical contortions, or as a fundamentally compromised and limited project. Not only does an agonistic view enable us to respond to the most pressing criticisms of human rights, it also opens up space to interrogate the defense of human rights based in their supposedly positive consequences. These improvements are achieved in part by reconsidering what human rights do, focusing on their formal emptiness as claims upon the social order made in terms of the ambiguous notion of humanity. Yet, the ethical content of human rights as an emancipatory project is sustained by thinking of them as a universal ethos, which I have defended in terms of pluralizing and democratizing political life in ways that expand our moral concern and challenge us to increase the substantive control people have over their lives.

Human rights may be used cynically and the discourse of humanity will always tempt the powerful to impose themselves, only sometimes with good intentions, on those who are oppressed and marginalized. These are worries that a critical human rights theory must attend to continuously. There is danger in universal politics. Further, human rights, in their ubiquity and universalism, risk overshadowing other alternative projects, which they have no warrant to do – and this fundamental contestability should be kept in mind. The suffering and hope that finds an outlet in political ethics may find new and more powerful forms of expression, we must keep this possibility alive in our thinking to avoid becoming blind to the human hands that seek to wield human rights as an idol rather than a tool.

¹ My thanks are owed to Myriam Fotou for comments on an earlier version of the paper and many insightful conversations about Giorgio Agamben, and many other important things. Also, I have benefited from many conversations with Elke Schwarz that helped clarify my thoughts on Hannah Arendt's criticism of human rights. All errors and omission, however, remain solely my own.

² Slavoj Žižek, "Against Human Rights," *New Left Review* 34 (2005): 128–129.

³ While this transformation is presented as an effort to overcome the tyranny of national sovereignty, it nonetheless depends upon the preservation of privileged authorities, such as international courts or legal texts, or hoped for legislative bodies with global scope. These authorities still depend upon sovereign power, which can be seen in dependence of the International Criminal Court and the Responsibility to Protect Doctrine on the military power of dominant states. Mahmood Mamdani, "Responsibility to Protect or Right to Punish?," *Journal of Intervention and Statebuilding* 4, no. 1 (2010): 53–67; Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).

⁴ Seyla Benhabib, "Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty," *American Political Science Review* 103, no. 04 (2009): 691–704.

⁵ Giorgio Agamben's call for a political ethics beyond human rights is a rare exception to the qualified support of human rights offered by even the most determined critics. Giorgio Agamben, *Means Without End: Notes on Politics* (University of Minnesota Press, 2000), 15–28.

⁶ Critics such as Wendy Brown, Costas Douzinas, Jacques Rancière and Slavoj Žižek for example, retain a fragile affirmation of the power of rights. Wendy Brown, "'The Most We Can Hope For...': Human Rights and the Politics of Fatalism," *The South Atlantic Quarterly* 103, no. 2/3 (2004): 451–463; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing, 2000); Jacques Rancière, "Who Is the Subject of the Rights of Man?," *The South Atlantic Quarterly* 103, no. 2 (2004): 297–310; Žižek, "Against Human Rights."

⁷ Cosmopolitan thinkers defending the interventions of powerful states in terms of human rights illustrate this dynamic. Jürgen Habermas, "Bestiality and Humanity: A War on the Border Between Legality and Morality," *Constellations* 6, no. 3 (1999): 263–272; Andrew Linklater, *Critical Theory and World Politics: Citizenship, Sovereignty and Humanity* (Routledge, 2007), 79–89.

⁸ The development of a number of agonistic approaches to human rights is seen in recent works: Bonnie Honig, "The Time of Rights: Emergent Thought in an Emergency Setting: The Paradox of Politics," in *The New Pluralism: William Connolly and the Contemporary Global Condition*, ed.

David Campbell and Morton Schoolman (Duke University Press, 2008), 85–120; Andrew Schaap, “Enacting the Right to Have Rights: Jacques Ranciere’s Critique of Hannah Arendt,” *European Journal of Political Theory* 10, no. 1 (2011): 22–45; Ayten Gündoğdu, “Potentialities of Human Rights: Agamben and the Narrative of Fated Necessity,” *Contemporary Political Theory* 11, no. 1 (July 19, 2011): 2–22; Chantal Mouffe, “Democracy in a Multipolar World,” in *Interrogating Democracy in World Politics*, ed. Joe Hoover, Meera Sabaratnam, and Laust Schouenborg (Abingdon: Routledge, 2011), 118–129; Joe Hoover and Marta Iñiguez De Heredia, “Philosophers, Activists, and Radicals: A Story of Human Rights and Other Scandals,” *Human Rights Review* 12, no. 2 (2011): 191–220.

⁹ Makau Mutua, for example, examines the way human rights are not only alien and often ineffective in an “African” context, but also the political hierarchy written into the international human rights regime. Makau Mutua, *Human Rights: a Political and Cultural Critique* (Philadelphia, PA: University of Pennsylvania Press, 2002).

¹⁰ Kenneth Baynes, “Toward a Political Conception of Human Rights,” *Philosophy & Social Criticism* 35, no. 4 (2009): 371–390.

¹¹ Chantal Mouffe, *The Return of the Political* (London: Verso, 2005), 51. Also see, Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press, 1993), 126–161.

¹² Joshua Cohen, “Minimalism About Human Rights: The Most We Can Hope For?,” *The Journal of Political Philosophy* 12, no. 2 (2004): 190–213. It’s notable that the increasing acceptance of human rights as in some measure political has pushed some Rawlsian writers to embrace more practical and contingent forms of consensus as justification; for example, see Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press, 2009).

¹³ While Rawls speaks in terms of pluralism, I want to suggest that diversity is a better phrase. For Rawls, the diversity of final philosophical faiths exhibited in contemporary democratic societies is irresolvable because reason cannot authoritatively adjudicate between these worldviews – it is a “pluralism” brought about by epistemological doubt. The broader tradition of pluralist thinking emphasises that pluralism is about the incommensurability of values, which is a claim that we can be equally rational, even share philosophical faiths, but value different things which cannot be reconciled – or if they are reconciled this is merely a political rather than a philosophical reconciliation. This view is presented by figures such as Isaiah Berlin and John Gray, most notably, but is also shared by more radical critics of Rawls such as William E. Connolly and Chantal Mouffe. Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Human Ideas* (Princeton, NJ: Princeton University Press, 1990); William E. Connolly, *The Ethos of Pluralization* (University of Minnesota Press, 1995); John Gray, *Two Faces of Liberalism* (New York, NY: The New Press, 2000); Mouffe, *The Return of the Political*.

¹⁴ John Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993).

¹⁵ John Rawls, *The Law of Peoples* (Harvard University Press, 2000), 54–58 & 64–68. The basic human rights that Rawls claims all peoples must uphold for toleration to be extended to them include the right to life (defined as subsistence and security); liberty (defined as freedom from slavery, serfdom, forced occupation, as well as freedom of thought and religion), personal property, and formal equality.

¹⁶ Cohen, “Minimalism About Human Rights: The Most We Can Hope For?,” 198–199 & 213.

¹⁷ Rawls undermines the philosophers privilege by locating the purpose of public reason in the conventions of particular types of political communities (liberal, decent or in the case of international politics a community of communities), and in doing so locates authority in social understanding, but rather than revealing the political basis of public reasoning, it instead reveals that the appeal to community and convention is as depoliticised as the appeal to universal reason. Honig, *Political Theory and the Displacement of Politics*, 195–199.

¹⁸ Brown, “The Most We Can Hope For...,” 459.

¹⁹ Brooke Ackerly's critique of Cohen on this point is especially damning. "Cohen's justificatory minimalism is only interested in that aspect of an intellectual tradition that best supports a fixed and known 'global public reason.' Even though he acknowledges the diversity and disagreements within Confucianism, Islam, and Catholicism, his assumption is that these differences have nothing to contribute to a dynamic global public reason." Brooke A. Ackerly, *Universal Human Rights in a World of Difference* (Cambridge University Press, 2008), 109.

²⁰ Jürgen Habermas, *Moral Consciousness and Communicative Action* (MIT Press, 1992); Jürgen Habermas, "Remarks on Legitimation Through Human Rights," *Philosophy & Social Criticism* 24 (1998): 157–171; Seyla Benhabib, "The Legitimacy of Human Rights," *Daedalus* 137, no. 3 (2008): 102.

²¹ Jürgen Habermas, "Human Rights and Popular Sovereignty: The Liberal and Republican Versions," *Ratio Juris* 7, no. 1 (1994): 1–13; Habermas, "Remarks on Legitimation Through Human Rights."

²² Žižek describes this as a general problem when he examines the way human rights refuse to grant legitimacy to choices made on religious belief and make the only legitimate form of belief a personalized choice rather than a public spiritual matter. Žižek, "Against Human Rights," 34. Honig detects a version of this closure in Benhabib's work: "On Benhabib's account, this foreigner is always already marked as particularity in relation to European universality. And although she treats both as two moments in a dialectic, the two are not equal: Universality represents a *principle*; democratic self-determination an *exigency*. And universality provides the perspective from which the claims of particularity are judged. This is quite different from a formulation like Derrida's, which seeks to underline the *alienness* of a universalism that seeks to subsume the new or the foreign under categories whose fundamental character and validity are unchanged or unaffected by this encounter between newcomer and established rules or norms." Seyla Benhabib et al., *Another Cosmopolitanism* (Oxford University Press, 2006), 110–111.

²³ Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (Abingdon: Routledge, 1992); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002).

²⁴ Benhabib, "Claiming Rights Across Borders," 696.

²⁵ *Ibid.*, 692–5.

²⁶ *Ibid.*, 696; Benhabib et al., *Another Cosmopolitanism*.

²⁷ Benhabib, "The Legitimacy of Human Rights," 100.

²⁸ Honig, "The Time of Rights: Emergent Thought in an Emergency Setting: The Paradox of Politics," 90.

²⁹ *Ibid.*

³⁰ Kimberly Hutchings, "Speaking and Hearing' Habermasian Discourse Ethics, Feminism and IR," *Review of International Studies* 31 (2005): 162.

³¹ Anthony Pagden, "Human Rights, Natural Rights, And Europe's Imperial Legacy," *Political Theory* 31, no. 2 (2003): 171–199.

³² Karl Marx, *Karl Marx: Selected Writings*, ed. David McLellan, 2nd ed. (Oxford University Press, USA, 2000), 21–53.

³³ Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995), 96–134.

³⁴ *Ibid.*, 106.

³⁵ *Ibid.*, 114.

³⁶ *Ibid.*, 120.

³⁷ *Ibid.*

³⁸ Brown, "The Most We Can Hope For...," 460.

³⁹ *Ibid.*, 453.

⁴⁰ *Ibid.*, 454–455.

⁴¹ Ibid., 456.

⁴² Ibid., 459.

⁴³ Ibid., 461–462.

⁴⁴ Ibid., 460.

⁴⁵ Ibid.

⁴⁶ The phrase under-developed is ostensibly preferable to discourse of civilization versus barbarism or primitivism, yet the discourse of development and human rights continues to be framed in binaries of capable/incapable, peaceful/violent, lawful/criminal and so on. See Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal* 42, no. 1 (2001): 201–245.

⁴⁷ Gayatri Chakravorty Spivak, “Righting Wrongs,” *The South Atlantic Quarterly* 103, no. 2/3 (2004): 523–533.

⁴⁸ Kenneth Baynes, “Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights,” *Political Theory* 28, no. 4 (2000): 451–468.

⁴⁹ Brown, *States of Injury*, 134. This hesitance can also be seen in Brown’s discussion of democracy, in which she identifies a number of deep challenges to democratic forms of government but is unwilling (unable?) to offer a positive account of democracy’s value. Wendy Brown, “We Are All Democrats Now ...,” *Theory & Event* 13, no. 2 (2010), http://muse.jhu.edu/content/crossref/journals/theory_and_event/v013/13.2.brown01.html.

⁵⁰ As noted earlier we can also see this ambiguous relationship with rights with both Žižek and Douzinas. Žižek says, ‘The gap between the universality of human rights and the political rights of citizens is thus not a gap between the universality of man and a specific political sphere. Rather, it “separates the whole of the community from itself”. Far from being pre-political, “universal human rights” designate the precise space of politicization proper; what they amount to is the right o universality as such – the right of a political agent to assert its radical non-coincidence with itself (in its particular identity), to posit itself as the “supernumerary”, the one with no proper place in the social edifice; and thus as an agent of universality of the social itself.’ Žižek, “Against Human Rights,” 131. Also, Douzinas, ‘Against imperial arrogance and cosmopolitan naivety, we must insist that global neo-liberal capitalism and human-rights-for-export are part of the same project. The two must be uncoupled; human rights can contribute little to the struggle against capitalist exploitation and political domination. Their promotion by Western states and humanitarians turns them into a palliative: it is useful for a limited protection of individuals but it can blunt political resistance. ... Human rights can reclaim their redemptive role in the hands and imagination of those who return them to the tradition of resistance and struggle against the advice of the preachers of moralism, suffering humanity and humanitarian philanthropy.’ Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge, 2007), 293.

⁵¹ Hannah Arendt, *The Origins of Totalitarianism* (New York and London: Harvest Books, 1976), 267–302.

⁵² The debate between Benhabib and Honig highlights this ambiguity in Arendt’s critique, with Benhabib claiming that human rights require a more expansive polis in which individuals can achieve post-national citizenship, while Honig focuses on the way such an expansion risks extending sovereign power over all of humanity rather than constraining it. The ambiguity is found in Arendt’s remarks in *The Origins of Totalitarianism*, ‘For, contrary to the best-intentioned humanitarian attempts to obtain new declarations of human rights from international organizations, it should be understood that this idea transcends the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states; and, for the time being, a sphere that is above the nations does not exist. Furthermore, this dilemma would by no means be eliminated by the establishment of a “world government.” Such a world government is indeed within the realm of possibility, but one may suspect that in reality it might differ considerably from the version promoted by idealistic-minded organizations. The crimes against

human rights, which have become a specialty of totalitarian regimes, can always be justified by the pretext that right is equivalent to being good or useful for the whole in distinction to its parts. ... And this predicament is by no means solved if the unit to which the “good for” applies is as large as mankind itself.’ Ibid., 298–299.

⁵³ Schaap, “Enacting the Right to Have Rights,” 39.

⁵⁴ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998), 32.

⁵⁵ Agamben, *Means Without End*, 21.

⁵⁶ Agamben, *Homo Sacer*, 133.

⁵⁷ Andrew Schaap, “Political Abandonment and the Abandonment of Politics in Agamben’s Critique of Human Rights,” *The Exeter Research and Institutional Content Archive* (2008): 2, <http://hdl.handle.net/10036/42438>.

⁵⁸ Gündoğdu Gündoğdu, “Potentialities of Human Rights,” 14.

⁵⁹ Honig, “The Time of Rights: Emergent Thought in an Emergency Setting: The Paradox of Politics,” 104.

⁶⁰ Arendt, *The Origins of Totalitarianism*, 295.

⁶¹ Schaap, “Enacting the Right to Have Rights,” 32–33. While Arendt may think such exclusions unjustified, her account of politics doesn’t give a clear way of understanding how they become included, since those marginalised in this way lack politics – perhaps all they are left with is violence. Also important is the focus on statelessness or foreignness as the paradigmatic type of exclusion, which while important is not the only way individuals and groups are excluded from equal address in the polity – the homeless and impoverished within the political community, for example are deprived of voice and recognition, not only as a result of their destitution but increasingly through their criminalization.

⁶² The Rawlsian tradition is notable for its lack of concern with sovereignty except in the case of liberal and decent peoples judgment of the illegitimacy of sovereign authority in outlaw states or burdened societies. Benhabib illustrates this tendency in Habermasian thinking when she advocates the expansion of governance to a cosmopolitan level without considering the way in which expanding a state-like bureaucracy also extends the points at which power is exercised over individuals, whatever legal protections might be on offer. Finally, both Brown and Agamben tend to unify sovereignty as well, despite nods to Foucault’s understanding of power – in Agamben this is less surprising given his formal analysis and focus on the work of Carl Schmitt when considering the sovereign exception. Brown’s more surprising tendencies are seen in Wendy Brown, “Sovereignty and the Return of the Repressed,” in *The New Pluralism: William Connolly and the Contemporary Global Condition*, ed. David Campbell and Morton Schoolman (Durham and London: Duke University Press, 2008), 250–272.

⁶³ William E. Connolly, *Pluralism* (Duke University Press, 2005), 145.

⁶⁴ William E. Connolly, *Identity/difference: Democratic Negotiations of Political Paradox* (University of Minnesota Press, 2002), 198–222.

⁶⁵ Gus Van Harten and Martin Loughlin, “Investment Treaty Arbitration as a Species of Global Administrative Law,” *European Journal of International Law* 17, no. 1 (February 1, 2006): 121–150.

⁶⁶ Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton University Press, 2009), 67.

⁶⁷ Ibid., 115–120.

⁶⁸ Connolly, *Pluralism*, 131–134.

⁶⁹ William E. Connolly, *A World of Becoming* (Durham and London: Duke University Press, 2010), 135–147. The core political idea of such abstract machines is that the milieu in which sovereignty is exercised, in which power is made effective, is complex and ambiguous but that at times diverse forces come together to reinforce particular tendencies – in the case of the anti-cosmopolitan

antagonism machine the tendency is toward the resentment towards difference that threatens insecure identities and a sense of entitlement that underwrites callousness towards the suffering of others. Altering this system requires not just winning elections and changing laws but developing different habits and beliefs about the nature of the world, infusing everyday life with greater generosity, and inculcating sufficient existential maturity to enable agonistic respect.

⁷⁰ William E. Connolly, "Speed, Concentric Cultures, and Cosmopolitanism," *Political Theory* 28, no. 5 (2000): 602.

⁷¹ William E. Connolly, *The Augustinian Imperative: The Politics of Morality*, Modernity and Political Thought; (Lanham, MD: Rowman & Littlefield, 1993), 135.

⁷² *Ibid.*, 141.

⁷³ Connolly, *Pluralism*, 7.

⁷⁴ *Ibid.*, 47–48.

⁷⁵ *Ibid.*, 126.

⁷⁶ Honig, *Emergency Politics*, 47.

⁷⁷ There are an increasing number of scholars working in this gap whose work is of real import to anyone defending or criticizing human rights in terms of their practical consequence. Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2007); Upendra Baxi, *Human Rights in a Post Human World: Critical Essays* (Oxford University Press, 2009); Gurminder K. Bhambra and Robbie Shilliam, *Silencing Human Rights: Critical Engagements with a Contested Project* (Palgrave Macmillan, 2009); Mark Goodale, *Surrendering to Utopia: An Anthropology of Human Rights* (Stanford, CA: Stanford University Press, 2009); Mark Goodale and Sally Engle Merry, eds., *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007); Joe Hoover, "Human Rights Contested," *Journal of Intervention and Statebuilding* 6, no. 2 (2012): 233–246; Hoover and Iñiguez De Heredia, "Philosophers, Activists, and Radicals"; Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Cornell University Press, 2006); Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press, 2010); Neil Stammers, *Human Rights and Social Movements* (Pluto Press, 2009); Randall Williams, *The Divided World: Human Rights and Its Violence* (University of Minnesota Press, 2010).

⁷⁸ Siba N. Grovogui, "No More No Less: What Slaves Thought of Their Humanity," in *Silencing Human Rights: Critical Engagements with a Contested Project*, ed. Robbie Bhambra and Robbie Shilliam (London: Palgrave Macmillan, 2009), 43–60.

⁷⁹ Hoover and Iñiguez De Heredia, "Philosophers, Activists, and Radicals"; Max Rameau, *Take Back The Land: Land, Gentrification and the Umoja Village Shantytown* (Nia Press, 2008).

⁸⁰ Baxi, *Human Rights in a Post Human World*.

⁸¹ Mutua, *Human Rights*.