Becoming to Belong: An Essay on Agency and Democratic Rights

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Abstract

My project develops what I call a dignity oriented model of human agency, and a related approach to human rights; especially democratic rights. I also juxtapose my model of agency against those offered by the liberal and post-modern approaches, and the political positions which flow from these approaches.

In the first Chapter, I characterize our dignity as flowing from an individual's agency to engage in self-authorship by defining themselves through redefining the socio-historical boundaries within which they exist. The socio-historical boundaries are those which can be changed through the applications of what I refer to as individual's expressive capabilities.

In the next Chapter, I argue that amplifying human dignity would involve realizing two human rights. The first is a right to participate in the democratic authorship of political and legal institutions, and the laws which flow from these. The second is a right for all individuals to enjoy an equality of expressive capabilities, except where inequalities flow from their morally significant choices.

In Chapter Three, I deepen my philosophical account of agency by trying to illustrate how the innate human capacity to develop novel statements in semantic communities is one of the most prominent expressive capabilities which enable us to redefine the boundaries which constrain us.

In Chapter Four and Chapter Five, I develop criticisms of the liberal and post-modern approaches to agency. I suggest that both of them offer unique and important insights that can help us understand what is required to amplify human dignity.

Finally, in Chapters Six through Eight, I critically analyze several major theoretical traditions and decisions in the Canadian, American, and European legal systems. I suggest that we should adopt my dignity oriented approach to agency as a normative guide for how to best reach a just outcome in cases involving democratic rights: including the Sauvé, *Williams*, and *Hirst* decisions.

Finally, I conclude by summarizing my argument and offering some suggestions for the future.

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Academic Table of Contents

Introduction and Outline

"In a world of democracies, in a world where the great projects that have set humanity on fire are the projects of the emancipation of individuals from entrenched social division and hierarchy; in such a world individuals must never be puppets or prisoners of the societies or cultures into which they have been born." *Roberto Unger*

Historically, the normative links between agency, human rights, and democracy have been highly contentious. For many centuries, what I have called the liberty oriented model of agency has had the predominant impact on our understanding of these normative links; or, more precisely, on our conception of rights and democracy. Contemporaneously, the most prominent intellectual tradition competing with the liberty oriented model of agency has been the post-modern model. Unfortunately, while offering a great deal of critical guidance, post-modern theorists have been unable to develop a sufficiently robust model of agency linked to an alternative conception of rights and democracy.

A good example of the liberty oriented model's influence can be seen in many judicial decisions issued by courts in Western states, and at the international level. This is most clear with regard to voting rights. For instance, in Canada voting rights are enshrined in Sec 3 of the *Charter*. However, there have been ongoing debates about whether this right should be qualified by certain reasonable constraints such as disenfranchising those convicted of serious crimes. There have also been important debates about the extent procedures to uphold the equality of each individual's voting rights are fundamentally related to the substance of democracy. In the United States, there have been similar debates about how and when voting rights should be constrained. Unfortunately, these debates have also had a much more insidious connotation. Often, the voting rights of individuals have been constrained for openly or implicitly racist reasons. By contrast, large corporations have recently been granted a great deal of power to

influence elections through political expenditures. Finally, there is increasing discussion about the extent international law should interfere in the democratic practices of sovereign states. This has been most notable in a European context where the European Court of Human Rights (hereinafter "European Court") has played an active role in expanding the franchise for individuals, often against the wishes of sovereign governments.

In each of these examples, the normative link between agency, rights, and democracy is interrogated. Some states, and the Courts which interpret their laws, regard voting rights as of qualified importance. They can be constrained within reasonable limits because they are not as fundamental as more basic rights, such as one's right to freedom of expression or association. Here we can clearly see the influence of the liberty oriented model of agency, which in the classical liberal formulation has had a contentious relationship to democracy. Other states and Courts have placed considerably more value on voting rights. They discern a strong normative connection between agency and democracy, and seek to amplify the capacity of citizens to participate in legitimating their government and the laws which flow from it. Unfortunately, the justifications given for this connection often draw on post-modern accounts of democracy which have great critical value but have not provided a strong constructive connection between agency, rights, and democratic participation. For instance, they often rely on historical accounts of marginalization which, while informative, in themselves cannot provide firm guidance on what to do in the future.

This dissertation attempts to evade these problems by clarifying the normative link between agency, rights and democracy while eschewing the limitations of the liberty oriented and post-modern models. It develops a dignity oriented approach to understanding agency and a related approach to human rights and democracy. I believe that my dignity oriented approach to

agency and human rights enables us to conceive a richer account of individuals, and what I call the expressive capabilities they require to become authors of their lives. On my account, agency involves individuals becoming authors of their own lives by having the capacity to define themselves through re-defining the contexts within which they exist. To the extent they are able to do this, individuals might be said to have lived dignified lives.

The central claim is that rights can be understood as flowing from human dignity, which exists not simply as an *a priori* status, but on a continuum that ranges from what might be called "bare life" to a dignified life where one has the capacity to engage in authentic self-authorship.[1] Whether one possesses dignity can be gauged by the development of an individual's expressive capabilities. By contrast, the liberty oriented conception maintains that agency is to be understood as non-interference in one's decision. I view agency in terms of the potential capacity of an individual's consciousness to define themselves by renegotiating the boundaries within which they exist. For instance, a racialized individual may be at liberty to vote. But if the significance of this person's vote is severely hampered, for instance by redistricting electoral districts to favor other ethnic groups, they may be unable to play a meaningful role in defining the agenda of the state. Their dignified ability to transcend the boundaries within which they exist can be severely hampered.

My argument has significant political and legal consequences. I maintain that respecting human dignity requires amplifying an individual's expressive capabilities through the realization of two twinned rights. The first is a right for individuals to democratically become co-authors of

[1] The term bare life is Agamben's. See Giorgio Agamben. *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen. (Stanford, CA: Stanford University Press, 1998), 6

their governing political and legal institutions and subsequently the laws that flow from them. The second is a right for an individual to enjoy a meaningful equality of human capabilities, for instance an equal capacity to engage in political participation, except where inequalities flow from their morally significant choices.[2]

This democratic-egalitarian conception of rights is highly individualistic, in that I stress throughout the dissertation that rights are primarily valuable for promoting the self-authorship of individuals. None the less, since individuals only realize their identity within socio-historical boundaries, their self-authorship must be limited by respect for the co-existent rights of others. One of the reasons the two rights are twinned, rather than lexically ordered, is because I believe it is important to guard against both individualistic majoritarianism and heteronymous communitarianism. Rights not only enable individuals to employ their expressive capabilities; they concurrently protect vulnerable minorities against spurious prejudice while also enabling individuals to transcend the influence of the socio-historical boundaries within which they exist.

Unpacking my argument for this dignity oriented conception of agency and the related approach to rights will make up the bulk of Part I of this dissertation. Throughout, I will pay special attention to how democracy has been conceptualized and institutionally organized. In particular, I will argue that it is a mistake to understand progress towards democracy exclusively as the expansion of voting rights. While undeniably of critical importance (and I shall be discussing proposals on how to broaden enfranchisement at several points), focusing myopically

[2]This appears as the 10th of Martha Nussbaum's list of indexed capabilities. See Martha Nussbaum. *Creating Capabilities: The Human Development Approach*. (Cambridge, MA: The Belknap Press, 2011), 33-34.

on voting rights can prevent us from developing a more robust understanding of democracy and its link to human dignity.

Following many others, such as Ronald Dworkin, I claim that democracy is the best system for respecting human dignity because it, alone amongst political systems, pays equal respect to the value of all individuals. When understood in this way, we can better grasp why simply enfranchising a wider volume of people does not exhaust what is required to develop and maintain a robust democratic polity. In particular, we must have a much more thorough understanding of how economic power and social prejudices can unduly influence the behavior of majorities and their representatives. This in turn can lead the state to devalue the dignity of many of its citizens through establishing discriminatory practices. Such practices, even if they do not extend to outright disenfranchisement,[3] constitute a fundamental attack on our democracy and must be condemned and remedied. For instance, granting the members of certain groups more political power by ensuring electoral districts are arranged so their interests are continuously protected discriminates against the democratic rights of individuals belonging to other groups by unjustifiably limiting their capacity to participate in the political affairs of the state relative to others. This constitutes a serious infringement of their dignity because they are unable to play a role in defining the socio-historical contexts within which they will exist.

In addition to this central politico-legal argument, there are two other related dimensions to this project. Both are meant to reinforce, elaborate, and ground my overarching politico-legal argument for taking a dignity oriented approach to rights.

[3] Though in many instances it does go this far.

The first related topic is highly abstract. I attempt to ground my argument for a dignity oriented conception of democratic and egalitarian rights in a model of consciousness that emphasizes our expressive capabilities. Drawing on Roberto Unger and others, I argue that consciousness can be understood as a boundary transcending structure, which in turn means we are capable of transcending the false necessity of socio-historical boundaries to become authors of our lives. A prominent example is how human beings creatively deploy language to transcend semantic boundaries established by speech communities. For instance, semantic novelty suggests that most statements produced by an individual cannot be put into one to one correspondence with any prior statement made by any other individual. Most sentences, beyond colloquialisms, are entirely new yet comprehensible. I take this as evidence that human beings are continuously, if gradually, pushing beyond the socio-historical boundaries that constrain them.

This capacity for achieving agency through transcendence is, I believe, the fundamental way human beings bring new values into the world. It is in this capacity that our dignity lies. While we remain necessarily bound by the existential limitations of our lives, we are not so limited by the socio-historical boundaries within which we exist. A political and legal system that respected human dignity would maximize our transcendence capabilities to the widest extent possible. This is how my philosophical argument concerning the nature of consciousness, agency, and human dignity links directly to my conception of democratic-egalitarianism.

This metaphysical link poses pressing philosophical questions about the salience of my overarching perspective that cannot be taken up thoroughly here. Instead, I will juxtapose my conception of consciousness, agency, and value creation against two competing traditions. The first competing tradition is the postmodern conception of the self. Post-modern authors, who

draw heavily on the work of authors such as Lyotard, Foucault, Rorty and others argue that consciousness, to the extent we can even talk about it, is largely the product of socio-historical determinants. From this perspective, to speak of agency in any meaningful sense is to speak of political agency free from such social determinants. I argue that, while post-modern theorists have directed a great deal of critical resources against contemporary heteronymous practices and institutions, they are unable to provide a more rigorous account of the relationship between consciousness, agency, and value creation than vague appeals to a Nietzschian aesthetics of the self.

The second tradition is what I have characterized as the liberty oriented conception of consciousness, agency, and value creation. Canonical authors in this tradition include Thomas Hobbes, John Locke, Immanuel Kant, J.S Mill, Robert Nozick, and F.A Hayek. Far more than post modernism, the liberty oriented conception has dominated many liberal-democratic communities as their guiding ideology. Since I believe that liberalism has contributed to the realization of human dignity in many instances, I do not take this to be a bad thing. At the same time, I believe the liberty oriented conception has proven a barrier to the adoption of a more substantive conception of consciousness, agency and value creation. This is because of the insistence of its advocates that to be free only means to be free of direct coercion from another, or most famously, by the state. This emphasis on what Isaiah Berlin characterized as "negative liberty" has proven a substantial ideological barrier to the adoption of a more robust understanding of consciousness, agency, and dignity.[4] Perhaps more pertinently, those who adopt the liberty oriented conception have not even followed the most interesting thrusts in

[4] See Isaiah Berlin. "Two Concepts of Liberty." In *Four Essays on Liberty.* (Oxford, UK: Oxford University Press, 1969)

liberal philosophy, pioneered by Rawls, Dworkin, and Sen, who have come to adopt a more substantive conception of agency, moral dessert, and dignity. For these reasons, and a variety of others, I argue that we should move beyond the metaphysics and morals of the liberty oriented conception.

The second related topic in this dissertation is much more practical. It concerns how the further democratization of political and legal institutions could be carried out in practice by analyzing several prominent cases concerning the right to vote in Canadian, American, and European jurisprudence. Throughout I argue that, beyond simply extending the franchise, we should see positive democratic rights as attempting to achieve two ends. The first is to amplify the human dignity of all citizens. The second is to pay equal respect to all. In many instances these two ends will be realized in tandem. For instance, when asking whether one should extend the franchise to groups to whom it has been denied it is clear that the two coincide. However, in some instances the two ends might compete. In cases where one seeks to rectify historically gross power imbalances it might be appropriate to pursue substantive rather than formal equality by seeking to amplify human dignity, which I claim should be the unifying ideal of a normative approach to jurisprudence. This would be the case where a historically marginalized group requires greater democratic powers to compensate for long-endured disadvantages and mitigate their effect over time. If we adopt these two ends as the goals of positive democratic rights, I believe this would lead to defending a normative approach to jurisprudence.

In the Canadian context, I maintain that this normative approach to jurisprudence should be adopted over both right wing and left wing skepticism towards legal interpretation, especially with regard to the interpretation of *Charter* rights. I also maintain that we should reject the famed "dialogue" approach to understanding the relationship between judicial interpretation and

legislative prerogative. This is because the "dialogue" approach presents itself as a descriptive account of legal practice while tacitly depending on evaluative judgments concerning questions of procedural justice and democratic legitimacy.[5] By contrast, a normative approach to jurisprudence would see the amplification of human dignity as the unifying ideal of a normative approach to jurisprudence.[6] As such, it can clarify how to interpret those rights which are important to amplifying this dignity. Many of these are already established in the common law and the Canadian Constitution. Amongst the most important of these are democratic rights, such as those guaranteed by Sec 2 and Sec 3 of the *Charter*.

After analyzing several prominent judicial decisions related to democratization in the Canadian context, I shift my focus southward to analyze parallel judgments decided by the U.S Supreme Court. I first move to contrast my normative approach to interpreting jurisprudence with the prominent American tradition of "originalism," or to use the more updated parlance "textualism." While variants of this approach to jurisprudence appear around the world, American legal scholars and Judges have offered the most vocal and sophisticated arguments for understanding the meaning of law as flowing from the intentions of its original framers. Drawing heavily on the work of Roberto Unger and Ronald Dworkin, I attempt to show why this approach to understanding law is theoretically misconceived.[7] Secondly, I go on to argue that adherence to originalism has also contributed to law's failure to resolve the most egregious injustices in American history: most prominently the country's treatment of African Americans.

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[5] See Peter Hogg and Allison Bushell. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad Thing After All)." *Osgoode Hall Law Journal* 35 (1997) and Peter Hogg and Allison Bushell and Wade Wright "Charter Dialogue Revisited (Or Much Ado About Metaphors)." *Osgoode Hall Law Journa*l, 45, (2007)

[6] My definition of dignity is distinct from that taken in the famous *Law* decision for reasons that will be made express in the relevant Chapter.

[7] Those familiar with the literature might find these strangely discordant sources. The link I draw between the two is that individuals must have a moral right to self-authorship if they can be said to live dignified lives.

This is particularly true when looking at the many ways African Americans have been denied fundamental voting rights. The failure to resolve this injustice is an important example of how American law has not shown equal respect to all citizens. This is a trend which continues to this day, with serious and undemocratic consequences. To ground this analysis I look at two major cases in American law which relate to equality and voting rights. The first is the infamous case of *Williams v Mississippi.*[8]I will then flash forward a century to analyze *Citizens United*, a much more recent decision which affects a different but related dimension of democracy in America.[9]

In the European context, I go on to briefly describe how one can engage a normative approach to jurisprudence in a context where there are few well established legal bodies capable of enforcing the law. I maintain that Europeans should adopt a Kantian approach to understanding state legitimacy; that to the extent a state maintains the "rightful condition" for the realization of human dignity, it can be said to retain the legitimate right of a sovereign authority to exercise legal power.[10] One of the ways this can be checked is by comparing domestic law to the human rights provisions found in major international treaties, especially binding treaties such as the ICCPR, the ICESCR, and the European Convention on Human Rights (hereinafter "European Convention"). I then digress briefly to detail why I believe the provisions of the ICESCR have been woefully ignored by the international community, despite their importance and novelty. I believe that this is in no small part because taking these provisions seriously would impose major obligations on rich European states to provide aid to their poorer counterparts. I then go on to analyze several prominent cases on voting rights in European law.[11]

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8 See *Williams v. Mississippi, 170 U.S. 213 (1898)*

9 See *Citizens United v Federal Election Committee No. 08-205, 558 U.S. 310 (2010)*

10 See Arthur Ripstein. *Force and Agency: Kant's Legal and Political Philosophy.* (Cambridge, MA: Harvard University Press, 2009), 325-352.

11 I chose to focus on the ECHR because it is the most-well developed, and therefore arguably the most important from a precedent setting perspective, of all the major international legal systems. It also deals more directly with the

The first is *Aziz v Turkey* which concerns whether a disenfranchised minority should be given the right to vote.[12] I then go on to analyze the *Hirst* decision which, like *Sauve* in Canada, concerns an attempt by the United Kingdom to disenfranchise prisoners.[13]

I will then go on in the Conclusion to re-articulate and summarize my central arguments before briefly speculating on how they can be extended in the future. In particular, I will illustrate how the second of the twinned rights might be realized. Throughout this dissertation, my focus will be on how the first right - that individuals should be the democratic authors of politico-legal institutions and the laws which flow from them - can be understood theoretically and realized practically. This is not because I believe the second right - to an egalitarianism of human capabilities except where inequalities are justified by morally significant choices - is less important than the first. Indeed, given that global inequality is an increasingly pressing issue, I believe that realizing the second right has rarely been so critical. However, I also differ from the liberal-egalitarian contract and Marxist traditions in believing that the push for egalitarianism must be secured through a democratic mandate rather than being imposed from above. This stems from a commitment to ensuring that self-authorship is realized through the express commitments of individuals, rather than derived from the comparatively abstract determinations of legal-political theory.

Realizing the second right also entails complex questions of policy and preference which I am unable to engage systematically here. In the Conclusion, I simply suggest two approaches one might take to move towards egalitarianism in practice. The first would be the institution of a

issues brought up by the dissertation, unlike the ICC which only has jurisdiction over crimes related to mass violence, and only in specified circumstances.

[12] See *Aziz v Cyprus (No 2)-69949/01 [2004] ECHR*

[13] See *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005)*

universal living wage. This proposal has been attempted in South Africa and was recently proposed in Switzerland, though rejected. It has since made it onto the public agenda in Canada, and should be considered seriously. The second would be the institution of a state administered guaranteed inheritance. This inheritance would become available to all youth over a certain age, though attached to specific conditions which are designed to ensure the funds are not misused. Such a guaranteed inheritance could go a long way to ensuring that inequality of capabilities are mitigated at a time period when many are about to enter the workplace or post-secondary institutions for the first time.

Finally, I touch on some of the limitations to my argument. Specifically, I acknowledge that the account of dignity and rights given here only indirectly addresses pertinent meta-ethical questions about the sources of value. I only touch sporadically on questions concerning the "objectivity" of value.[14] My belief is that these are ultimately questions of faith which can only be resolved by addressing a more complex set of metaphysical and meta-ethical problems. For instance, I believe that authentic self-authorship might be intrinsically (rather than just instrumentally) valuable. By rejecting the false necessity of the world we inhabit in favor of one where we become active participants, human beings might gradually come to better understand the role we play in the larger cosmos.

[14]In the 1980s Derek Parfit wrote eloquently concerning the need, deeply pressing now in our increasingly secular world, for a plausible meta-ethics. See Derek Parfit. *Reasons and Persons.* (Oxford, UK: Oxford University Press, 1986)

Chapter One:
Expressive Capabilities, Rights, and Human Dignity

Introduction

In this Chapter, I make the case for a dignity oriented approach to understanding human flourishing. My claim is that individuals should possess the expressive capabilities needed to transcend the socio-historical boundaries within which they exist to become authors of their own lives. To begin, I discuss which capabilities would be required to realize dignity through examining the pioneering work of Amartya Sen and Martha Nussbaum. I then argue that, to the extent that individuals possess the capabilities needed to engage in self-authorship, we can maintain that they have led dignified lives of human flourishing. Importantly, I note that self-authorship has an integrally social dimension since it is characterized by our being about to transcend the socio-historical boundaries within which we exist. Finally, I conclude by arguing that rights discourse can be a useful jurisgenerative tool in realizing the capabilities of individuals to transcend the socio-historical boundaries maintained by many politico-legal systems, and maintain that we should focus on realizing two twinned rights in particular.[15]

1) The Capabilities Approach to Human Flourishing

The capabilities approach to human flourishing pioneered by Amartya Sen and Martha Nussbaum is amongst the most innovative and important recent contributions to the discourse of

[15] The term "jurisgenerative" is Benhabib's. I have found it exceptionally helpful when accounting for how moral claims can lead to codification of legal rights, and vice versa. See Seyla Benhabib. *The Rights of Other: Aliens, Residents, and Citizens.* (Cambridge, UK: Cambridge University Press, 2004), 176-183.

egalitarian liberalism. In this section, I will briefly summarize the value of this approach while glossing over many details. My primary focus will be discussing the capabilities approach's unique synthesis of deontology, utilitarianism, and Aristotelian virtue ethics. This will become important later, when I discuss why institutions should seek to realize two twinned rights to democracy and egalitarianism of capabilities.

Drawing tremendous inspiration from Rawls' pioneering efforts, the capabilities approach to human flourishing outlines the universal but context sensitive conditions required for all human beings to enjoy a dignified life. The approach takes securing the dignity of human beings as a primary aim.[16] Sen and Nussbaum integrally link dignity to an agent's choices; but agency is understood here in a rather refined way. They further the Kantian claim that agency is a practical rather than a theoretical matter by concretizing it. To discuss agency concretely, we must look at the actual capacity an individual has to make meaningful life choices.

Such a claim is more empirically oriented than one finds in a strictly Kantian approach. Sen and Nussbaum tirelessly stress that agency means little unless one looks at what choices individuals are capable of making. For them, this means looking at what individuals are capable of doing. From the perspective of the capabilities approach to human flourishing, understanding agency means passing from transcendental philosophy to the messiness of the empirical world.

This is where the connection between the capabilities approach and Utilitarianism is most apparent. Sen has been especially critical of Utilitarians for not being adequately sensitive to the meaningful differences that exist between individuals.[17] This suggests that Kantian

[16] Sen is more inclined to understand the capabilities approach as being concerned with amplifying human freedom.
[17] See Amartya Sen. *Inequality Re-Examined.* (Cambridge, MA: Harvard University Press, 1992), 59. See also Amartya Sen. *Commodities and Capabilities.* (Oxford, UK: Oxford University Press, 1999), 17-21

individualism remains the moral centre inspiring his project. None the less, Sen accepts the Utilitarian claim that substantiating agency is as much a matter of developing sound policy as it is deriving the correct transcendental metaphysics.[18] Marginalized individuals would likely be made freer by receiving a respectable caloric intake than they would by receiving a copy of the *Groundwork to the Metaphysics of Morals.*

In *Inequality Re-examined,* Sen clarifies this point by referring to the capabilities an individual possesses as determining the "overall agency a person enjoys to pursue her well-being."[19] He distinguishes between 1) the wellbeing of individuals and 2) their agency to pursue well-being. This is a key distinction since Sen admits that one's well-being and the agency to pursue it or not (what he calls agency) may in many instances conflict. He gives the example of a doctor who is willing to sacrifice her health to secure that of others, though one can think of many far less admirable examples.[20] For example, this might also involve the capability to make what seem like unhealthy choices. A Brahmin who decides to fast for religious reasons is emphatically different from an individual struggling in the midst of famine.[21] Nussbaum claims that this distinction highlights the link between the deontological and Utilitarian dimensions of the capabilities approach to human flourishing. Since human flourishing entails being able to make meaningful choices through the exercise of practical reason, all individuals should have the capabilities needed to pursue their own idea of human flourishing.[22] After this threshold is met,

[18] His most systematic account of these philosophical questions is found in Amartya Sen. *The Idea of Justice.* (Cambridge, MA: Belknap, 2009)
[19] Amartya Sen. *Inequality*, 150.
[20] Sen, *Inequality*, 61.
[21] My account is informed by Thomas Wells. See Thomas Wells. "Sen's Capability Approach." *Internet Encyclopedia of Philosophy: A Peer Reviewed Academic Source*.
[22] This links to the emphasis Sen places on "freedom" in his work. My own preference is to focus on dignity. See Ananta Giri. "Rethinking Human Well-being: A Dialogue with Amartya Sen." *Journal of International Development* 12 (2000) and also Amartya Sen. *The Idea of Justice.* (Cambridge, MA: Harvard University Press, 2009)

the capabilities approach to human flourishing is agnostic on the actual functioning of people, since their flourishing or not is now seen as dependent on individual choices.

This brings me to discussing the Aristotelian dimension of the capabilities approach to justice.[23] Until recently, the capabilities approach to human flourishing was quite unique in programmatically arguing for a liberal theory of the good life, rather than just engaging in Rawls-inspired "transcendental institutional" deductions to abstractly demarcate the correct political institutions required for the co-existence of free individuals.[24] Sen has been markedly more reserved than Nussbaum in discussing this Aristotelian dimension to the capabilities approach. I believe that this is a mistake.[25] By engaging the Aristotelian dimensions of the project, Nussbaum has been filling in a notable gap in liberal theory which has provided critics such as Alasdair Macintyre with grist for the illiberal mill.[26] She is also able to substantiate her claims about giving an account of what constitutes human dignity.

For Nussbaum, liberals must emphasize that being free to choose is a precondition for the good life. Those who hold to what I call the liberty oriented conception of agency in the Introduction have gone wrong in assuming that agency only involves not interfering with the lives of others. In Nussbaum's view, this liberty oriented conception agency is both too individualistic and not individualistic enough. It presumes, for example, that most people pursue their own happiness in a social vacuum.[27] The liberty oriented conception of agency is unable to

[23] See Martha Nussbaum. *Frontiers of Justice: Disability, Nationality, Species Membership.* (Cambridge, MA: Belknap Press, 2006), 159-160. Interestingly, she directly links this Aristotelian dimension with her account of human dignity.
[24] Sen's critique of what he calls "transcendental institutionalism" is found in Sen. *Idea*, 75-87.
[25] This is connected to his unwillingness to "list" the fundamental capabilities he takes to be important. See Amartya Sen "Capabilities, Lists, and Public Reason: Continuing the Conversation." *Feminist Economics* 10 (2004)
[26] See Alasdair Macintyre. *Whose Justice, Which Rationality?* (Notre Dame, IN: University of Notre-Dame Press, 1989), 326-348.
[27]This is a theme throughout her work. It appears most systematically in Nussbaum, *Frontiers*

recognize what Aristotle taught us; that humans are social beings whose happiness is in no small part dependent on establishing and maintaining meaningful relationships with others. The liberty oriented conception of agency is also not individualistic enough for very similar reasons. By looking at individuals abstractly, and not recognizing sufficiently the meaningful differences that exist between them, the liberty oriented conception of agency has not acknowledged the existence of socio-historical boundaries that make negative liberty more valuable to some and virtually meaningless to others.[28]

For Nussbaum, these intuitions can lead us to a liberal account of the good life.[29] This is summarized nicely, if critically, by Linda Barclay:

> It seems to me that Nussbaum's theory of capabilities is best and most consistently described as a theory that takes as its most central value the realization of each individual's capacity to choose and pursue their own conception of the good life. It is the capacity for choices in key areas of human activity that is the central value underlying her approach, and in that sense it is indeed capability and not functioning that is valuable, and not just for the purpose of politics.[30]

Nussbaum believes that liberalism can be conducive to a good life once all individuals are capable of human flourishing and can substantially choose which relationships they wish to establish. These relationships are what make their lives meaningful. Nussbaum argues that communitarians neglect the agency of individuals by arguing for the existential and moral priority of cultures over those who make them up.[31] By doing so, communitarians fail to recognize that one person's life affirming heritage might be another's cultural hegemony. A

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[28] Nussbaum's preferred term is "background conditions." I have instead substituted my own terminology.
[29] See Nussbaum, *Frontiers*, 160-164.
[30] Linda Barclay. "What Kind of Liberal is Martha Nussbaum?" *SATS: The Northern European Journal of Philosophy* 4, (2003), 17
[31] See Martha Nussbaum. "Political Liberalism and Respect: A Response to Linda Barclay." *SATS: The Northern European Journal of Philosophy* 4 (2003): 26-27. The paper was written in response to Linda Barclay, who deftly claimed that the capabilities approach entails adopting a substantive approach to the good. While Nussbaum was more reticent to accept this in the early 2000s, she since appears more willing to concede the point within limits. See Barclay. "What Kind of Liberal is Martha Nussbaum?"

liberalism guided by the capabilities approach would accept, and even embrace, those individuals who wish to pursue an esoteric vision of the good life, so long as they do so consciously rather than being coerced into it by others. An excellent, and timely, example would be allowing Muslim women the right to wear the hijab or niqab (or not should they so choose).[32] Human agency is not an abstract power which merely exists *a priori*. The transcendental dimension of agency is ideational: by willing my own ends I can become author of my identity. But this is accomplished through making practical choices within a socio-historical context. This, I take it; will by now be uncontroversial if my argument has been accepted thus far. It is through the lived application of what I shall call the individual's expressive capabilities to make actual choices that one leads a life of dignified self-authorship.

Expressive capabilities are, unfortunately, often deeply constrained by existing socio-historical boundaries. The boundaries we live within can impose constraints that may be overcome by respecting and increasing the capabilities individuals have. For example, the boundaries imposed on those with serious physical disabilities can be overcome by establishing handicapped friendly spaces. This leads to the question: what expressive capabilities must be respected and increased for individuals to be capable of self-authorship? This leads to further complex questions on how and whether to create an index of those same capabilities which purports to some degree of universalism.

Here, Sen and Nussbaum have parted ways in the past. Sen has been notably unwilling to speculate on the content of such a universal index which lists the human capabilities states should try to realize and amplify. Beyond the conceptual difficulties involved in such a project

[32] This point is made in the first Chapters of her programmatic work on capabilities. See Nussbaum, *Creating Capabilities*, 1-17.

his standard worry is that providing such a list might prove to be reductive. Indeed, Sen has been adamant that one of the failures in standard liberal approaches to human well being has been its focus on the equitable distribution of "resources" according to some pre-defined theory of dessert.[33] In other words, Sen believes that liberals have focused too much attention on what people allegedly deserve. They should have instead focused on what individuals need to function. As put by Elizabeth Anderson:

> A person's capabilities consist in the sets of functioning she can achieve, given the personal, material, and social resources available to her. Capabilities measure not actually achieved functionings, but a person's agency to achieve valued functionings. A person enjoys more agency the greater the range of effectively accessible, significantly different opportunities she has for functioning or leading her life in ways she values most.[34]

The focus on dessert runs counter to Sen's understanding of fairness.[35] Since human functioning is individual, it makes no sense to discuss what people deserve before discussing what they were and are capable of doing as individuals rather than just as the abstract subjects of a theory of justice made flesh. For instance, it would seem grossly unfair to claim the poor deserve their lot if the individuals who fall into that class were largely incapable of climbing out of their poverty.

This leads to Sen's worries about developing a universal index of human capabilities. Such an index might not be nuanced enough to capture all the idiosyncrasies which characterize human individuality, and thus what is needed to maximize each person's capacity to function. It would also pay inadequate respect to the pluralism of values.[36] More worrying still, by

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[33] This theme pervades his work. For instance, Sen disagrees with Rawls' focus on primary goods. See, for just a few examples, Amartya Sen, *Development as Freedom.* (New York, NY: Anchor Books, 1999)
[34] Elizabeth Anderson. "What is the Point of Equality?" *Ethics* 109 (1999): 316.
[35] I believe dessert to be morally relevant, but only when combined with an analysis of the basic competence of individuals. I will discuss this in further detail in the subsequent Chapter, which deals with the relationship between capabilities and rectifying moral arbitrariness.
[36] See Ananta. "Rethinking Human Well-being," 1014

prioritizing which capabilities are most integral to human flourishing, a political theorist might encourage states to focus their resources on those specific capabilities while ignoring those further down the index. This would run counter to the stress Sen has always placed on the inter-relatedness of different human capabilities. For instance, it would make little sense to offer even cheap quality education to the very poor if doing so would involve taking on external financial burdens they cannot afford to assume.[37]

Martha Nussbaum has been more willing to theorize on just what capabilities would be required to ensure human flourishing. Her most notable contribution has been developing a ranked index of the capabilities to be respected and increased. This index has undergone several revisions. Most of these have been technical, though some have involved important changes. For the sake of brevity, I will not address these controversies here. I will instead refer exclusively to the most updated version of Nussbaum's index, which appeared in her 2011 manifesto: *Creating Capabilities: The Human Development Approach.* Given economy of space, I will paraphrase her account of each of these ten central capabilities. They are, in ranked order of priority:

The Central Capabilities

1) Life: Being able to live to the end of a human life of normal length

[37] Unfortunately, I part ways with Sen on this point. While there are undeniable difficulties moving forward, the value of the capabilities approach lies in the clear link it establishes between abstract concepts of well being and specific human capabilities to be respected and increased. Without some degree of specification on the concrete particulars, the capabilities approach will collapse into being just another call for egalitarianism in the abstract. It is therefore fortunate that Sen has found such a capable intellectual partner in Martha Nussbaum. In many ways, she has been just as instrumental as Sen in popularizing and deepening the capabilities approach to justice.

2) Bodily Health: Being able to have good health
3) Bodily Integrity: Being able to move freely from place to place, security, and opportunities for sexual satisfaction and reproduction
4) Senses, Imagination, and Thought: Being able to use one's senses, imagine, think, and reason and to have these cultivated by an education and participatory culture. Being able to have pleasurable experiences.
5) Emotions: Being able to have attachments to things and people outside of ourselves and to not have one's emotional development blighted by fear and anxiety
6) Practical reason: Being able to form a conception of the good and engage in reflection on it.
7) Affiliation: A) Being able to live with and towards others, to have institutions that foster this and B) Having the social bases for people to possess self- respect and not be subjected to humiliation.
8) Other Species: Being able to live with concern for and in relation to animals, plants, and the world of nature.
9) Play: Being able to laugh, play, and enjoy recreation.
10) Control Over One's Environment: A) Political-Being able to participate in political choices that govern one's life, participate in politics, free speech. B) Material-Being able to hold property and enjoy property rights on an equal basis with each other, to be protected against search and seizure, to engage in work and enjoy meaningful relationships with other workers.[38]

[38] The full list appears in Nussbaum, *Creating Capabilities,* 33-34.

At this point, I regard Nussbaum's index as comprehensive and well-reasoned. I shall not suggest alterations to it here. I will only offer two qualifications. The first is that, for the purposes of this project, I shall not be addressing how to respect and increase the Eighth Capability: "to live with concern for and in relation to animals, plants, and the world of nature."[39] The second is that my project, for the most part, will not systematically address how to amplify the human dignity of women and other sexual minorities.

The first three capabilities outlined by Nussbaum involve preserving and, if possible, improving our bodily functioning. They concern our capacity to live unhindered by direct manipulation by other parties on both our immediate and reproductive lives. I will call these the existential capabilities. For the most part they are realized by respecting the formal agency of an individual. The second capability implies some substantive notion of good health which remains somewhat ambiguous. It implies that a good life entails the capability to be free from debilitating physical and mental disorders to the extent possible. The boundaries, I take it, are those of biology and available resources.

These existential capabilities have a clear link to leading a life of dignity through being able to make meaningful choices. Put most simply, respecting and increasing them for a time will moderate the impact and extremity of the existential boundaries on our lives. Unless we possess adequate time and the ability to move around relatively freely in space, we would be unable to make any meaningful choices. Indeed, at the extreme margins of poor health it might

[39] This is not out of indifference to our relations with non-human animals and the natural world generally, but rather out of respect. I think that analyzing this capability would warrant a much richer discussion than can be addressed in this project. I will therefore not touch on this issue here. My analysis will remain limited to analyzing the needs and rights of human beings.

be impossible to make any meaningful choices at all. The realization and amplification of expressive capabilities therefore clearly requires that first three capabilities be respected and increased to the extent possible.

The next three capabilities - to enjoy senses and thought, to have emotional attachments, and to reason practically about the good life - speak most clearly to the deontological dimension of the capabilities approach. Each reflects our capacities to be and become individuals with unique values and goals. Importantly however, these capabilities cannot simply be realized by formally respecting them. They can be stunted or increased, for instance, by the quality and consistency of the education subjects receive.

These deontological capabilities, as I shall call them, are essential to the employment of all our other expressive capabilities. They speak most immediately to the individualism at the core of my account of expressive capabilities. Without the capacity to reason, to ascribe value to the world, and to act upon those values, we could not formulate how or why to redefine the boundaries around us and thereby define ourselves through such actions. However, these capabilities are especially complex. Because of the boundary transcending power of human agency there are no limitations to how extensively we might conceive new concepts, values, and commitments. However, this capacity remains a potential unless it is realized and amplified through engagement with the world; including exposure to the concepts, values, and actions of others through education. Unfortunately, there is no space here to engage in pedagogical ruminations. I will only say that if human agency operates as I will characterize it, learning should be a creative experience which encourages students to foster their expressive capabilities through the application of democratic pedagogical techniques.

The remaining indexed capabilities, from Seven to Ten, I consider the socio-historical capabilities. These capabilities relate to the Aristotelian and Utilitarian dimensions of Sen and Nussbaum's approach. The socio-historical capabilities speak to our desires to form meaningful relations with others that include and go beyond mere expediency. This includes the human desire to lead a life involving self-respect. According to Nussbaum, living a life of self-respect must include at least the opportunity to enjoy a significant level of material satisfaction and leisure time. It also includes a desire to participate meaningfully in determining the form and dictates of organizations which claim authority over us.

The socio-historical capabilities are often of concern only once those further up the index are respected and increased. However, as Sen has noted, they can directly affect those further down since one's material and political position within society can directly and even profoundly affect other capabilities.[40] They are also most directly those that involve our relations with other individuals within the socio-historical boundaries which can define us. They are therefore the most immediate locus for the realization of our expressive capabilities as it is socio-historical boundaries that must be transcended for them to be amplified.

It is the socio-historical capabilities which therefore most directly link to an account of human rights and the proper structure of politico-legal institutions. Rights can be best understood as claims to respect our dignity by defining the conditions and actions of human life which we believe should be universalized. In other words, they reflect the values an individual will that we should live by.

[40] See Sen, *Inequality*, 64.

It is through authenticity that we determine the objectivity of values, and so the rights we would establish. How willing would we be that others hold to and act on our system of belief? If we did not allow this, then we would eschew the universalizing of such values. We could not then hold on to such a system and live authentically as the author of a life story which speaks to our value by expressing and thus respecting the value of all others.[41]

This brief summary of the capabilities approach to human flourishing was not intended to be exhaustive. I wanted to lay the groundwork for how such a list of what I will call expressive capabilities can be understood as the pre-conditions for realizing and amplifying human dignity. In the next section, I will discuss how human expressive capabilities link with the idea of human dignity. With this groundwork complete, I will then move on to unpacking the legal and political ramifications of my position.

2) Expressive Capabilities, Human Dignity, and Context Transcendence

Classical liberalism argued for what I will later characterize as a liberty oriented understanding of agency and rights. By contrast, this Chapter will argue that we should instead adopt a dignity oriented conception of agency and rights. Dignity remains a well contested topic, with some authors claiming that its ambiguity renders it a fairly useless part of moral vocabulary.[42] Some have even argued that a focus on dignity contributes to the rise of

[41] Again, I do not speak here to the particular challenges faced by women and sexual minorities. Again, this is not out of strict neglect. Indeed, fostering individual's capabilities to enjoy "bodily integrity" and " affiliation" remains a far more pressing concern for women than for men. Similarly, how to respond to the still widespread discrimination against LBTQ individuals is a very live concern. How to address these issues remains exceptionally important questions; especially given the depth of cultural disagreements about what sexual equality means in practice, and the impact discriminatory practices have on marginalized individuals. Because of the depth of the problems, and the complexity of the related literature, I will put these important questions aside. Instead, I will be examining the list of capabilities, and how they operate as jurisgenerative concepts, from the standpoint of the individual in the abstract.
[42] See for example Ruth Macklin "Dignity is a Useless Concept." *British Medical Journal* 327 (2003)

conservatism in morally sensitive fields such as bio-ethics.[43] Many of these critics are skeptical that dignity means something substantially different than autonomy as understood by authors who hold to the liberty oriented conception of agency.

My conception would address these concerns by putting human dignity front and centre. I argue that agency is realized through amplifying the expressive capabilities of individuals. To the extent that these capabilities are amplified to allow individuals to become authors of their lives in a substantive way, we can say they have lived a dignified life. Taking such a dignity oriented approach to agency would also have significant repercussions for how one would understand human rights. For instance, it implies that the dignity of individuals is not entirely respected when legal and political institutions simply avoid interfering with the lives of their citizens except where their actions infringe on the rights of others. One must go much further than this. Dignity, I will argue, is respected when legal and political institutions establish equal conditions for all individuals to prosper or fail and have their claims acknowledged or dismissed in the self-authorship of an authentic life.

The argument presented here is, in many respects, deeply Kantian. Our basic dignity, as Kant understood it, lay in our existing as transcendental beings that ascribe value to the world rather than having value immediately ascribed to us externally by nature.[44] Because we care about the world, we constitute the ends we wish to strive for and in so doing establish the boundaries that will have to be transformed to achieve those ends. This forms an integral link

[43] See Steven Pinker. "The Stupidity of Dignity." *The New Republic*, May 28th, 2008.

[44]See especially Immanuel Kant. *Critique of Judgement*. trans. J.C Meredith (Oxford, UK: Oxford University Press, 2007). In this work, he discusses how human beings must ascribe a teleological orientation to nature in order to make sense of its transformations. On my reading, this is intended to round out the project initiated by the first *Critique* by linking it to the necessary postulates of practical reasoning in the second.

between dignity and agency.[45] Because we ascribe value to the world, rather than having value ascribed to it, conscious beings alone act as if they are lights in the world. My dignity oriented conception agrees with this basic point but draws on Sen and Nussbaum to maintain that the empirical circumstances of an individual's life matter as much to the realization of their agency as their abstract transcendental potential.

Capabilities refer to those individual human "functionings" which are a pre-condition for the exercise of human agency.[46] In the literature, they have been closely linked to what people can do and who they are.[47] I have chosen to characterize capabilities as expressive to reflect their relationship to human dignity more clearly. This is because I believe that an individual's basic dignity lies in that person's capabilities to define themselves by redefining the boundaries within which they exist. By doing so they can engage in self-authorship. It is through the realization and amplification of consciousness' expressive capabilities to transcend socio-historical boundaries that a person's dignity is affirmed. This leads directly to the need for recognizing which expressive capabilities are needed for individuals to lead dignified lives.

Expressive capabilities are those through which a person defines his or her self by re-defining the boundaries within which they exist. To use Unger's terminology, expressive capabilities are "context transcending" powers.[48] While similar, expressive capabilities are

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[45] This conception of dignity is more voluntaristic than the anti-humanist interpretation of Kant given by some authors. See Michael Rosen. *Dignity: Its Meaning and History.* (Cambridge, MA: Harvard University Press, 2012), 151

[46] The term "functionings" is Sen's. See Sen, *Inequality,* 39.

[47] One of the ways I develop the account given be Sen and Nussbaum is by looking more extensively at how law and constitutionalism can be organized to amplify human dignity. The reasoning I apply here echoes some of the points made by Daniel Weinstock on the distribution of goods, for instance when he claims that a refined theory of distributive justice with regard to health "will have more to do with the manner in which societies organize the delivery and distribution of goods that have not usually been thought of as having to do with health." See Daniel Weinstock. "Integrating Intermediate Goods to Theories of Distributive Justice: The Importance of Platforms." *Res Publica.* 21 (2015), 172

[48] See Roberto Unger. *Politics Volume One: False Necessity.* (London, UK: Verso Press, 2004), 4.

distinct from the Kantian will in that they exist only potentially unless they are realized and amplified in the empirical world. This means that one must look at what individuals are able to do given both their intrinsic capabilities and the empirical socio-historical boundaries they live within.[49]

My dignity oriented approach argues that the realization of agency remains only an abstract potentiality until it is substantiated by expanding the range of choices an individual could possibly make through amplifying their expressive capabilities. For example, the agency to go where one pleases would mean little to someone stranded on an island of 2 square kilometers. Expressive capabilities become valuable where they can have an impact by allowing an individual to transcend the boundaries within which they exist by transforming them in line with their choices.

Expressive capabilities are those which enable us to define ourselves by re-defining the socio-historical boundaries within which we exist. They are the source of our general capacity to transcend the hegemonic aura of false necessity which can be associated with socio-historical boundaries.[50] To accord socio-historical boundaries a false necessity is, in Roberto Unger's words, to regard as unyielding something which is truly plastic. This can even have debilitating effects on the long-term prospects of communities, which become inegalitarian and organized along the lines of a calcified hierarchy.

> In both the European preindustrial and the Asian postindustrial situations, success, even survival, required the practice of an art of institutional dismemberment and recombination. This art constantly rearranges the two linkages repeatedly considered in this essay...The practice of institutional dissociation and recombination shakes up and wears down a society's plan of social division and social ranking; roles and hierarchies depend for their

[49] For the most part I will eschew discussing questions related to natural talents except briefly in Chapter 2, where I analyze the relationship between competence and dessert.
[50] See his account of context transcending powers in Unger, *Politics: Volume One*, 319-324.

> perpetuation on the stability of particular institutions. This shaking up and wearing down represents one of the major forms taken by the imperative of self-transformation in history.[51]

Creating the conditions for individuals to re-define socio-historical boundaries may be as simple as educating people on the ultimate plasticity of those boundaries. It may also be as complex as re-imagining the society's entire foundation and initiating authorship of a new set of socio-historical boundaries either individually or in conjunction with like-minded individuals.[52]

The claim that we are capable of defining ourselves by re-defining the socio-historical boundaries within which we exist is an old one.[53] Historically, the claim goes back to Kierkegaard, and perhaps even Kant.[54] While accepting that human beings always exist as "thrown" into the world that pre-exists them, this "world" remains does not just remain a static collection of things. The world and its contents are the means through which I define myself by the choosing which social relationships I wish to establish and maintain.[55] Individual self-authorship is fundamentally linked to the choices individuals make which define the form and texture of their life in relation to the rest of the world.

Among the most important expressive capabilities is the capacity to reflect one's individuality through the choices one makes without being constrained by the will of others. Another is the capacity to make choices that are reflective of the deeper features of one's

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[51] See Roberto Unger. *Politics Volume Three: Plasticity Into Power (Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success).* (London, UK: Verso Press, 2004), 206.
[52] To re-define socio-historical boundaries does not necessarily mean to undertake the revolutionary re-ordering of socio-political institutions (which was always the claim of vulgar Marxism). Nor does it mean mere gradual reform in line with the ever so modest proposals of nominally progressive political associations.
[53] See Roberto Unger. *Knowledge and Politics*. (New York, NY: The Free Press, 1973)
[54] See Soren Kierkegaard. *Concluding Unscientific Postscript to Philosophical Fragments*. trans. Howard Hong. (Princeton, NJ: Princeton University Press, 1992), 190.
[55]The term "thrown" comes from Heidegger. See Martin Heidegger. *Being and Time*. trans. Jogn Macquarrie and Edward Robinson. (San Francisco, CA: Harper Collins, 1962), 41-53.

individuality without being subject to unjustifiable and inequitable material constraints.[56] These include those boundaries that result from the perpetuation of unjustifiable economic inequality. By amplifying expressive capabilities, citizens can assume increasing authorship over both their own lives and the socio-historical boundaries within which they exist. In this respect individuals become authors of their own lives by becoming authors of the socio-historical conditions within which they live. Expressive capabilities are those an individual possesses which enable them to assume authorship over their lives. They are never fully realized, because they can always be further amplified by emancipating human beings from invasive socio-political institutions. I will argue that a rights respecting society would be one which protects its citizens' expressive capabilities and seeks to amplify them. The most important way we can achieve this is through becoming authors of the politico-legal institutions which govern us and the laws which flow from them.

3) Expressive Capabilities, Their Boundaries, and the Rights Which Flow From Them

I mentioned previously that the expressive capabilities of individuals are never fully realized. What are the boundaries that constrain an individual in employing his or her expressive capabilities?

To say that the boundary transcending power consciousness has boundaries is to say that consciousness is not an Absolute power. We may be able to think and ultimately achieve anything, even those goals which are yet unimagined and so unknown. But we shall never be

[56] Rational individuals might choose to impose such boundaries on themselves to achieve some collectively valuable goal; for example protecting the natural environment.

everything. The boundaries faced by consciousness are of two separate but inter-related categories: the existential and the historical.

The first category of boundaries are existential.[57] The second category are socio-historical. The categories can be distinguished from one another by their comparative plasticity.[58] The category of existential boundaries are those which even the creative capacity of our boundary transcending consciousness are unable to break out of without, I take it, becoming an entirely different type of being[59] than what we human beings are.[60] Socio-historical boundaries are those, by contrast, which may appear all pervasive but are none the less a false necessity which can, and in many cases should, be transcended by the employment of human expressive capabilities. Once the contingency of socio-historical boundaries is recognized, we can begin the task of conceiving which politico-legal institutions would be most appropriate for respecting and then amplifying human expressive capabilities.

The absolute boundaries imposed on the range of choices one can make are those imposed by our existential boundaries.[61] I will not take up much space discussing the existential

[57]My understanding of existential limitations draws a great deal on Heidegger's. His existential analytic of "Dasein" remains, to my mind, the most profound and systematic of all the great authors in the tradition. See Heidegger, *Being and Time.*

[58] My understanding of socio-historical boundaries is directly lifted from Unger. See Unger. *Politics Volume One* and Roberto Unger. *Politics Volume Two: Social Theory (Its Situation and Its Task)* (London, UK: Verso Press, 2004)

[59] A great deal of science fiction is taken up with these hypotheses. Philip K Dick's tremendous novel UBIK theorizes on a future in which partially alive human beings are frozen and share something akin to a collective mind. Being a Dick novel, over time they begin to lose their sense of individuality. See Phillip K Dick. *UBIK.* (London, UK: Gollancz, 2004)

[60] Much of the debate in post-humanist discourse focuses precisely on this topic. For an informative contribution on the moral dimensions of post-humanism see Upendra Baxi. *Human Rights in a Posthuman World: Critical Essays.* (Oxford, UK: Oxford University Press, 2007)

[61] It is possible, of course, to conceive of a trans-human future in which some or even, given enough time, all of these boundaries are removed. In such fantastic circumstances, the only boundaries imposed on any conscious beings might be those of basic scientific laws and the claims of logic (however these are conceived). Upendra Baxi, for instance, has discussed these issues at some length. But in such a situation we would have ceased to be human beings in any sense I, or anyone, would be familiar with. In such a context one might have to develop a new type of moral theory. While interesting, that is not my goal here.

boundaries imposed upon the boundary transcending power of human consciousness, since that is not the focus of this project. I shall only list two of the existential boundaries here, with the understanding that there might be others which are not addressed. What distinguishes existential from historical boundaries is that, even where the two interconnect (as, for instance, when examining the temporal nature of human life, or the permanence of relative scarcity of resources),[62] the former cannot be changed while the latter are categorically plastic. The particular boundaries can be transcended through the reflective employment of human expressive capabilities.

The most important of the existential boundaries we face are those imposed by the materiality of our human existence.[63] One of these is that we live and die within a demarcated period of time. This is inescapable and imposes an absolute limitation on the recognition, realization, and amplification of our expressive capabilities. Death, as Wittgenstein claimed, is what gives to an individual life its unique "form and texture."[64] Death and birth demarcate the boundaries of human life as we understand it.[65]

[62] The relative scarcity of resources is a point where the two types of boundaries interconnect. So far as we know, human beings will never enjoy a condition where they possess so many resources that questions of allocation cease to be meaningful. This suggests that in the most absolute sense the scarcity of resources is an existential boundary to our agency. On the other hand, particular instances where resources are scarce might be overcome by better public policy or technological improvement. In these particular instances, resource scarcity can be connoted as a socio-historical boundary.

[63] The onto-theological question about the deeper nature of reality, and our ultimate relationship to it, I leave aside here. Paul Tillich nicely characterizes these questions as religious because they deal with what is of "ultimate concern." See Paul Tillich. *Dynamics of Faith.* (New York, NY: HarperOne, 2009), 1

[64] Derek Jarman. "Wittgenstein" DFI Production, United Kingdom, 1993

[65] I take this to be a major theme in Faulkner's work. In *the Sound and the Fury* the nihilistic patriarch of the Compson family gives his oldest son, the intellectual Quentin, a watch. "I give it to you not that you may remember time, but that you might forget it now and then for a moment and not spend all your breath trying to conquer it. Because no battle is ever won.' he said. 'They are not even fought. The field only reveals to man his own folly and despair, and victory is an illusion of philosophers and fools." See William Faulkner. *The Sound and the Fury.* (New York, NY: Vintage International, 1990), 76

While often the source of a great deal of mourning, one may take consolation in the relationship death has to the realization and amplification of our agency. By existing within time, human beings make choices which indelibly stamp us as individuals by establishing the commitment we made within the time allocated to us. Some materially finite being characterized by its existing for eternity would have, in this respect, no meaningful agency. Given the infinite period of their existence within time, such beings would realize all the possibilities available to them and, in the sum of time, their choices would therefore dissolve into meaninglessness. Our existence within a finite period of time is thus both a boundary on the structure of consciousness, and a condition for the possibility of using one's expressive capabilities to become meaningfully free in a temporally defined context.

A second existential boundary we face are those imposed by physical constraints stemming from having a body. These include the basic limitations imposed upon us by our physicality; including the limitations of our senses and physical strength, the experiences of bodily decay and all types of pain, and our inability to create any effect through sheer choice. These are boundaries upon the structure of consciousness because they constrain our capacity to experiment either with regard to the natural world, or with regard to socio-political institutions. We do not have unlimited rein in amplifying our expressive capabilities concretely so long as there are physical boundaries on what we are capable of doing. While these boundaries might be mitigated indefinitely by the application of the technical mindset to removing the physical challenges to human life, we shall never evade them entirely so long as we have a body.

More important than these though, are the mental boundaries we experience as a subset of our general physical boundaries. Is it not true that consciousness itself is a "physical entity"

whose capacities might be limited?[66] This classical question on the tenability of Cartesian style dualism is highly important and will be discussed in the Chapter on human agency. I hope to show that my model of agency, if not neutral on this question, shows how mental boundaries may be unavoidable, but that we remain capable of transcending those associated with the next set of boundaries.

The second category of boundaries are those characterized by plasticity: the socio-historical boundaries. The socio-historical boundaries regard our existence as social, not as natural, beings.[67] While related to the existential boundaries, in the sense that the social world has developed for and through human beings rather than angels or devils, historical limitations are distinct in an all-important way. Unlike the existential boundaries to our lives, the socio-historical boundaries we exist within are plastic. Put simply, socio-historical boundaries are the product of human decisions taking place in the natural world. Different decisions about what one might have done, or what should be done, can lead individuals to transcend old socio-historical boundaries. These boundaries may be adjusted, or replaced wholesale by largely new ones. To accord them a "false necessity" is to abnegate one's capacity to employ expressive capabilities to become author of one's self in an authentic way.[68]

This human capacity to transcend socio-historical boundaries exists because individuals can employ their expressive capabilities to define one's self by redefining the world around them. By doing so, one can claim to come increasingly near to authenticity of self: an individual can

[66] I adhere to the physicalist understanding of the mind, with the qualification that what constitutes something "physical" remains philosophically ambiguous.
[67] My reading on this point is partly inspired by Allan Hutchinson. See Allan Hutchinson. "A Poetic Champion Composes: Unger (Not) On Ecology and Women." *The University of Toronto Law Journal* 40 (1990), 274-277.
[68] The reference to the "false necessity" of socio-historical boundaries appears throughout Roberto Unger's work. For his most systematic discussion see Unger, *Politics: Volume One*.

become author of their life. Because the structure of consciousness enables it to transcend boundaries, there is no way to determine limitations to the scope of choices available to human beings *a priori.* It is always possible that a person might employ their expressive capabilities to bring about a socio-historical state of affairs that might have seemed inconceivable in the past. But such a possibility is to be embraced. It constitutes the passage to greater authenticity and authorship over the socio-historical boundaries which previously determined us.

By realizing and amplifying one's expressive capabilities to re-define the boundaries in which we exist, the dignity of human beings can be respected and amplified. Human dignity does not lie in simply being free from external coercion, though this can be an important prerequisite. Dignity grows as the range of concrete choices available to individual human beings expands.

It is important to offer two qualifications to this claim. The first is to argue against Utopianism of any sort. To transcend a given socio-historical context does not mean we will ever reach a point where there are no more historical boundaries to transcend in general. The agency to re-define socio-historical boundaries means precisely that we will always exist within history so long as we remain human beings. The open texture of history is not something to mourn. History must be accepted and transformed. This also relates to a point of conjunction between the existential and socio-historical boundaries to our life.[69] The temporality of our existential lives means that we will always need to make concrete choices and therefore will always exist historically.

[69] Again, a good example is the distinction between the existential boundary posed by the relative scarcity of resources and the socio-historical boundaries which develop because of policy choices and contingent physical, mental, and technological limitations.

The second qualification is more important. Nothing here is intended to suggest that recognizing the "false necessity" of socio-historical boundaries is in any way easy or available to all.[70] This belief in the inevitable triumph of Enlightenment is what led to the confusion which ultimately weakened the Kantian argument that heteronomy could be undone by the application of education and rationalization.[71] The micro-physics of knowledge-power structures which permeate our society remain extraordinarily strong, and impose limitations on the realization and amplification of expressive capabilities.[72] This is true not just as long as they remain invisible, but to the extent they function practically. As Zizek often points out, one can very well recognize a given discourse as ideological at a conscious level while remaining unconsciously determined by it through festishistic[73] disavowal.[74]

This poses an extraordinary problem for the account of rights I will soon be outlining. The basic claim of my approach is that individuals can realize and amplify their expressive capabilities concretely. The range of choices one can make remains in tension with this potential so long as the socio-historical boundaries of modernity impose significant constraints upon us. To analyze the particular constraints imposed by the socio-historical boundaries that have emerged in modernity, and to critique how they constitute the subjectivity of marginalized individuals, remain important and open ended tasks for critical theorists of all types.

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[70] See Unger, *Politics: Volume One*, 87-96.
[71] See Immanuel Kant. *On History*, trans. Lewis White Beck. (United States: The Library of Liberal Arts, 1957)
[72] The idea of a "micro-physics" of power is Foucault's. It recurs throughout his work. See Michel Foucault. *The Foucault Reader*, ed. Paul Rabinow. (New York, NY: Pantheon Books, 1984), 51-76.
[73] Don DeLillo often explores these themes in his prose. See Don DeLillo. *Cosmopolis*. (New York, NY: Picador, 2003)
[74] The common example he gives is disavowal by acknowledgement, the "I know..But." For instance, one might claim to understand that the contemporary capitalist order is unjust and poses serious challenges to the environment, but unconsciously believe that nothing serious will happen. These examples are presented throughout a great many of his books. For an especially comprehensive read see Slavoj Zizek. *The Parallax View*. (Boston, MA: MIT Press, 2006).

Unfortunately, there is no space here to engage in a system analysis of the knowledge-power structures which permeate our society and establish the socio-historical boundaries that constrain our agency. Instead, my aim below will be to make concrete the more abstract account of expressive capabilities by specifically articulating those which would require realization to ensure human flourishing. If these concrete expressive capabilities were secured, an important step would have been taken towards amplifying the dignity of all individuals.

To respect the dignity of all others, a system of rights can be very useful tool in defining the conditions and actions of human life one would wish to universalize. I believe that rights should be organized to enable individuals to realize and amplify their expressive capabilities. A system of rights that did so could be said to respect human dignity. It would respect our potentially infinite capacity to create values and so define ourselves be redefining the boundaries in which we exist. In so doing, we would increasingly become the authors of our own authentic narratives.

Rights remain insubstantial aspirations unless they give rise to concrete obligations on the part of others to respect them. In this respect, rights must be what Seyla Benhabib referred to as both determined by and constitutive of a "jurisgenerative politics."[75] The recognition of universal rights imposes subsequent obligations on actors (and politico-legal institutions) to enshrine them in law. To not do so would indicate a lack of authenticity.. They not only specify what conditions and actions should be universalized, but those which all others must strive to realize and amplify. Once these were enshrined within law, and the expressive capabilities of human beings respected and increased through the enshrined legal rights and obligations, socio-

[75] See Benhabib, *Rights of Others*, 20.

political institutions could then be reformulated in line with the principles expressed by these rights.

This will lead me back to point out some of the gaps in Sen and Nussbaum's approach. The most important of these gaps is their unwillingness to link the capabilities approach to human flourishing with arguments for particular forms of political and legal organization. I do not believe this is adequate. Instead, I will argue that one should understand human rights as jurisgenerative. We must then ask what form of political and legal organization is best suited to adequately foster the expressive capabilities individuals need to lead dignified lives. This links directly to a particular form of political and legal organization.

Conclusion to Chapter One

In this Chapter, I argued that we should take a dignity oriented approach to understanding human flourishing. The basis of my argument is that individuals become authors of their own lives to the extent they can employ their expressive capabilities to transcend the false necessity of the socio-historical boundaries within which they exist. It is in this capacity for self-authorship that our dignity lies. I ultimately concluded that rights discourse can be a useful jurisgenerative tool in realizing the particular expressive capabilities of individuals within politico-legal boundaries. In the next chapter, I will argue that we should work to realize two twinned rights in particular: a right to democratic authorship and a right to an egalitarianism of human capabilities. Together, these are the twinned rights required to secure human dignity. The twinned rights specify the principles which should be realized if human dignity is to be authentically respected.

Chapter Two:

The Twinned Rights of Democratic Authorship and Equality of Human Capabilities

Introduction

This chapter argues for the two "twinned" rights I believe should be realized in a society which adequately respects human dignity. The first is a right for all citizens to be democratic co-authors of their governing political and legal institutions and the laws which flow from these. The second is a right of all citizens to enjoy equal expressive capabilities except where inequalities flow from their morally significant choices. I maintain that these rights are twinned because, while they can operate in conjunction, the two must never be collapsed into one another. This is because the individuals exercising their democratic rights must independently choose to realize the second. After discussing the relationship between the two rights, I will proceed to unpack both independently. This will involve explaining why I believe democracy is the political and legal system most adequate for respecting human dignity, and why I believe the morally arbitrary allocation of expressive capabilities must be rectified along egalitarian lines.

1) Self-Authorship: Individual and Social

Throughout the last chapter I stressed how expressive capabilities, and the jusrigenerative rights required to realize and amplify them, can be linked to an individual's ability to engage in authentic self-authorship through their engagement with the socio-historical boundaries that contextualize their existence. This is achieved by their defining themselves through re-defining the socio-historical boundaries within which they live.

Though this characterization of authentic self-authorship has a very important social dimension, my focus thus far has been largely on the individual. From here on out, my argument will increasingly consider the political and legal institutions that might be required to constitute a society in which an individual's expressive capabilities can be realized and amplified.[76] I will present the twinned rights required to realize a dignity oriented account of human flourishing. My approach stresses that there are two twinned rights which should be realized in a society which respects human dignity: a right to democratic authorship and a right to equality of human capabilities. It stresses that legal and political institutions, and the laws that flow from them, should be arranged so that individuals become their authors. Realizing my approach would entail both democratizing political and legal institutions and ensuring an equal distribution of human expressive capabilities except where inequalities can be morally justified.

However, before presenting these twinned rights it is necessary to ask if and how the self-authorship of the individual is consistent with their authorship of legal and political institutions. This is by no means a simple question, and I shall only be able to address the issue in brief here by touching on the two major critiques of what, following Unger, I would characterize as a superliberal position.[77]

The first is the claim, common to some existentialists, that the social-historical boundaries within which one exists are largely irrelevant in determining an individual's capacity for self-authorship. In other words, it is not the stage, but the play alone which matters. While

[76] My account of many of the theories of justice explored here was in part inspired by Michael Sandel's clarifying exposition. See Michael Sandel. *Justice: What's the Right Thing to Do?* (New York, NY: Farrar, Straus and Giroux, 2009)

[77] The reference to super-liberalism comes from Unger. *Politics: Volume One*, 350-355. It refers to the need to further the basic emancipatory potential of liberal theory by pressing its individualism to more radical conclusions. My reading draws, in part, from Will Kymlicka. See Will Kymlicka. "Communitarianism, Liberalism, and Superliberalism." In the *Critical Review: A Journal of Politics and Society* 8 (1994): 265-267.

all individuals may exist within certain historical boundaries, none of these can infringe on our basic need to make choices which define us. To claim otherwise, for instance by claiming that we are determined to act in a given way by social pressure, would be to exist in bad faith. This argument is found, for instance, in the hyper-individualistic work of Kierkegaard and in the writings of the early Jean Paul Sartre.[78]

The second critique is given by communitarians who claim that self-authorship is only possible if one is an active participant in a given tradition who also recognizes its internal validity. The communitarian claim is that the responsibility of an individual is to participate in the fabric of their given tradition, rather than to transcend or fundamentally transform it. To do so would undermine the hermeneutic framework within which all individuals make concrete life decisions. This argument goes in primitive form back to Burke, and finds its best modern expression in the work of Alasdair Macintyre and, in some respects, Michael Sandel.[79]

The claim of existentialists is complex and nuanced. I shall only be able to capture a sense of it here. The basic argument is that socio-historical boundaries, while important in other respects, are irrelevant to the individual's capacity to achieve self-authorship over their life. Here I must be very careful. Existentialists never claim that social contexts *in general* are irrelevant to this capacity. Since all individuals come into existence historically, none are free from making choices given socio-historical boundaries. The claim is that the *socio-historical* boundaries are unimportant, including the politico-legal systems within which such individuals exist. This is

[78] Wittgenstein appears to have shared many of the same sentiments.
[79] See Alasdair Macintyre. *After Virtue: A Study in Moral Theory.* (Notre Dame, IN: University of Notre-Dame Press, 1981). See also Michael Sandel. *Liberalism and the Limits of Justice: Second Edition.* (Cambridge, UK: Cambridge University Press, 1998).

because what is of existential priority is the individual's capacity, and indeed their commitment, to making transcendent choices.[80]

According to the existential models, socio-historical boundaries are relatively unimportant, since the human capacity for agency transcends even the most stringent restrictions. Regardless of the boundaries one might face throughout life, the capacity for authentic choice, and therefore the capacity to engage in self-authorship, persists. In this claim, one sees the inversion of the classical Hobbesian formulation that agency entails being unconstrained.[81] The existential position is that agency, as the commitment to our choices made in good faith, consists in reflective interiority. Individuals who understand why they make the choices they do will be able to make them in good faith, since they are not bound to understanding themselves as the product of various social-determinants. In a certain sense such individuals have achieved control over their own destinies by engaging in the self-authorship of their lives. This existential individualism therefore follows Kant in characterizing socio-historical boundaries as phenomenal rather than fully real.[82] In the most important respects we can speak of, socio-historical boundaries can have no determinant effect on each individual's agency.

I believe that the existential account unduly neglects the role socio-historical boundaries, and the inter-personal relationships which are both their source and product, play in the authorship of the self. More importantly, the existential account errs by assuming that the

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[80] This echoes Kierkegaard's far more profound examination of the seemingly mundane lives of his seemingly endless cast of pseudonymous characters, which in turn is meant to awaken us to the significance of choice in our own lives. Much as Abraham, a simple farmer and nomad, was greater than Agamemnon through his choice to live within faith, so too the individual who lives an authentic life may transcend the hegemony of even the most brutal political system.

[81] This metaphysical argument takes up the first part of Thomas Hobbes. *Leviathan.* (London, UK: Penguin Books, 1982), 110-118.

[82] See Kant on the application of pure practical reason. Immanuel Kant. *Critique of Practical Reason*, trans. Lewis White Beck. (New York, NY: Macmillan Publishing Company, 1985), 52-59. See also Immanuel Kant. *Groundwork to the Metaphysics of Morals,* trans. H. J Paton. (New York, NY: Harper Torchbooks, 1964)

capacity for agency is a power that simply exists *a priori*, rather than as something to be realized and amplified by empowering the capabilities of individuals to employ their human expressive capabilities.[83] In other words, self-authorship becomes a misleading metaphor so long as individuals are not capable of making meaningful choices about the directions they wish to take in life. Robinson Crusoe cannot be an existential hero because his loneliness results from the material conditions of his life. Crusoe has little agency to reflect on the dread he feels over his lack of potential.

At the other extreme lies the communitarian claim that human flourishing, including the realization of human agency, is only possible within well-established socio-historical boundaries (typically referred to by them as traditions). This is usually coupled with a critique of liberal individualism.[84] The claim of communitarians such as Macintyre is that liberal individualists have erred in drawing a strict distinction between the individual and tradition, and by claiming that the former held epistemological and moral priority over the latter.[85] This basic error has had numerous repercussions. By understanding the individual as the wellspring of moral legitimacy over socio-historical traditions, liberals and liberal political thought has offered ideological support for the growth of relativism and nihilism. Once the individual's selfish desires are not just given free reign, but seen as objective goals individuals and their representatives in state institutions are to achieve, the hermeneutic fabric which linked individuals to a sense of the good

[83] As expressed in Kant, *Groundwork*, 108. Here he states that transcendentally postulating the autonomy of the will is the "Supreme Principle" of morality.
[84] The most sophisticated of these critiques is Sandel's. See Sandel. *Liberalism*
[85] Alasdair Macintyre "The Virtues, the Unity of a Human Life, and the Concept of a Tradition" in *Liberalism and Its Critics*, ed. Michael Sandel (New York, NY: New York University Press, 1984), 125-149.

life begins to collapse. Consequently, those same individuals begin to lose sight of the valuable aspirations they would have hoped to achieve.

Against this, many communitarians argue that we must recognize that all human activity inevitably takes place within given socio-historical boundaries, which in turn establish the goals towards which we strive.[86] This is because they provide a framework which clarifies the standards by which excellence and deficiency in various social activities are assessed. An example might be participating in a sport. Without clear rules which are respected by most participants, it would be impossible to determine whether individuals interacting with one another were engaged in anything more than random kinetics, let alone assess who was performing social activities in a morally admirable fashion. When the rules are established, we can begin to assess who is skilled at exploiting them to perform well.

Many communitarians emphasize the role socio-historical traditions play in self-authorship. Communitarians argue that hermeneutically thick socio-historical boundaries will offer individuals a variety of different roles they can possibly play; many simultaneously. As Macintyre claims in *Whose Justice, Which Rationality,* robust socio-historical boundaries will contain reflexive mechanisms which enable change while preserving the overall integrity of the tradition.[87] The classical example, going back to Ancient Greece, would be the dynamic

[86] Part of my difficulty in accepting this argument comes from the misguided tendency to naturalize the community as the basic web underpinning all socio-historical communities, and then to give it an immediate moral value. This strikes me as not just philosophically implausible, but also historically misguided. As Daniel Weinstock has pointed out, many of the national communities that appear today were the product of state interference. "The nations that exist today are the result, rather than the pre-condition, of the states formed in the Westphalian world. Most successful states have had to undergo a phase of nation building in order to create identities capable of sustaining institutions of solidarity without recourse to illiberal and undemocratic means. Social scientists and historians studying the emergence of national identities are almost unanimous in rejecting ''primordialism,'' which is the view that nations pre-exist states, which are then seen as expressions of an antecedent national identity." See Daniel Weinstock. "Motivating The Global Demos." *Metaphilosophy,* 40 (2009), 95.

[87] See Macintyre. *Whose Justice, Which Rationality?*

Athenian polis of Socrates and Pericles. A great cultural power, Athenian society spread its influence across the Aegean before eventually falling victim to rigid conservatism and calcification. Another example might be Scotland during the 18th century Enlightenment.[88]

In these settings, individuals are able to flourish both because they have a clear sense of who they are, and more importantly they understand what it is they wish to achieve. In this regard, they do not fall victim to the existential nausea that afflicts modern liberal subjects. Communitarians argue that individuals who exist within robust socio-historical traditions can more readily become authors of their lives because they better understand the complex and socially determined ends to which they strive. Much as a good baseball pitcher strives to be great, an engaged individual seeks to contribute to his or her community in a meaningful way that reflects well upon both the individual and the social tradition. Individualistic philosophies, it is claimed, cannot provide such ends since these are to be determined only by individuals. As such, they lead to an empty subjectivity that is doomed to incompleteness as individuals become trapped in an endless cycle of self-examination and narrative inconsistency.[89]

This, communitarians often claim, also accounts for the empty subjectivities of modernity. As individuals experience their subjectivity as simultaneously the source of the good and ultimately without any external meaning, they come to inhabit a variety of different identities whose animating principles are mutually incompatible. One might spend a week as a bohemian artist, then be posturing as a yuppie the next. But since none of these identities is

[88] Macintyre, *Whose Justice, Which Rationality?*, 209-326
[89] See Pierre Schlag. "The Empty Circles of Liberal Justification." *Michigan Law Review* 96 (1997) for an indicative criticism of this position.

sustained by engagement in a robust socio-historical tradition, they quickly dissolve forcing individuals to turn to yet another temporary pseudo-identity.

For these reasons, most communitarians argue that we moderns should eschew individualism and focus on retrieving or recreating the socio-historical boundaries which are a condition for human beings to achieve meaningful self-authorship of their subjectivity. This often leads to the adoption of a relatively conservative approach to justice which emphasizes the need to ensure continuity between past, present, and future.[90] While Communitarians may accept the need for change at a pragmatic level, they argue that any such changes should be seen as adapting socio-historical traditions to the needs of the present rather than instances where individuals seek to transcend the traditions wholesale.

I believe the communitarian position is consistent with many analogous claims made by post-modern philosophies[91]; albeit given a more consistent political dimension.[92] Communitarians argue that the self can only be constituted within a given socio-historical context, and that liberalism has therefore been mistaken to place the individual at the centre of

[90] The best example is in the work of Michael Oakshott. See Michael Oakshott. *Rationalism in Politics and Other Essays*. (Indianapolis, IN: Liberty Fund, 1991). See especially the titular essay.

[91] The distinction lies in the moral emphasis. Most post-modern theorists argue that we must engage in the ultimately impossible task of breaking away from socio-historical boundaries, while communitarians emphasize the need for rootedness. The difficulty I have with this is in part that rootedness strikes me as an extremely ambiguous concept. It is unclear to me that one can draw a strong link between the epistemic claim that socio-historical contexts provide meaning, say in semantics, for individuals with the stronger normative claim that this meaning roots us in a valuable way except with appeal to very particular examples. But this strongly suggests that one needs more than a simply immanent critiques to evaluate whether given socio-historical contexts are valuable, since that would reduce such arguments primarily to questions of aesthetics and privilege. Some of these points were clarified for me by Daniel Weinstock. See Daniel Weinstock. "Rooted Cosmopolitanism: Unpacking the Arguments." In Will Kymlicka and Kathryn Walker. *Rooted Cosmopolitanism: Canada and the World.* (Vancouver, BC: UBC Press, 2012)

[92] Charles Taylor is perhaps the most overt example. See the second part of Charles Taylor. *Philosophical Papers: Volume Two, Philosophy and the Human Sciences.* (Cambridge, UK: Cambridge University Press, 1985), 185-318. One can also see Charles Taylor. *The Malaise of Modernity.* (Toronto, ON: CBC Massey Lectures Series, 2003)

moral and political theory.[93] They are correct in this argument, but wrong to assume that it thereby follows that we should respect the socio-historical boundaries within which we come into existence.

If it is true that there is no a-historical position from which we can assess the cogency of a socio-historical boundary's moral tradition, then we need in no way feel bound to accepting any one boundary over the other. It is a matter of subjective preference or the accident of birth which determines whether one prefers, say, Aristotelianism over liberalism. What might strike Macintyre as a vital and dynamic tradition might appear to another as an overwhelming and undesirable ideology. The only standards by which to assess this are aesthetic; as a matter of moral theory the preference is arbitrary unless one is willing to claim "ethics and aesthetics are one and the same."[94]

On this point, Macintyre reflects his Marxist roots while illustrating that he has never gotten beyond the historicist limitations of that tradition. The irony of his approach is that its historicist prejudices are entirely modern; all he does is render them ideological by presuming, against Marx, that there is no point where one transcends the limits of history and reaches an Archimedean point from which to derive an objective morality. Macintyre's position becomes even more stereotypically modern (and circular) in its assumption that it is up to the subject to determine which socio-historical context he/she believes should become the standard by appealing to the aesthetic standards of their preferred context. But if this is true, then one is

[93] Most prominently Macintyre. See Macintyre, *After Virtue*. Interestingly, Rorty makes a similar argument at a deeper philosophical level that echoes many communitarian points while moderating them considerably. He argues that we have no need for "prophetic" grand narratives, and should instead accept a morality based on the stories of our own cultures. See Richard Rorty. *Philosophy and Social Hope.* (London, UK. Penguin Books, 1999), 201-209.
[94] Ludwig Wittgenstein. *Tractatus Logico-Philosophicus*, trans. D.F Pears and B.F McGuinness. (London, UK: Routeledge, 2001), 86

pushed to asking what political institutions can enable all moral agents the opportunity to express their preferences, according to those standards which make sense to them.

On the other hand, if there is an ahistorical position from which to assess a moral tradition then Macintyre's argument falters. The moral legitimacy of socio-historical traditions is once more invalidated, but not from the standpoints of a subject's aesthetic choices. Instead they are to be assessed by the standards of objective morality; everything which falls short once again becomes an ideology to be abandoned. There is all the difference in the world between saying "it would be morally and historically desirable for Aristotle to be morally correct" and "Aristotle is morally correct." The first sentiment could only appear in modernity; it would be unrecognizable to the Greeks and their philosophers. Or as put by A.N Whitehead, "the most un-Greek thing that we can do, is to copy the Greeks."[95]

Macintyre does not adequately appreciate that the dignity of self-authorship lies in the licence it gives individuals to make determinations on the nature of the socio-historical boundaries within which they will exist. For Macintyre, a political question on the legitimacy of a socio-historical context is resolved by the communitarian's autocratic appeal to a tradition's role in enabling the self-authorship of its members.[96] Here I fundamentally disagree. While it may be the case that it might be necessary to establish closer communal ties than those which are customarily found in modern liberal democratic societies to ensure human flourishing (as reflected in Nussbaum's Sixth and Seventh capabilities), it should be for the subjects of justice to determine whether and how this is to be carried out.[97] This entails adopting a more

[95] A.N. Whitehead. *Adventures of Ideas.* (New York, NY: Free Press, 1961), 274.
[96] Charles Taylor perhaps makes this point most consistently and thoroughly. See Taylor. *Philosophical Papers: Volume Two*. It also appears in the work of Michael Walzer. See Michael Walzer, *Spheres of Justice.: A defence of Pluralism and Equality.* (New York, NY: Basic Books, 1983)
[97] See Nussbaum, *Creating Capabilities*

individualistic perspective to the question of the legitimacy and scope of legal-political institutions, and how they can be designed to enable individuals to employ and amplify their expressive capabilities by and through making determinations on the nature of the socio-historical boundaries within which they exist. To the extent such institutions are designed to support such determinations, we can say that individuals are capable of living more or less dignified lives. But how are we to make such determinations, and what guidance can theory provide on this subject?

I believe that self-authorship is achieved when individuals can employ their expressive capabilities to define themselves by reinventing the socio-historical traditions within which they exist. This account of self-authorship is meant to capture the valuable insights found in both the existential and communitarian positions; however, I believe my position should commit us to a politics that is substantially different from either. I believe authentic self-authorship is only possible where socio-historical boundaries are materially and ideologically responsive to redefinition, and also where individuals can employ their expressive capabilities to meaningfully transcend them. I claim that if these two conditions were realized, individuals could be said to have been treated with dignity because they possessed the capacity to become authors of their individual lives.

2) The Question of Legal-Political Legitimacy and Equality of Human Capabilities

The question of political legitimacy is one of the defining issues of all legal and political theory. It can be framed in many different fashions depending on one's moral and meta-ethical positions. The natural law tradition, going back to the Greeks, frequently saw a political and

legal system as being legitimated to the degree it reflected the teleological orientation of nature.[98] The Christian tradition saw politico-legal forms as being legitimated to the degree they reflected the revealed will of God, as determined through a complex interaction between faith and reason. With the advent of modernity, a dramatic shift took place.[99] Many modern philosophers, starting with Hobbes, believed that a political system was legitimate to the extent it was a product of the people's will either expressed actively through a collective formulation of and agreement to a social contract or passively through the acceptance of the "general will" or "tradition."[100]

While important, for the purposes of this dissertation, I will not be addressing which of these approaches to the question of legal-political legitimacy is correct. For programmatic purposes, it is largely assumed here that the democratic approach to this question is correct. A political system is legitimate to the extent that it reflects the will of the people. The question going forward is how to determine what the will of the people is, and what consequences this has when conceptualizing the legal-political institutions which would be justified on this democratic basis. I by no means believe my account to be decisive, given the many problems which persist surrounding the very concept of democratic legitimacy. Carl Schmitt, for example, has identified very troublesome problems with the democratic conception of politics. Most notably, he has challenged the claim that any genuine politics can avoid antagonisms which necessitate the concentration of power in the hands of a sovereign authority.[101]

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[98] Aristotle, "Politics" in *The Basic Works of Aristotle,* trans. Richard McKeon. (New York, NY: The Modern Library, 2001)

[99] See Saint Augustine. *On Free Choice of the Will,* trans. Thomas Williams. (Indianapolis, IN: Hackett Publishing Company, 1993)

[100] The explicit reference to tradition is found in the work of both Macintyre and Oakshott. See Macintyre *After Virtue* and Oakshott, *Rationalism*

[101] See Carl Schmitt. *Political Theology,* trans. Tracy. B Strong. (Chicago, IL: The University of Chicago Press, 2006), 5-6.

Only an authentic democracy would be justifiable *a priori* since it alone is constituted through the choice of citizens to realize it as a political form and, hopefully, accept the historical-empirical consequences that come with such a choice. It respects the dignity of citizens by treating them as ends in themselves who are given a say in decisions which dramatically affect them. But democratic legitimacy would not be satisfied by only giving citizens a choice on the structure of political and legal institutions. In that case my approach to realizing human dignity could be satisfied by appealing to a heuristic device such as the social contract.[102] It is not adequate that citizens merely have a say in determining the structure of the institutions that govern them; though this has in practice only very rarely been the case even for contemporary liberal democracies. Citizens should have their expressive capabilities realized and amplified through increasingly being able to dictate the content of the laws and policies generated by political institutions. In this way citizens might be said to gradually become the authors of the laws that govern them.

In this sense, democracy can also be said to reflect the ideal of self-authorship articulated in the sections above because it elevates the ability of citizens to define themselves by redefining the boundaries within which they exist to a central political practice. Individuals, through co-ordination with one another, determine the form and content of the legal and political structures that govern them.[103] What in other political systems would be a destabilizing practice to be

[102] Rawls is perhaps the most explicit about the heuristic character of contractarianism. See John Rawls. *A Theory of Justice.* (Cambridge, MA: Harvard University Press, 1971), 118-195.

[103] One would be justified here in asking why self-authorship is valuable, and consequently whether the political and legal reforms I suggest are intrinsically or merely instrumentally valuable. This is a much larger question than I am capable of answering here, though the reader can see my forthcoming article "Becoming to Belong: An Essay on Consciousness and the Absolute" for some suggestions. While I no longer fully believe in the position stated there, I do hold to my basic claim that authentic self-authorship enables us to more freely recognize the way in which our life processes matter. For instance, recognizing the plasticity of the socio-historical boundaries to our lives may enable us to better come to grips with the existential boundaries we face, and the dilemmas they pose to our sense of significance. In the previous paper I argue that this higher level recognition should lead us to embrace a position close to Spinoza's.

quashed is a defining feature of an authentic democracy. But further than that, what makes a democracy valuable is not only the extent to which it recognizes the ability of citizens to redefine the boundaries within which they exist, but the extent to which it amplifies these capabilities. This requires not only that the first right be respected, that citizens increasingly become authors of the political and legal institutions that govern them and the laws which flow from these. It also requires that their expressive capabilities be fostered so as to make both authentic self-authorship, and authorship of laws, feasible to all within the parameters established by fairness.

This is where I can present the twinned dimensions of this approach to rights in systematic detail. I will begin by discussing why I separate the democratic and egalitarian dimensions, rather than unifying them into some central scheme as has become increasingly common, as for instance in the work of Dworkin, Sen, and to some extent even Rawls. In the next two sections I will discuss the two rights independently before detailing how they are meant to fit together.

The decision to distinguish two distinct rights was deliberate, and at least partly inspired by Thomas Nagel, who made a similar argument in his book *Equality and Partiality.*[104] I maintain that the first right, to democratic authorship, precedes the second. Individuals should have the opportunity, in a democratic context, to choose whether they wish to ensure an egalitarianism of human capabilities. Choice is important to my conception of how to realize human dignity. This is because my conception is fundamentally democratic at both the theoretical and practical level. It rests upon the claim that legitimacy is minimally bestowed by consent and increases to the degree that subjects become authors of both politico-legal

[104] Nagel refers to this discord between liberty and equality as the "problem of convergence." Thomas Nagel. *Equality and Partiality.* (Oxford, UK: Oxford University Press, 1991), 75-85.

institutions and the laws which flow from them. It is insufficient, even if occasionally enlightening, to offer a justification for political and legal institutions by appealing to even the most ingenuous thought experiments to indicate consent such as a social contract.

The democratic intuition central to this piece is that social and political institutions are minimally legitimate to the extent that individuals have consented to obey the laws which flow from them. At best they should be the authors of the laws that govern them, though this is highly conditional on material and social circumstances. I say this to draw an important distinction from Rawls, who I believe was mistaken to focus on developing a heuristic thought experiment to imply that all rational actors would consent to live in a liberal democratic society.[105] Theorists of consent often deny subjects the right to consent in practice because they claim to have derived it hypothetically by appealing to a rational decision making processes. Rawls is an exemplar here when he argues:

> The intuitive idea of justice as fairness is to think of the first principles of justice as themselves the object of an original agreement in a suitably defined initial situation. These principles are those which rational persons concerned to advance their interests would accept in this position of equality to settle the basic terms of their association....one must establish that, given the circumstances of the parties, and their knowledge, beliefs, and interests, and agreement on these principles is the best way for each person to secure his ends in view of the alternatives available.[106]

In this way, theorists hope to legitimize their conception of justice. But I would argue that the legitimacy thereby obtained by the theorist is therefore just that, theoretical. A theorist should focus on describing the institutions that would be required for a political system to obtain legitimacy. After that one can offer a conception of what is fair, and then let individuals make of it what they will.

[105] See Rawls. *Theory*
[106] Rawls, *Theory*, 118-119

The link between the two rights the right to democratic authorship and the right to equality of human capabilities is that both are intended jurisgenerative legal tools to be used to amplify our expressive capabilities and so realize the dignity oriented account of human flourishing. Expressive capabilities, as mentioned, are those which enable individuals to transcend socio-historical boundaries and assume responsibility for their subjectivity. This is what enables people to lead a dignified life. Only in this way would their status as morally individual subjects be respected. Therefore the first step to respecting and amplifying these capacities is to democratize political and legal institutions. After this, one can make the more challenging argument for establishing the right to an equality of human capabilities.

This is not to imply that the second right is at a lower tier of importance in some scheme, lexical or other. The metaphor of twinned rights is meant to show that the two are paired so intimately that modern democracies may be unable to function meaningfully without substantive change, for instance by rectifying a grossly unequal distribution of human capabilities. But, I reiterate, it is not for the theorist to claim that these substantive changes must be instituted through consent and thereby give license to demagogues indifferent to the onus implied by democratic legitimacy. Marx, here, is a useful historical lesson, especially the Marxist tradition of deterministic historical materialism. Individuals must recognize that the precondition for the amplification of their individual capabilities is the realization of the human capabilities of all. But they cannot be forced to reach this conclusion, and none should attempt to do so either theoretically or in reality.[107] This, as we shall see, has been a prevailing problem in liberal political and legal theory.

[107] Sen also appears sensitive to this problem. In a brief interview he claims that his reticence to draw a fixed list of which capabilities should be realized stems, in part, from a desire to leave such issues to the democratic deliberation of societies. As he puts it "... pure theory cannot ‘‘freeze’’ a list of capabilities for all societies for all time to come, irrespective of what the citizens come to understand and value. That would be not only a denial of the reach of

3) The Right to Democratic Self-Authorship

I argue that a society that seeks to realize the dignity of its members would respect the twinned rights to democratic authorship and equality of human capabilities respectively. The former requires that individuals be given the formal opportunity to realize their expressive capabilities to become authors of politico-legal institutions and the laws which flow from them.[108] The latter requires that the expressive capabilities of individuals be amplified to the extent compatible with moral fairness.

These rights are conceptually linked by the animating ideal of human dignity. As mentioned, dignity means allowing individuals to employ their expressive capabilities to engage in self-authorship by redefining the socio-historical boundaries within which they exist. To do so, they must be authors of the political and legal institutions which govern them. Processes of democratization can achieve this. Realizing human dignity would also entail amplifying citizens' expressive capabilities along lines dictated by moral fairness.

Despite operating together, the two rights must not be collapsed into one another. Procedural fairness must assume legitimating priority over the benefits of egalitarian substance.[109] Realizing a substantive equality of human expressive capabilities across society could only be justified through the free choices of individuals who are able to participate in fair

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democracy, but also a misunderstanding of what pure theory can do, completely divorced from the particular social reality that any particular society faces." This citation appears in Amartya Sen. "Capabilities, Lists, and Public Reason: Continuing the Conversation." *Feminist Economics* 10 (2004): 78. While I differ with Sen on the value of drawing up such an index, I believe the democratic intuition is valuable and have translated it into my own account.

[108] My account draws heavily on Dahl. See Robert Dahl. *Democracy and Its Critics.* (New Haven, CN: Yale University Press, 1991), 97. He states: "Democracy-rule by the people-can be justified only on the assumption that ordinary people are, in general, qualified to govern themselves."

[109] The focus on procedural fairness is classically Rawlsian. See Rawls *Theory.* A more updated account is given in John Rawls. *Political Liberalism.* (New York, NY: Columbia University Press, 1993), 35-40.

decision making procedures.[110] The two rights move closer together to the extent that the capabilities of individuals are amplified so they can engage in authentic self-authorship through the transcendence of socio-historical boundaries, and the political and legal institutions which calcify these same boundaries. The more proximate the two rights become through realization, the more human dignity would be enhanced. But they must never be assimilated to one another, since in that case the formal capacity of individuals to determine the nature of the politico-legal system they wish to see realized would be removed. Individuals would become subjects existing in a state organized along the lines of egalitarian fairness, rather than its authors. This temptation[111] must be avoided if we are to truly treat individuals with dignity by respecting their right to act from a personal perspective of self-interest.[112] In other words, we must respect the outcomes of fair decision making procedures to the extent they are consistent with the democratic right. But, as discussed in the Section below, this results in its own problems.

A right to democratic authorship will only be realized when individuals are capable of defining themselves by redefining the socio-historical boundaries within which they exist. This necessarily entails granting individuals increasing authorship over the political and legal institutions which govern them, and the laws which flow from these. But this becomes

[110] Later in this paper I will discuss the key question of how different individual's competing processes of self-authorship can fit together. I argue that democracy is the best system because it most respects an individual's dignity by according each person equal value. This two-part justification is not simply an abstract conceptualization. I believe that understanding the substance of democracy as being respect for dignity through the ascription of equal value can help us make concrete decisions in hard cases. In most such cases the two-part demand of respecting dignity and ascribing equal value will operate in tandem. In other instances of conflict there might be a tension between the demand to respect the dignity of conflicting individuals and ascribing them equal value; for instance, in affirmative action cases where a long-marginalized minority requires assistance to (gradually) participate on an equal footing with a long-privileged majority. In these cases, I believe the requirement to respect the dignity of individuals should trump the requirement for strict equality.

[111] How to convince individuals in a democratic framework to accept the impersonal egalitarian dimension of justice is a question I leave aside here. It does not seem adequate to simply hope, as Kant did, that the exercise of increasing agency will lead to demands to amplify it further for all. But going beyond such platitudes would involve a substantive critique of modernity and its various subjectivities, raising a host of issues along themes not directly addressed in this project.

[112] The personal and impersonal perspective are theorized by Nagel. See Nagel, *Equality*

complicated when trying to reconcile the competing claims of groups of individuals. In a democratically organized system, individuals might group together according to their competing interests. These competing groups might in turn argue for the adoption of different social policies which come into conflict, for instance, regarding whose expressive capabilities should be amplified.[113]

The basic tension between democratic and individual rights becomes even more apparent when developing a highly individualistic account of democracy that links the self and social authorship to human dignity. The tension between democratic rights, which pertain to authorship of political and legal institutions, and individual rights, which link with human expressive capabilities more broadly, poses significant problems when discussing the legitimacy of the democratic state. This was noted by Hobbes centuries ago, when he maintained that the passage to the state entails giving up a general right to all things for an exclusive right to some things.[114] The question is the extent to which the tension between democratic and individual rights can be eased along continuum legitimacy, rather than whether it can be evaded entirely.[115] The state would move further along the continuum of legitimacy to the extent it was authorized by the citizens who make it up, while still showing respect for alternative conceptions of substantive justice. Put another way, the state should enable all individuals to engage in processes of self-authorship to the extent possible while only limiting those behaviors which are not conducive to the self-authorship of others. This is what is meant by a democratic right.

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[113] This distinction between group and individual rights might appear proximate to the distinction between the two dimensions of justice mentioned above. While in practice the two often overlap, especially when considering economic protections for marginalized communities, this connection is not conceptually necessary. The problem of domineering majorities would emerge even in a relatively homogenous state; for instance, the United Kingdom at the time when Mill (and Marx) wrote.

[114] See Hobbes, *Leviathan*, 228-239.

[115] Like Dahl, I believe these tensions can only be imperfectly resolved. See Dahl, *Democracy*, 96-107.

I argue that the democratic right is secured by the implementation of fair decision making procedures which value each individual citizen equally as they engage in a deliberative process of conceiving and establishing the design of political and legal institutions and subsequently determining the laws which flow from these.[116] The democratic right is not secured by appeal to historical contingencies, such as culture, or to the abstract formulations common to many liberal theories. Individuals in a democratic framework must possess the actual capabilities required both to make their claims heard and to have them deliberated in a forum which formally accords equal value to all members regardless of the specific content of their deliberative claims. Their jurisgenerative rights to such capabilities must be respected by the establishment of fair decision making procedures which equally value each individual's opportunity to participate in the deliberative authorship of the laws that govern them. This right to participation cannot be revoked by any democracy worthy of the name; though of course it does not mean that one's interests will always carry the day. This is the formal requirement to satisfy the dimension of democratic right. To the extent that such fair democratic procedures are implemented in practice, and are engaged in by individuals able to employ their expressive capabilities, the right of individuals to democratic self-authorship would be secured.

[116]I believe this constitutes a dimension of self-authorship rather than simply political participation. The two have occasionally been separated, for instance by the existential tradition, and I believe falsely. The right to have a meaningful say in determining the form of governing structures and the laws which flow from these is key to engaging in robust self-authorship. Hierarchical political systems which deny individuals such rights limit the capacity of individuals to engage in self-authorship because they calcify the socio-historical boundaries. At best this is justified in the name of benevolent patrimony. At worst a hierarchical political system is designed in the naked self-interest of one group over another; for instance, in apartheid South Africa. Since self-authorship is predicated on an individual's capacity to define himself by redefining the socio-historical boundaries within which he exists, such a hierarchical political system would not be the ideal setting for the type of individualism I espouse to flourish. That said, there may be other virtues to hierarchical political systems that are not captured in a democracy. Plato certainly thought so. More contemporaneously, Robert Dahl has discussed the arguments for and against what he calls a system of "Guardians." See Dahl. *Democracy*, 52-82.

In practice, the most basic way to achieve this would be through the institution of a direct democracy. Citizens, not just their representatives, would actively determine the structure of political and legal institutions conducive to democratic deliberation, and would then engage in authoring the specific laws which are to subsequently govern them. This law-making capacity would be limited only by respect for the individual rights of those who hold alternative conceptions of the good. They would be offered the same formal and substantive rights to realize and amplify their expressive capabilities, with the qualification that these will only become socially transformative when such individuals either become convinced by the claims of others, or when they convince others to adopt their own position. While this might appear unlikely in many cases, the model of a boundary transcending consciousness I shall discuss later implies that it is never the less possible. All individuals, no matter how apparently intransigent, possess the same capacity for self-authorship through transcending the socio-historical boundaries in which they exist. Everyone can shift the articulation of their interests, either because they are convinced to redefine them, or because they can convince others more effectively. Consequently, if the institutions of a direct democracy were implemented, the laws that flow from them would be achieved through deliberative procedures resulting in either a democratic consensus, or where disagreement persists, a pragmatic compromise.

Since Rawls' *Theory of Justice*, the issue of reaching a consensus has prevailed in much of legal and political theory.[117] Rawls argued that, since they can be justified from many different comprehensive world views behind the "Veil of Ignorance" in the "Original Position," liberal-democratic principles and the political and legal institutions that flow from them can be

[117] The clearest account is given in John Rawls. *Justice as Fairness: A Restatement.* (Cambridge, MA: The Belknap Press of Harvard University Press, 2001).

legitimated through an "Overlapping Consensus."[118] [119] While I disagree with the transcendental justification given for this argument, I believe that the goal of reaching an overlapping consensus on constitutional arrangements would be the same in a direct democracy but would go considerably further. Individuals would formulate and deliberate on the structure of the basic institutions needed to maintain and amplify the democratic process, and thence would be the direct authors of the subsequent laws which govern them. The dialectic of such deliberative processes, if engaged in good faith through what Habermas refers to as "ideal statements," would enable individuals to gradually hone legislation to a point where it might be affirmed from many different metaphysical and/or moral perspectives.[120] This would ensure that, unlike in representative party systems defined by the to and fro of party politics, what Benhabib refers to as the "rights of others" would be respected by all participants because they were equally and directly involved in formulating and affirming the laws that govern them.[121] This would remain true even though all participants may have been required to engage in reflective processes to determine how a given piece of legislation might be reconfigured until it could be affirmed from the standpoint of their particular metaphysical and/or moral subjectivity.[122]

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[118] For the most developed account of this view see Rawls. *Justice*, 32-38.

[119] Rawls felt that sound political principles could be the subject of "Overlapping Consensus" by reasoners who would endorse the consensus from different moral standpoints.

[120] Habermas' most philosophically rich theorizing on the relationship between morality, language, and truth is found in Jürgen Habermas. *Truth and Justification*, trans. Barbara Fultner. (Boston, MA: MIT Press, 2005), 256-275.

[121] See Benhabib. *Rights of Others*

[122] This is comparable to the "deliberative universalism" argued for by Amy Guttmann. See Amy Guttmann, "The Challenge of Multiculturalism in Political Ethics," *Philosophy and Public Affairs* 22 (1993): 197. "Deliberative universalism makes more defensible claims about decision making methods and substantive principles of justice than the alternative responses to moral conflict we have been considering. The resolution recommended by cultural relativism is that people be governed by dominant social understandings. But this resolution, as we have seen, sanctions cultural tyranny and attributes too much moral determinacy to culture. Political relativism recognizes the indeterminacy of cultural values in the face of moral conflict but confuses the procedural resolution of moral conflict for a sufficient condition of justice, and it does not distinguish between moral conflicts that are resolvable by reasoning through the relevant considerations and those that are not. Comprehensive universalism, by contrast, attributes too much moral determinacy to reason here and now, and in so doing mistakenly assumes that all major moral conflicts are now substantively resolvable by reason."

It is unlikely that such a deliberative ideal would, for now, be realistic on anything more than a very small scale. This is due to the immense complexities and efforts required in the governance of the (post)-modern state. Even the goal of reaching an overlapping consensus on specific pieces of legislation is rather Utopian. It is much more likely that citizens in a direct democracy, even working as individuals rather than through a party system, would have to work to reach pragmatic compromises on various points of legislation. In these instances, individuals will be unable to entirely affirm a given piece of legislation, even after a process of deliberative reflection. Pragmatic compromise entails recognizing the functional consequences a piece of legislation might have and ranking these in a hierarchy determined by the priority participants ascribe to given interests. Individuals could then negotiate with each other to determine the content of legislation which, while to no one's complete satisfaction, none the less accommodates enough interests to become legitimately binding law. While such laws would rank further down the continuum of democratic legitimacy than those determined in a system which met the deliberative ideal, they would none the less still impose obligations on citizens since the processes through which they were reached were fair and treated all individuals as being of equal value. While the tensions produced by failure to reach a consensus might be disheartening they do not necessarily indicate a deep problem in a democratic community. Tensions do not necessarily entail instability; indeed, they can be productive if the tensions are conducive to the formulation of novel solutions to social problems. Compromise does not necessarily entail that one inhabits a "mere modus vivendi."[123]

[123] This concern is present throughout Rawls' work. It is most prominent in his work on multiculturalism, where he expresses deep concerns that many individuals will accept liberal principles simply because there are few opportunities for them to manifest their preferred principles. The classic example would be those who endorse comprehensive world views, such as religious doctrines. See Rawls, *Political Liberalism*, 144-150. One can also see Kymlicka's work on the subject. See Will Kymlicka. *Multicultural Odysseys: Navigating the New International Politics of Diversity.* (Oxford, UK: Oxford University Press, 2006)

None the less, given that the establishment of a direct democracy remains unrealistic now, we must ask what democratic options are conceivable in contemporary societies. For now, I will simply say that we must look for instances where state systems can be made more democratic by either the creation or improvement of deliberative procedure. At the same time, democrats must do everything they can to foster participatory cultures which respect the right of individuals to democratic authorship. This includes demonstrating respect for political opponents, and establishing inclusive spaces for reflective deliberation on the given socio-historical boundaries facing citizens, the political and legal institutions which reflect and preserve these boundaries, and how they can be transcended.[124] Finally, we must do everything possible to move away from undemocratic forms of decision making, while pragmatically accepting their temporary political necessity. The most prominent, if problematic, example of this would be to use the judicial system to push for social change. Courts are often seen as necessary to protect the rights of citizens against prejudicial minorities. At the same time, they remain a deeply undemocratic institution for resolving complex social problems. For this reason we must cautiously and gradually kick our addiction to jurisprudence while recognizing that, for a time, direct application of the cure might be more noxious than the disease.

I will expand upon these potential avenues for democratization in far more detail in Chapters Six, Seven, and the Conclusion. In this Chapter, they are meant merely to point a

[124] This is why I would characterize the first right as being consistent with a deliberative rather than a substantive moral conception. Amy Guttmann and Dennis Thompson helpfully distinguish the two. See Amy Guttmann and Dennis Thompson, "Deliberative Democracy Beyond Process" *The Journal of Political Philosophy* 10 (2002), 194-195. "The primary problem with comprehensive universalism is not that it imposes one set of substantive principles on all societies, but rather that it overlooks those cases of moral conflict where no substantive standard can legitimately claim a monopoly on reasonableness or justification. In some cases, people have conflicting reasonable beliefs (about the status of the fetus, for example) that our best efforts at moral understanding cannot resolve." See also Amy Gutmann and Dennis Thompson. *Democracy and Disagreement: Why Moral Conflict Cannot be Avoided in Politics, and What Should Be Done About It.* (Cambridge, MA: The Belknap Press of Harvard University Press, 1996)

realistic way forward for contemporary states. For now, we must move on to discussing the second of the twinned rights: the right to an equality of human capabilities. An equality of human capabilities, as I shall discuss, enables all people to be treated as moral equals and would entail the more general amplification of an individual's overall capacity to engage in self-authorship.

4) The Right to Equality of Human Capabilities

I must preface my discussion of the egalitarian right by emphasizing that I am addressing it from the standpoint of moral and political theory. I will not be looking at questions of political economy; for instance, questions surrounding the production of goods.[125] Instead my approach makes the purely moral argument that arbitrary contingencies[126] in the allocation of capabilities should be reduced to the extent possible.[127] This would be justified as a measure to amplify human dignity.

However, it is important to note that approaching the distribution of capabilities from the standpoint of moral and political theory has its limitations. The most important of these is where equity might infringe on the efficient generation of new values within, say, a market framework. This, as even Rawls acknowledged, is exceptionally important since a distributional scheme

[125] The reader can see my short article Matthew McManus "Capitalism and the Production of Difference" *Critical Legal Thinking*, accessed November 19th, 2015 for some suggestive arguments.
[126] Here I naturally draw a great deal of inspiration from Rawls.
[127] This is undeniably an important gap. Marx, for instance, was highly critical of J.S Mill for assuming the question of distribution could be conceptually separated from questions of production (and for good reason I believe). I do not take up these questions here because I feel there is conceptual value in developing an independent justification for equality. See Karl Marx. *Capital Volume One: A Critique of Political Economy,* trans. Ernest Mandel (London, UK: Penguin Books, 1990), 652-653

which allocates capabilities fairly may not be the most efficient at generating new values.[128] This, in turn, begs the question of whether and to what extent it is permissible to trade off moral rightness for the sake of efficiency. For example, Hayek argues in *The Constitution of Liberty* that the trade-off between equity and the generation of new values is too high to allow for anything but a minimal welfare state to compensate individuals for the inevitable and morally arbitrary cycles of the market.[129]

Another, more important restriction points to the inherent limitation of any moral theory. The capabilities approach remains deeply sensitive to the limits of what any political and legal system can achieve.[130] But the existential boundaries to our lives remain intact regardless of our commitment to transforming them by political and legal means. Equality of capabilities can mitigate the sting of the existential boundaries by attempting to arrange conditions to mitigate the moral arbitrariness of life. But it can never eliminate it. For instance, securing equality of capabilities might entail granting more resources to the chronically sick than the healthy. But no

[128] Rawls' work is marked by a consistent leftward shift from the already quite radical position maintained in *Theory*. In his final work, he seems convinced that only a social democracy can adequately claim to embody the principles of justice as fairness. See Rawls. *Justice as Fairness*

[129] See F.A Hayek. *The Constitution of Liberty: The Definitive Edition.* (Chicago, IL: University of Chicago Press, 2011). One can also see a more updated version of this argument in the work of Milton and Rose Friedman. See Milton Friedman and Rose Friedman. *Free to Choose: A Personal Statement.* (Orlando, FL: Harcourt, Inc. 1980)

[130] One of the nuanced difficulties in any argument such as this is accounting for the realization of capabilities which, while apparently not of immediate importance to human dignity, are necessary to securing those of more central importance. Daniel Weinstock refers to these as "intermediate goods." He claims: "The point I want to develop in this section of the paper is that the main answers to the question posed by Sen in his classic essay—let me refer to the set of goods that constitute answers to Sen's question as ultimate goods—do not refer to goods that are directly distributable by the state and the institutions of the state that are mandated to regulate the allocation of goods which contribute to the satisfaction of the different criteria set forth by theories of distributive justice. Such intermediate goods are what allow ultimate goods to be realized, either through causal or constitutive relations. Policy-makers and policy theorists looking for guidance as to how to think about the distribution of intermediate goods will not receive clear answers from leading contemporary theories of distributive justice." This is a fine-grained observation that I do not see as posing a decisive problem for an account such as mine. It does demonstrate the need to approach human capabilities from an integrated perspective that recognizes the interconnections between the different human capabilities, and indeed between the twinned rights which are intended to express the commitment to human dignity captured by the emphasis on capabilities. See Daniel Weinstock. "Integrating Intermediate Goods to Theories of Distributive Justice: The Importance of Platforms." *Res Publica.* 21 (2015), 173

political and legal system can assuredly prevent the arbitrary appearance of a terminal illness in an individual who may have otherwise lived an exceptionally healthy life, though it might attempt to compensate them in other ways.

Finally, it is important to emphasize that the right to an equality of human capabilities is distinct from the democratic right in an important respect. The democratic right operates at a procedural level to indicate how individuals can formally become authors of the political and legal institutions which govern them, and the laws which flow from these. While it is difficult to clearly separate procedure from substance, democratic institutions for fair procedural deliberation could be affirmed from many different perspectives regardless of one's deeper convictions. The right to an equality of human capabilities, on the other hand, would entail realizing a more robust moral ideal. It both emphasizes the value of individuals employing their expressive capabilities, and maintains that these capabilities should be amplified to the extent possibly except where limited by fairness. For instance, it would suggest many OECD states have a long way to go in rectifying substantial material inequities which disproportionately affect certain radicalized minorities such as African Americans in the United States and Muslims of Algerian descent in France. This is because individuals in these marginalized communities have long been the victims of direct and indirect prejudices which have prevented them from developing valuable capabilities that otherwise might have been within their grasp.

This argument for a right to an equality of human capabilities necessarily draws on more robust moral conclusions about fairness and human flourishing than the right to democratic authorship. A right to equality of capabilities will obviously appear controversial to many, and could not be affirmed from many points of view without significant hermeneutic efforts being made to bridge substantial differences. For this reason amongst others, I have argued that the

first right of my approach, to democratic self-authorship, must be realized before the second. This is despite the considerable connection I draw between the two rights. I believe that an equality of human capabilities is a requisite for a robust democracy. As we have seen many times throughout history, just recently given legal mandate in the atrocious *Citizens United* decision of the US Supreme Court, economic elites have often and will likely always find ways to manipulate democratic processes to their advantage.[131] This propensity was observed and reported by Marx as early as the mid-19th century in Europe.[132]

The argument that the democratic right must be ensured before securing an equality of human capabilities is a difficult one. This is because many democracies are seriously compromised, both in principle and in practice, by deep rooted inequality. Unfortunately, I do not believe that even achieving a an equal distribution of capabilities would be justified if many individuals would reject it. Individuals must willingly choose, through fair decision making procedures, to enact the redistribution process. This is where the twinned nature of the two rights becomes clear. If individuals realized both, the egalitarian democracy that would result would truly enable individuals to realize and amplify their expressive capabilities. They would be able to define themselves through constantly redefining the boundaries within which they exist. As such, individuals could be said to have led a dignified life.

Having now qualified my argument, I will move on to explaining why we should accept equality of capabilities and what realizing it might entail in practice. This explanation will

[131] My interpretation of this decision is heavily influenced by Dworkin's reading. See Ronald Dworkin "The Decision that Threatens Democracy." *The New York Review of Books*, May 13, 2010.
[132] See Karl Marx. *Early Writings*, trans. Rodney Livingstone. (London, UK: Penguin Classics, 1992), 424-428.

hopefully be deepened throughout the remaining sections of this dissertation, particularly in the Conclusion.

Linda Barclay rightly notes that Martha Nussbaum has been relatively unwilling to link her approach to capabilities with a more general theory linking equality and human rights. In an important essay, she summarizes this unusual tension in Nussbaum's work nicely.

> Nussbaum (2010; 2011b) puzzles over why some capabilities must be held equally rather than merely sufficiently. By way of explanation she tells us that 'equality holds a primitive place in the theory' in the sense that it is the equal dignity of citizens that demands recognition (Nussbaum, 2011b, p. 31; 2010, p. 79). In some cases recognition of equal dignity requires equal capabilities, while in other cases mere sufficiency will do, although she continues to puzzle over why this might be so, suggesting that social norms play an explanatory role (Nussbaum, 2010, p. 81). Nussbaum does not provide a particularly satisfactory explanation of the role and importance of equality within her overall theory.[133]

One dimension of my project in this dissertation is to resolve some of these difficulties by exploring how a capabilities approach to human dignity could be linked to a more generally egalitarian project.

The right to equality of capabilities would be realized by ensuring that capabilities are distributed so that individuals are equally able to flourish except where differences result from morally significant choices. I have chosen to focus on capabilities, rather than on goods or resources, for two interrelated reasons. The first, and most important, is that capabilities refer concretely to what people are actually able to choose in given contexts. What one is generally capable of doing is not something abstract, like what one could transcendentally will, or even something contingent such as what one would do with certain goods. The second, and related point, is that the focus on capabilities treats people as individuals with context specific needs and

[133] Linda Barclay. ""The Importance of Equal Respect: What the Capabilities Approach Can and Should Learn from Human Rights Law." In *Political Studies,* (2014): 8-9

interests. A focus on capabilities takes into account the special circumstances of people's lives. The capabilities approach to justice seeks ways to achieve a fair distribution of expressive capabilities in a manner tailored to the unique status of all individuals. For instance, it might be uniquely sensitive to the needs of individuals with substantial physical or mental disabilities.[134]

By contrast, equality of goods or resources, as argued for by Rawls and Dworkin respectively, fails to consider these uniquely important individuating features which in some contexts may be all important to determine whether a person can flourish.[135] Rawls argues that a just society would distribute primary goods in a manner consistent with the rationalizing procedures of the original position. This would yield his famous maximin principle: society should seek to maximize the benefit of the least good off.[136] This argument has many merits, but fails to consider how goods can be allocated to compensate individuals who may face special difficulties. Indeed, the entire purpose of the "Original Position" is to preclude consideration of such individuated conditions except where they can be organized in a scheme for abstract moral deliberation.[137] The very emphasis on goods implies a neutral medium through which to objectively determine what all citizens, regarded primarily as economically interested actors rather than as concrete individuals, should commit to in the most Pareto efficient manner to maximize the welfare of the least well off.

Since a *Theory of Justice* in 1977, Rawls qualified his argument considerably to maintain that no rational person would not allocate some goods for those who are specially disadvantaged. He has maintained that rational people behind the veil of ignorance would be unwilling to accept

[134] See Nussbaum, *Frontiers*, 107-108.
[135] See Rawls, *Theory* and Dworkin, *Sovereign Virtue*
[136] See Rawls, *Political Liberalism*, 6.
[137] See Rawls, *Justice*, 85-89 for his most mature engagement with the "formal constraints" to reasoning on justice.

a zero-sum game where they might end up receiving massively less on the basis of morally arbitrary circumstances. This marks a significant grounding of Rawls' theory.[138] None the less, the level of abstraction in his procedural account makes it difficult to see how it could ever be adequately sensitive to individual needs since the animating power of the maxmin principle is its indifference to the concrete status of actual individuals and their capacity to flourish. Relying on purely rationalistic procedures to determine the content of justice seems a roundabout way of theorizing something so practical.

Dworkin's argument is considerably subtler and less abstract. I will be relying on it in important ways when justifying equality of capabilities. None the less, I believe it has significant problems. Dworkin argues that the proper realization of liberalism entails distributing resources in an egalitarian way to ensure that all have the same opportunities in life, regardless of their real starting positions. He claims that the only inegalitarian distribution of goods permissible is one produced because of the morally significant choices individuals make under fair conditions where resources were equitably distributed in a manner which compensates for morally arbitrary circumstances.[139] Morally arbitrary circumstances, such as one's race or previous class position, cannot be invoked to justify an inequality of resources. This also means that individuals who may otherwise be unjustly penalized for morally arbitrary reasons, such as on racial grounds or due to a significant long term disability, should be compensated to equalize their position. On the other hand, choices such as to be a Bohemian artist inspired by Dadism are morally significant and can have bearing when justifying one's unequal resources relative to a Computer Engineer. In the former case, our aspiring artist clearly chose to adopt a lifestyle they

[138] Rawls, *Justice.*

[139] This argument was first introduced in Ronald Dworkin. *A Matter of Principle.* (Boston, MA: Harvard University Press, 1985). Its most cogent and powerful defense is found in Ronald Dworkin. *Sovereign Virtue: The Theory and Practice of Equality.* (Cambridge, MA: Harvard University Press, 2002) 149-152

knew (or ought to have known) was not conducive to accruing significant economic resources in the long term. In the latter case, the individual clearly decided to focus most of their attention on achieving just that end. So long as the background resources which conditioned the contexts within which they made such choices are equal, Dworkin would say any inequity of resources that results from their career paths is justifiable.[140]

There is a great deal to be said for this argument, and as mentioned I will draw on it heavily very shortly. None the less, I believe that Dworkin's focus on resources is misguided. Like goods, resources are too abstract a medium to adequately ensure that all individuals have equal opportunity to make the same morally significant choices.[141] A focus on capabilities broadens individualism beyond just looking at each person's private resources. One must not look at individuals as merely atomic units while recognizing that the socio-historical boundaries within which we live matter. Focusing on achieving an equality of capabilities helps to further an individualistic approach to egalitarianism by accounting for this dimension of human life and leads us to look at what people are capable of in the actual socio-historical boundaries they find themselves in.

Arguing for an equality of capabilities for moral reasons also has the virtue of considering the individual in their particularity, along with the socio-historical boundaries within which they live, while being agnostic on outcomes. The focus on outcomes is sometimes known as the argument for securing equality of welfare. I believe such a focus on outcomes would be disadvantageous. It abstracts away from individuals in their particularity, and the choices they

[140] Dworkin, *Sovereign Virtue*, 65-120.

make over which life goals to pursue. By attempting to ensure all individuals enjoy an equal level of flourishing regardless of their choices, the welfare egalitarian treats them from the standpoint of impartial justice that none the less fails to recognize the meaningful differences between them. This has moral consequences since I believe it infringes the dignity of individuals. Dignity flows from people's capacity to define themselves by redefining the contexts within which they exist. Equality of welfare, by attempting to eliminate the consequences and benefits individuals might accrue from their morally significant choices, would significantly hamper the capacity of individuals to live dignified lives because it would render the pursuit of different life goals an instrumentally meaningless pursuit.

But why should we decide to pursue equality of capabilities of the type proposed by Sen and Nussbaum at all?

Inequalities which emerge from morally arbitrary causes cannot be justified and therefore should not impose constraints on the capabilities of individuals. Inequalities in the capabilities of individuals can only be justified by looking at two interrelated questions. These are: 1) the competence of individuals, and 2) what they deserve from a moral standpoint. The first involves us asking what moral choices individuals were capable of making, and the second what they deserve as a result of those choices. Unpacking these two questions will help us understand where inequalities can be justified.

Competence refers to what an individual was and is capable of doing within a given socio-economic system.[142] It represents the aggregate of all an individual's capabilities

[142] I distinguish between what an individual was and what they are actually capable of doing because a substantive approach to justice must go beyond simply looking at how competent an individual is at any present moment. If one did so, then the likely, and spurious, conclusion would be that those who are well off likely deserve to be there on the basis of their markedly superior credentials.

considered from the standpoint of substantive justice. A substantive approach to equality must ask what background conditions enable individuals to develop their capabilities and become competent in the first place?[143] Are an individual's capabilities the result of their morally significant choices? Or were an individual's capabilities fostered by circumstances beyond their control, which in turn implies that they should be subject to moral scrutiny?

These questions are significant since those capabilities which become highly developed or under-developed due to morally arbitrary circumstance do not accurately reflect a person's potential to become competent based on their choices. An individual who grew up within a wealthy family had opportunities to foster their capabilities and become competent that were not available to all in each socio-economic system. At the other extreme, an individual who grew up in a poor and racialized family would not likely have the same opportunities to foster their capabilities and become competent to the same degree as his peer in the wealthy family. This has tremendous bearing on the question of dessert: what are people owed and what do they owe to others?

The dessert of individuals has historically been assessed in a manner which abstracts from the question of competence. The liberty oriented conception of agency, for example, assumes that, so long as there are no external constraints on one's actions, that all are equally capable of becoming competent within a given socio-economic context.[144] The rather specious

[143] See Rawls, *Theory* and Dworkin, *Sovereign Virtue*

[144] Very few modern classical liberals share this view. Hayek and Friedman, for instance, both reject the argument that the market system can be justified because it allocates resources fairly. See F.A Hayek. *Law, Legislation, and Liberty.* (Chicago, IL: University of Chicago Press, 1978), and F.A Hayek. *The Road to Serfdom: The Definitive Edition.* (Chicago, IL: The University of Chicago Press, 2007), and Milton Friedman. *Capitalism and Agency: Fortieth Anniversary Edition.* (Chicago, IL: University of Chicago Press, 2002). Both rely on the argument that the free market {with some help}, whatever its equitability, none the less improves the aggregate welfare of the vast majority of people. Nozick's view runs a great deal deeper. He maintains that the question of dessert is misconceived. This is because he believes that whether individuals deserve the resources they receive in market conditions and whether they are entitled to them are different questions. While Wilt Chamberlain might not morally

empirics aside, I will demonstrate later that this conception of agency is not simply undesirable, but cannot pass philosophical muster at the metaphysical level. I will argue that people's agency always exists potentially; one must foster those expressive capabilities which enable individuals to be authors of their own lives before one can speak of substantial agency at a moral level. On this basis, individuals should not be penalized for not having the capabilities to make certain choices which might have benefited them if their overall lack of competence resulted from morally arbitrary circumstances. They should also not be rewarded for having capabilities they would have allowed to languish if not for a disproportionate volume of resources committed to making them competent, often from an early age.

The background competence of individuals must be equal before one can speak meaningfully of a fair competition which allocates dessert in a just manner. A just distribution of developed human capabilities would reflect only the morally significant choices of those who participate in each socio-economic context. The dessert of individuals can only be accurately determined by limiting or outright eliminating those morally arbitrary circumstances which advantage some and disadvantage others in the development and enjoyment of their human capabilities. In other words, dessert can only be accurately determined when all individuals are as equally competent as possible in terms of their relative starting position within a given socio-economic framework defined by processes of production, exchange, and distribution. A society which wished to respect the dignity of its citizens would value them equally and not permit the

deserve his millions, Nozick none the less believes he is entitled to them because they were acquired through non-coercive transactions. See Robert Nozick. *Anarchy, State, and Utopia.* (New York, NY: Basic Books, 1974)

existence of such unjustifiable inequalities. It would ensure that all individuals possessed equal capabilities except where inequalities flow from their morally significant choices.

If this were achieved, then the inequalities of outcome which result from private transactions between individuals could subsequently be justified since they resulted from the morally significant choices they made. The person who decides to become a bohemian artist would have no claim against the wealth of an engineer if both had the equal opportunity to foster the capabilities needed to become competent at pursuing wealth over aesthetic gratification. Wealth, and the advantages which come with it, would be incontrovertibly earned rather than crudely and unfairly passed from generation to generation within a tightly controlled group, as chronicled in Thomas Piketty's modern blockbuster *Capital in the Twenty-First Century*.[145]Such a society would approach realizing the second right. Getting all the way would involve going much further, quite possibly to the point of reforming the economic system to ensure that competition does not discriminate excessively against those who lose, even if participants benefited from possessing equal starting capabilities before engaging in meaningful acts of exchange. But I shall not take up that issue here.[146]

I remain deeply skeptical whether, on the model laid out here, any of the world's current elites could justify their grossly disproportionate wealth by referring exclusively to their morally significant choices made within a fair framework. It would therefore be justifiable to tax

[145] Thomas Piketty. *Capital in the Twenty-First Century*, trans. Arthur Goldhammer. (Cambridge, MA: The Belknap Press of Harvard University Press, 2014), 377-430.

[146] My supervisor, Dr. Lesley Jacobs, has discussed these questions at some length. I do not address either his second or third dimension of fairness here because the second has to do with the question of political economy and the third is related to the allocation of dessert in the event that fair background conditions and procedures are established. He refers to this as "stakes fairness": winners should not be allowed to take all even given a fair competition. This is a very subtle point, but one that also relates back to questions of political economy, since the allocation of dessert is to some extent dependent on the nature of a competition. For that reason I do not take it up here at length. See Lesley Jacobs. *Pursuing Equal Opportunities: The Theory and Practice of Equality*. (Cambridge, UK: Cambridge University Press, 2004)

that wealth and redistribute it through programs designed to equalize the capabilities of those who are significantly less fortunate. This could be done in a plethora of different ways.

Intelligently designed institutions with adequate capacity could be created which foster the capabilities of those who have historically been marginalized. In some instances, the Dworkinian model could be adopted and resources directly given to those who need them so that they may pursue those life ambitions they take to be important.[147] The best way to achieve this, I suspect, would be to institute a minimum guaranteed income which goes well beyond what typically passes for welfare in many OECD states. Such a policy was instituted by South Africa and was recently considered by Switzerland. Finally, policies could be instituted which minimize the impact of morally arbitrary circumstances on the capabilities of individuals who otherwise would be competent. One very simple example would be ensuring that individuals in wheelchairs can navigate spaces of work with ease. Another more complex example would be tailoring a teacher's pedagogical techniques to suit each individual child to ensure that all derive an equal value from their education. This might involve, for instance, showing greater sensitivity to the cultural histories of communities that have historically been marginalized. It would also mean fostering the dignity of professions that are necessary but frequently derided by those who think they do not rise above the menial.

These recommendations are not intended to be exhaustive, merely indicatory. I shall touch on them, and others, in more detail in the Conclusion. For now, I shall move on to discussing how the twinned rights might operate together in rights discourse generally and theorize on what a society organized by them might look like. This involves looking at the

[147]See Dworkin, *Sovereign Virtue*, 237-284.

jurisgenerative nature of rights in general and how law can help the twinned rights specifically.[148]

5) The Twinned Rights in Tandem

Operating together, the twinned rights of democratic authorship and the equality of human capabilities constitute and ideal which I argue all states should strive for. But this does not imply that there is only one way to realize the two rights. The argument for the twinned rights stems from the existential priority my model places on self-authorship, both individual and social, which itself stems from a deeper claim about the boundary transcending power of human consciousness. This is to say that there are many ways the ideal of the twinned rights could and should be realized; indeed, if my metaphysical claim is correct there might be a potentially infinite number of ways. This is especially true along the dimension of the egalitarian good. Here, democratic communities must not only choose whether my conception of quality is what they wish to realize, they must decide how they might wish to achieve it.

Individuals who exist within diverse socio-historical boundaries would undoubtedly prioritize some features of my argument over others, both for principled and pragmatic reasons. Ensuring an equality of expressive capabilities would enable individuals to be able to become authors of their own lives in a political system which respected their dignity through treating them as of equal value. However, expressive capabilities themselves are likely to be understood in radically different ways across various cultures. While my model undoubtedly places the

[148] Here I follow Benhabib again. See Seyla Benhabib. *Dignity in Adversity: Human Rights in Troubled Times.* (Cambridge, MA: Polity Press, 2011), 15.

individual at the moral center, and there are a potentially infinite number of ways individuality might express itself, this will always take place within pre-established socio-historical boundaries. Individuals define themselves in different ways by redefining the same socio-historical boundaries within which they exist. Given this, it is extremely likely that individuals from different cultures would choose to give more weight to certain forms of expression than others, and concurrently, would choose to maximize different capabilities which enable the employment of expressive capabilities appropriate in such contexts. Or, more simply, they may decide to prioritize fostering the more basic capabilities, such as those of bodily health and agency of thought, before committing resources to foster those capabilities which are almost or equally important but less immediately pressing. Such decisions cannot be made theoretically, even if theory might offer some hermeneutic guidance. They must be left to those who know and understand themselves and the boundaries within which they exist.

This seemingly relativistic claim might appear at odds with the universalistic pretensions that have pervaded the rest of this piece, but should not be understood that way. It is not a concession to pragmatic reality, but rather testifies to the dignified nature of individualistic self-authorship. If people are empowered to live authentically by becoming authors of their lives, then they will invariably decide to make decisions that a theorist might eschew. Increasing the capacity of individuals to make such choices, far from posing a problem for my theory, would only testify to the expansion of human dignity in the world. The crucial issue is not whether people should make decisions a theory will preclude; but what (if any) limitations should be imposed on the employment of human expressive capabilities. This is where rights discourse becomes key.

In Chapter One I argued that rights can be best understood as claims to respect our dignity by defining the conditions and actions of human life which we would universalize. Rights are more than simply aspirational moral concepts however; they are jurisgenerative. They posit moral obligations of states to realize the moral concepts concretely by enshrining them within law. This has important consequences when discussing the relativistic thrust of the twinned rights. Rights not only impose positive obligations on states, but negative limitations on citizens. Actions which could not be "universalizable" along certain lines of reasoning can be prohibited since they would become inconsistent with the rights of others. To put it in Kantian language, such actions would involve treating others as means to an end.[149]

The negative restrictions imposed on citizens dynamically relate to the positive obligations imposed on states by establishing the acceptable parameters within which human expressive capabilities are to be realized and amplified. Within these parameters, a just state would do everything it could to substantiate and amplify the dignity of its citizens. It could achieve this through democratizing legal-political institutions and securing the fair equality of human capabilities. On the other hand, it must enforce strict limitations on those activities which would infringe on the rights of others. But this imposes a tension for the democratic dimension of my project. The argument for a right to egalitarianism of human capabilities can be easily qualified by arguing that it must be chosen by individuals engaging in processes of democratic deliberation. Suggesting that the rights of others must be protected from the whims, or even at times the agreed upon intent, of a democratic majority, poses a more substantial conflict of principle. Mill has offered a way out of this by pointing out that a true democracy must reflect

[149] See Kant, *Groundwork*

the interests of all its members.[150] But this does little to clarify whether a strict boundary can be drawn between democratic right and the rights of individuals against the will of the *demos*.

The answer, I believe, lies in relating the concept of democracy back to that of dignified self-authorship. Rights which enable self-authorship and the right of a democratic will should not be regarded as separated. They should be seen as two connected ways human dignity is realized and amplified. Centering agency on dignity would significantly ease the tension between the concept of democracy and individual self-authorship. This would entail drawing deeper links between liberal individualism and democratic will. Rather than seeing them as operating in tension, we must understand both as flowing from a shared commitment to respecting human dignity, manifested by granting people the ability to realize and amplify their expressive capabilities. Legal and political institutions which realize the twinned rights will have adequately respected and amplified human dignity and accorded all citizens equal value.

Conclusion to Chapter Two

This Chapter linked my dignity oriented account of human flourishing to an argument for realizing two rights. The first is a right for citizens to be the authors of the politico-legal institutions which govern them, and the laws which flow from these. The second is a right for individuals to have equal expressive capabilities except where inequalities flow from their morally significant choices. To unpack the value of these rights, I started by juxtaposing the conception of self-authorship against those offered by existentialists and communitarians. I

[150] See John Stuart Mill "Considerations on Representative Government" in *On Liberty and Other Essays*, ed. John Gray. (Oxford, UK: Oxford University Press, 2008), 269-275.

defended my account of self-authorship as being the capacity of individuals to define themselves through redefining the boundaries within which they exist. To the extent we are able to do this, we can be said to have lived dignified lives. The remainder of the Chapter was taken up with defending why the system established by realizing the twinned rights would be best suited to amplifying human dignity.

In the next Chapter I will deepen my argument for this account further by linking it to a conception of agency which stresses its boundary transcending power. Later, I will juxtapose this account of agency against the alternative conceptions offered by the liberal and post-modern conceptions.

Chapter Three:
Human Agency as the Transcendence of Socio-Historical Boundaries

Introduction

In this Chapter, I will deepen my argument of self-authorship by linking it to an account of agency. I will argue that the human capacity for agency lies in the power of consciousness to transcend the socio-historical boundaries within which we exist. I then go on to ground this argument through the example of Chomsky's theory of generative grammar, which makes related but narrower claims about the semantic novelty of most human statements. I characterize the creative capacity to innovate using human language as a highly important and indicatory expressive capability. Finally, I conclude by contrasting my conception of agency with the rival liberty oriented and post-modern traditions.

1) Potentiality, Agency, and Expressive Capabilities

"If the doors of perception were cleansed everything would appear to man as it is, infinite." Blake

In this Chapter I hope to demonstrate that developments in meta-mathematics and linguistic theory provides material for developing a conception of agency that avoids the limitations of both the liberty oriented and post-modern conceptions. These inter-disciplinary developments were predicated on Georg Cantor's discovery that one can draw an analytical distinction between potential and absolute infinity. I claim that agency flows from individuals having a potentially infinite capacity to transcend the socio-historical boundaries within which they exist. One of the most important boundary transcending expressive capabilities is our capacity to organically generate and creatively develop a language. This is because language

involves, as Humboldt claimed, the infinite use of finite means.[151] Human beings deploy what is initially a quantifiably limited vocabulary to engage in an unlimited number of different statements. This capacity is amongst our most important expressive capabilities.

The distinction between potential and absolute infinity is integral to understanding some of these arguments. Strangely, our capacity to analyze infinity in an analytically consistent manner is uniquely modern. Many of the great philosophers,[152] scientists, and mathematicians who considered the issue of the infinite, especially as it related to metaphysical questions, came away believing that the issue simply could not be approached in a rigorous way.[153] Some protested against even trying to do so. For instance, at the beginning of the 19th century the great mathematician Carl Gauss claimed he would:

> …protest against using infinite magnitude as something consummated; such a use is never admissible in mathematics. The infinite is only a *façon de parler:* one has in mind limits which ratios approach as closely as desirable, while other ratios may increase indefinitely.[154]

[151] The reference to Humboldt is Chomsky's. See Noam Chomsky. *Language and Politics*. (Oakland, CA: AK Press, 2004), 213

[152] The problem of dealing with the infinite rationally was formulated systematically by Kant. Kant claimed that when "pure" transcendental reason engaged in speculation on important metaphysical questions it would wind up facing antinomies which could not be mediated. Indirectly, many of these antimonies revolve around the problem of infinity; for instance whether the universe could have a beginning in time and space or whether it had existed forever. The problem was that, however sophisticated one's answer to such questions, it was equally possible to develop a contradictory argument that was just as powerful. Kant thus claimed we should forever close the door to speculative metaphysics. This argument, made by modernity's greatest and possibly most ambitious thinker, is quite indicatory.

[153] Hegel is a noticeable exception. See Georg Hegel. *Hegel's Logic: Being Part One of the Encyclopedia of the Philosophical Sciences,* trans. William Wallace. (London, UK: Clarendon Press, 1975), 157-161. One could well draw parallels between his conception of a spurious or "bad" infinite which is merely an endless succession of quantities and the true Absolute, which on traditional readings is considered both all-encompassing and complete in itself. This reading has notably been challenged by recent authors such as Zizek. Zizek maintains that Hegel's philosophy highlights the ontological incompleteness of reality, and the way in which a subject often reconciles himself to this wound at the centre of reality by accepting the various ideologies presented by the cultural products of modern capitalism. See Slavoj Zizek. *Less than Nothing: Hegel and the Shadow of Dialectical Materialism.* (London, UK: Verso Press, 2012), 359-417.

[154] John. D. Barrow *New Theories of Everything.* (New York, NY: Oxford University Press, 2007), 46

Despite Gauss' early dismissal, the late 19th century would see an explosion of interest in the logic and mathematics of the infinite, culminating in the discoveries of Georg Cantor. I will briefly discuss the potential philosophical ramifications of these discoveries. I will then go on to ground this discussion in Chomsky's theory of generative grammar, which itself is explicitly based on Cantor's mathematical analyses. Chomsky argues that language users can creatively develop a potentially infinite number of novel statements. None the less, the quantity of novel statements one can conceive is limited both by the immanent logic of generative grammar and by the semantic communities of language users. I believe this demonstrates how human beings can possess both an unlimited potential for agency while still operating within given existential and socio-historical boundaries.[155]

Cantor's great discovery was to formulate the distinction between what he referred to as the potential and the absolute infinite. A potentially infinite "number" was a logical quantity which one could demonstrate had no definable limit.[156] None the less, one could paradoxically also establish that there were still larger quantities than that potentially infinite number if it was put into one to one correspondence with another potentially infinite number. An easy example of this would be to contrast the set of all possible prime numbers with the set of all possible real numbers. While both are infinitely large, the latter set none the less contains more members than the former. These paradoxes had long been known to mathematicians, but it was Cantor who

[155] Chomsky occasionally refers to the Kantian boundaries to our understanding, which stem from our biological characteristics. Though not analogous, there are close parallels to my account of existential boundaries.
[156] In his earlier work Cantor preferred to characterize potentially infinite numbers as "transfinite" to avoid confusion. Because the concept of potentiality has a longer history in the philosophical literature I have chosen to use this term instead.

demonstrated how to approach them concretely. In the footnote below, I describe some of his reasoning for the interested reader.[157]

Things become much trickier however, when attempting to define infinite, or "transfinite," numbers. The smallest of these "transfinite" numbers Cantor called Aleph-Zero or N_0. Cantor defined any finite number as u. He then asked us to consider a finite number whose cardinality included all natural numbers $\{v\}$ to which is added a new element e_0 whose union aggregate $(\{v\}, e_0)$ might appear to be equivalent to $\{v\}$. But as Cantor pointed out:

> We can think of this reciprocally univocal correspondence between them: to the element e_0 of the first corresponds the element 1 of the second, and to the element $\{v\}$ of the first corresponds the element $v+1$ of the other...we thus have $N_0+1=N_0$.* But we showed...that $u+1$ is always different from u, and therefore N_0 is not equal to any finite number u.[158]

In this way, Cantor was able to discover the cardinality, or power, of the smallest transfinite number N_0 through a consistent process of logical deduction initiating from pure axioms. However, things became more complicated when he decided to try and multiply and add transfinite numbers to one another. In so doing Cantor discovered that one could produce a transfinite number whose cardinality was, paradoxically, greater than Aleph-Zero. He called this number Aleph One or N_1.[159] Paradoxically, Cantor went on to demonstrate that there can be no

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[157] The example of a set of all prime numbers and a set of all real numbers indicates the all-important distinction Cantor drew between the cardinality and the ordinality of sets. The cardinality of Set 1(Primes between numbers 0-10), for instance, is 4. Two sets are said to have the same cardinality if they have the same number of elements within them. The ordinality of a set, by contrast, is determined by the order of the elements within it. An ordinal number is a "well ordered aggregate" defined by what precedes it. As put by Bertrand Russell, an ordinal number is a "type or class of series, or rather of their generating relations." Finite numbers can be defined as sets which, when defined logically, are those whose cardinality and ordinality are consistent with one another. The cardinality and ordinality of the set which defines the natural number 10, for example, are consistent with one another. They are the elements between 0-10 in ascending order. See Bertrand Russell. *Principles of Mathematics.* (Abingdon: Routledge Press, 2010), 317. See also Mary Tiles. *The Philosophy of Set Theory: An Historical Introduction to Cantor's Paradise.* (Mineola, NY: Dover, 1989)

[158] Georg Cantor, trans. Phillip Jourdain. *Contributions to the Founding of the Theory of Transfinite Numbers.* (Mineola, NY: Dover Press, 1955), 104

[159] This number is the set of all countable numbers; indeed of an infinite quantity of cardinal numbers. But this poses a problem when trying to draw a one to one ordinal correspondence between two cardinality is greater than infinity. Put another way, beyond *N1* it becomes specious to try and draw a one-to-one correspondence between the elements

largest transfinite number whose cardinality is logically definable even though one can develop a logically consistent definition of the smallest transfinite number.[160] This has since become known as the problem of the continuum.

Cantor knew that he was playing around with logical concepts which were paradoxical and, to some mathematicians then and today, even disturbing. How could something that was infinite none-the-less have something that exceeded it? To try and temper this problem, and to relieve the concerns of skeptical (and often very hostile) critics, Cantor drew a qualitative distinction between what he called the potential and the Absolute infinity.[161] To talk about a potential infinity simply involved...

> ...say[ing] that there are infinitely many objects of a certain kind ('infinitely' being taken in the syncategorematic sense) simply means that given any finite number of these objects there will be some larger number of them.[162]

In this way Cantor hoped to ground the logic of the potential infinity in the more palatable claim that it was of a unique type finitude. The potential infinity was a magnitude greater than any finite number that could be thought.[163]

Through these creative discoveries, a problem which once appeared insolvable within the philosophical parameters was given new life and sophistication. It has now become possible to speak about the infinite in highly exact terms that have analytical power well beyond what was

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of various transfinite sets as their cardinality reaches greater types of infinities without determining whether there is a highest transfinite number as determined by the ordinality of its members.

[160] The Absolute infinite, which he denoted with the symbol **Ω**, Cantor associated with God.

[161] Some of this history, and Cantor's rivalry with Leopold Kronecker, is recounted in David Foster Wallace's book on infinity. See David Foster Wallace. *Everything and More: A Compact History of Infinity*. (New York, NY: Norton, 2003), 170.

[162] Jane Ignacio. "The Role of the Absolute Infinite in Cantor's Conception of Set." *Erkenntnis* 42 (1995): 383.

[163] By contrast, Cantor regarded the Absolute infinity as a unity rather than just another magnitude and denoted it with the Omega symbol **Ω**. A deeply religious man, he came to associate it very closely with a personalized God.

available to previous philosophers. Cantor's theory provides a way of understanding the non-Absolute infinite as a potentiality that is none the less limited by certain quantifiable boundaries; the most notable of which is that no potentially infinite set has been shown to include all necessary cardinal values within it. Here, I am unpacking this in a different way. Cantor's mathematics provides us with a model for understanding how human beings can have a potentially infinite capacity for agency that none-the-less operates within the existential and socio-historical boundaries. [164]

What Cantor's mathematics exemplifies is a way of thinking through the deepest problems of the infinite in a manner that is not tied to what is empirically conceivable. The potential infinite is understood not by an appeal to empirical phenomena, but instead by clearly demonstrating the logical relationships that exist between complex mathematical propositions involving the members of sets. Whether these relationships are created or discovered, as indicated, I shall not take up here. What is clear is that Cantor's discoveries deepened the human understanding of infinity while raising a host of new problems which we were unaware of before. But more than that, Cantor's discoveries indicate that one can creatively go beyond the boundaries established by what is empirically conceivable. This creativity suggests that our capacity for agency is itself potentially infinite.

[164] Later in this Chapter, I will argue that Cantor's theory offers us important conceptual tools needed to define how human beings possess a potentially infinite capacity for agency. The most prominent example is our creative capacity to engage in novel statements. The defining feature of agency is the potentially infinite capacity to transcend these boundaries through the employment of our expressive capabilities. By contrast, I will later show how the liberty oriented and post-modern conceptions of agency rest upon claims that agency is fundamentally limited.

2) Implications for Theories of Human Agency

The paradox of our existence is to be a potentially infinite being within a universe that is none-the-less absolutely greater. We are capable of defining ourselves by redefining the world in which we exist by transforming our human relationships within it. By engaging in this self-authorship, the false necessity of what previously seemed an inalterable fact of human life will become apparent.[165] I believe that this potentially infinite capacity is what defines our agency.[166] Individuals recognize their potentially infinite capacity for agency when they become aware that even the immensity of the world is exceeded by our capacity to transcend it and establish new worlds. Indeed, we already do this every day through the invention and employment of novel statements that can be understood by almost all human beings who share our language.

The potentially infinite capacity for agency accounts for how human beings can transcend the false necessity of finite world-views and the legal and political institutions which both reflect and help constitute them. The hope is that as our agency is deepened through realizing and amplifying our expressive capabilities we might become authors of an authentic self; a self which is established through concrete choices made, rather than determined by the socio-historical boundaries within which one comes to exist. This position is very close to a transcendental claim. However, unlike Kant, I do not understand agency to exist in some absolute sense *a priori*. While all human beings possess expressive capabilities *in potentia*, many do not employ or amplify them. So while the first step to living an authentic life may well

[165] See Unger. *Politics: Volume One*

[166] This dialectical understanding of a reflective consciousness is basically Kierkegaardian; it was articulated in his *The Sickness Unto Death* through a critique of Hegelian metaphysics: "For it is not the case, as the philosophers would explain it, that necessity is a unity of possibility and actuality. No, actuality is the unity of possibility and necessity." See Soren Kierkegaard. *The Sickness Unto Death*, trans. Alastair Hanney (London, UK: Penguin Books, 2008), 40

be to recognize the false necessity of socio-historical boundaries and to assume responsibility for their transformation through the employment and amplification of our expressive capabilities, this recognition would be meaningless unless one also employs expressive capabilities to conceive and realize alternative ways of being-in-the world.[167]

There are two important features of my approach to agency worth noting. The first is that my approach to agency elides easy classification as either a transcendental or an empirical account. Indeed, one of its most important features is stressing the relationship between human beings' transcendent potential and their actual expressive capabilities in the most concrete sense. While my approach stresses that all individuals possess a potentially infinite capacity to introduce novelty into the world, this transcendent capacity can be realized to greater or lesser degrees depending on many empirical factors.

As will be detailed more extensively in later Chapters, this positions my approach between the liberty oriented and post-modern conceptions of agency. The former stresses the innate capacity of all individuals to live free lives and links this to a normative argument for the liberal state. The latter stresses that an individual's agency is limited by the socio-historical contexts which determine the form and substance of that individual's subjectivity within a hegemonic social form. Both positions have their virtues, but as I will detail later, the liberty oriented conception places too much emphasis on agency as a purely abstract power, while the post-modern conception is unable to develop any robust conception of agency which goes beyond the critique of contemporary socio-historical contexts and their antecedents. The

[167] To employ one's expressive capabilities concretely it is not adequate to merely acknowledge that they exist formally. Here I think that the arguments of many post-modern theorists can be very helpful. The formal recognition of one's expressive capabilities in law and politics is inadequate to realizing agency. For our agency to be realized, human expressive capabilities must be substantively amplified by the emancipatory transformation of the socio-historical contexts within which individuals exist and interact.

potentially infinite model of agency developed in this Chapter attempts, appropriately enough, to avoid both limitations.

This brings me to the second important feature of my approach to agency. One of the ways the potentially infinite approach to agency avoids the limitations of the liberty oriented and post-modern conceptions is its normative dimension. The potentially infinite approach to agency is linked to a strong normative argument for the necessity of amplifying human dignity to the extent possible. As I indicated in Chapter One, I believe that our dignity is amplified to the extent we can become agents capable of defining ourselves. This does not imply that dignity and agency should be collapsed together. My argument is that agency is a raw potential that is given normative priority through being linked to a dignitarian conception of rights, democracy, and law.

My approach to agency thus has both a descriptive and a normative dimension. It is possible to accept the former without agreeing with the latter. However, this would underestimate the link between the descriptive and normative dimensions, which is perhaps best captured by the emphasis I place on novelty. Amongst the most recognizably and distinctively human activities is to create the new, and to texture our lives by doing so. While there are other human needs, such as for stability and community, I believe that the capacity to conceive and bring about novelty is what most defines us and wherein our dignity lies.

Indeed, this capacity is so much a part of our nature that many of us do not even recognize that we use it every day in thousands of unique ways. One of the most obvious is through the creation of novel statements. To explain this further I will juxtapose Chomsky's theory of language with the popular discursive alternative. I will then engage with Chomsky's own complex position on semantic novelty.

3) The Discursive Approach to Language and the False Necessity of Socio-Historical Boundaries

Language has long been understood as having an important link to human agency. As far back as the 5th century Saint Augustine famously associated the free exercise of his will with his ability to name and understand the objects around him.

> This I remember; and have since observed how I learned to speak. It was not that my elders taught me words (as, soon after, other learning) in any set method; but I, longing by cries and broken accents and various motions of my limbs to express my thoughts, that so I might have my will, and yet unable to express all that I willed, did myself, by the understanding which Thou, my God, gavest me, practice the sounds in my memory. When they named anything, and as they spoke, turned towards it, I saw and remembered that they called what they would point out, by the same name they uttered. And thus by constantly hearing words, as they occurred in various sentences, I collected gradually for what they stood; and having broken in my mouth to these signs, I thereby gave utterance to my will.[168]

Many figures in modern philosophy also highlighted the importance of human language in conceptualizing the powers of both consciousness and human agency.[169] For instance, Rousseau famously asks us to:

> Consider how many ideas we owe to the use of speech; how much grammar trains and facilitates the operations of the mind; and let us think of the inconceivable difficulties and the infinite time which the first invention of languages must have cost. Join these reflections to the preceding ones, and we shall judge how many thousands of centuries would have been necessary to develop successively in the human mind the operations of which it was capable.[170]

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[168] Saint Augustine. *Confessions of a Sinner,* trans. Edward Pusey (London, UK: Duncan Baird Publisher, 2006), 15

[169] Hume is a good example of a philosopher who dealt seriously with language, and related it distinctly to our power to draw rational conclusions about the world. For instance, he echoes Augustine in saying "When we have found a resemblance among several objects, that often occur to us, we apply the same name to all of them, whatever difference we may observe in the degrees of their quantity and quality, and whatever other differences may appear among them. After we have acquir'd a custom of this kind, the hearing of that name revives the idea of these objects, and makes the imagination conceive it with all its particular circumstances and proportions." See David Hume. *A Treatise of Human Nature.* (Mineola, NY: Dover, 2003), 15.

[170] Jean-Jacques Rousseau. *The First and Second Discourses*, trans. Roger D. Masters and Judith R. Masters (Boston, MA: Bedford-St. Martins, 1964), 119-120

Despite these important and suggestive observations, the study of language truly assumed pride of place in 20th century philosophy. Since then there have been many exciting developments in the study of language which can help us look at the concept of agency with greater clarity (and even a degree of scientific rigour).[171]

One tradition that has emerged is the discursive approach to the study of language, which stresses the impact of historical discourses in determining the semantic meaning of statements. While important, I maintain that the discursive account is limited by according too much emphasis to these historical discourses at the expense of the creative role individuals play in developing the semantic horizons of their language. Put another way, the discursive account of language ascribes the semantic socio-historical boundaries determined by historical communities too much power in determining the meaning of words, while ignoring how individuals possess potentially infinite freedom to develop novel statements within these same boundaries. This latter point is central to Chomsky's account of the development and use of language, which I will discuss in the next section.

Many post-modern accounts of subjectivity, and (often) by extension agency, rest on a discursive approach to language.[172] The discursive approach, pioneered most famously by the early Foucault in the *Order of Things,* and more prominently in his *Archaeology of Knowledge,* stresses the social contexts which lead to the establishment of a language in which various systems of knowledge congeal. Like the pragmatists Foucault's discursive approach to language radically eschewed the positivism which colored early 20th century philosophies of language.

[171] Chomsky often refers to the study of language as one of the few examples of human cognition we can analyze directly.

[172] A good example would be the model of legal consciousness offered in the 90s by Ewick and Silbey. See Patricia Ewick and Susan Silbey. "Conformity, Contestation, and Resistance: An Account of Legal Consciousness." *New England Law Review*, 26, (1992): 741. Silbey has noticeably moved away from this conception since then.

He stressed that language did not simply represent, or "picture" in Wittgenstein's vocabulary, the "real" world of facts or things.[173] Language played an active role in establishing what subjects would take as the objective parameters of the world. These parameters were often established before we were born; they were the "archive" of meanings within which we came to exist. The "archives" of meaning through which we understood our lives were very often established by systems of knowledge-power which used knowledge to crystallize the realm of possibilities opened to human beings within various epochs. The unconscious archive establishes into which "ennunciative field" a given statement, say a statement of fact, will fall, by defining how its apparent content is to be objectified and ordered.[174]

> The statement is not a direct projection onto the plane of language of a particular situation or a group of representations. It is not simply the manipulation by a speaking subject of a number of elements and linguistic rules. At the very outset, from the very root, the statement is divided up into an enunciative field in which it has a place and a status, which arranges for it its possible relations with the past and which opens up for it a possible future.[175]

Occasionally a connection will be drawn between enunciative fields. This will most often take place when the themes, methods, inner logics or some other quality is consistent between the fields. In these cases the enunciative fields will combine to form a discourse, for instance the discourse around madness, which allows individuals to interpret data and further statements in a manner consistent with the inner discursive logic around the subject matter. Successful discourses are those which can maintain their internal consistency in the face of contradictions.

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[173] The so called picture theory of language was developed by Wittgenstein very early on. See Ludwig Wittgenstein. *Tractatus-Logico-Philosophicus,* trans. D.F Pear and B.F McGuinness (London, UK: Routledge, 2002)
[174] Michel Foucault. *The Archaeology of Knowledge,* trans. A.M Sheridan Smith (London and New York: Routledge, 2007), 99-118. Also pertinent is his earlier text on the human sciences. See Michel Foucault. *The Order of Things. An Archaeology of the Human Sciences.* (London, UK: Routledge Press, 2002), 330-374.
[175] Foucault, *Archaeology,* 111

I take Foucault's analyses to be the exemplar of the post-modern approach to language. It also accounts, quite nicely, for the post-modern understanding of agency, which I will outline in subsequent chapters. Here, discourses are taken as transcendent but empirical phenomena that define the limits of our subjectivity by establishing the limits of our conceivable world. Though Foucault would later deepen his brilliant accounts of subject formation by including a genealogical dimension to his project, he would never stray from its basic philosophical connotations. The subject, and the subject's language, are equally taken to be phenomena which are determined by external social forces. Their capacity for agency is therefore extremely limited.

Juxtaposing the discursive account of language with Chomsky's account of the development and use of language reveals how the latter better highlights the nature of human agency. The basic flaw with the discursive approach to language is revealed when attempting to define human agency. By focusing on how the speaker communities through which semantic norms governing language are dominated by a "micro-physics" of power-knowledge, they have neglected two key issues.[176]

The first issue is empirical. The discursive approach to language cannot give an account of the "communicative" functions of language emphasized by pragmatists such as Rorty, Price, and especially Habermas.[177] Foucault's account of discourses is totalizing. He cannot conceive how any discourse could evolve other than by simply adapting itself to the presence of thematic or empirical contradictions. But discourses are not set in stone; according to Foucault's own

[176] The classic exposition of the "micro-physics of power" at work in modern society is Michel Foucault. *Discipline and Punish: The Birth of the Prison,* trans. Alan Sheridan (New York, NY: Vintage Books, 1975), 298-306.
[177] See Richard Rorty. "Ethics Without Principles," in *Philosophy and Social Hope.* (London, UK: Penguin Books, 1999), 72-90, Habermas, *Truth and Justification* and Huw Price. *Naturalism Without Mirrors.* (New York, NY: Oxford University Press, 2011) among other works by these authors.

account they react and change and can even be discarded. Why this happens, he cannot say beyond pointing out how it occurred historically. But that discourses changed would be no surprise to pragmatists, who claim that the communicative functions of language are predicated on soft, but universal, conditions for establishing the validity of statements: such as truth condition about statements of empirical fact. This accounts for why, when confronted with contradictions, discourses may evolve or be discarded depending on how well they can assimilate new data established by appeal to truth conditions. If they cannot, discourses may well be discarded as incoherent or no longer valuable. This is why Robert Brandom, in a Hegelian vein, refers to the role of logic as an "organ of semantic" self-consciousness.[178] While important, for reasons of space I shall not address this claim at length here.

The second criticism of the discursive account of language is more important because it relates directly to my account of a human being's potentially infinite capacity for agency. Discursive accounts of language fail to explain how any language could emerge at all.[179] To explain the development of language generally, it is not enough to simply adopt a historical perspective since such only illustrates the fact of language use rather than providing a deep theory of how and why the language faculty develops in human consciousness. In the next Chapter, I will draw on Chomsky's account to illustrate how our creative capacities to invent novel statements highlights how languages grow and evolve. The creative aspect of language can also be conceptually linked to a human being's potentially infinite capacity for agency.

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[178] See Robert Brandom. "Intentionality and Language: A Normative, Pragmatist, Inferentialist Approach." In *The Cambridge Handbook of Linguistic Anthropology*, ed. N.J Enfield, Paul Kockelman, Jack Sidnell. (Cambridge, UK: Cambridge University Press, 2014), 347-364.

[179] Zizek makes this point against Foucault in favour of Derrida. Slavoj Zizek. "*Cogito*, Madness, and Religion: Derrida, Foucault and Then Lacan" in *Theology After Lacan: The Passion for the Real*, edited by Creston Davis, Marcus Pound, and Clayton Crockett. (New York, NY: Wipf and Stock Published, 2014)

4) Language as an Expressive Capability: Universal Grammar and Semantic Novelty

In the following Section, I will detail the essential points of Chomsky's theory of linguistics, and its relationship to my conception of human agency. Because of its substantial revisions and improvements over time, I shall be discussing the broad sweep of Chomsky's theoretical claims, rather than getting into the details of his more nuanced arguments on the finer points of linguistic theory.

Chomsky illuminatingly stresses a critique of empiricism throughout the development of his rationalist approach to linguistics. He argues that the discursive claim that a given language develops in a subject purely from social and material inputs is to argue that if one placed a baby, a stone, and a tomato in London they would all be equally likely to learn English.[180][181] What distinguishes a human being, and its consciousness, from these simpler objects is that consciousness possesses a unique capacity to generate a language and determine the grammatical rules for its use. Referencing Humboldt, Chomsky claims:

> Applying a rationalist view to the special case of language learning, Humboldt (1836) concludes that one cannot really teach language but can only present the conditions under which it will develop spontaneously in the mind in its own way. Thus the form of language, the schema for its grammar, is to a large extent given, though it will not be available for use without appropriate experience to set the language forming processes into operation. Like Leibniz, he reiterates the Platonistic view that, for the individual, learning is largely a matter of Wiedererzeugung, that is, of drawing out what is innate in the mind. This view contrasts sharply with the empiricist notion (the prevailing modern view) that language is essentially an adventitious construct, taught by 'conditioning' (as would be maintained, for example, by Skinner or Quine).[182]

[180] Chomsky refers to his opponents as "empiricists" in the tradition of Locke, Hume, and Skinner.
[181] At some points he refers to the historical empiricist account of language acquisition as "environmentalist." See Noam Chomsky. *Language and Problems of Knowledge: The Manangua Lectures.* (Boston, MA: MIT Press, 1988), 163-164
[182] Noam Chomsky. *Selected Readings on Transformational Theory.* (London, UK: Dover Books, 2009), 135

Individuals develop linguistic capacity through exposure to the language of a given community, most often the language of their immediate peers.

Chomsky has often approvingly cited Humboldt's claim that language involves the "infinite use of finite means."[183] To understand how this is so, one must momentarily turn back to Cantor's logical argument about the potential infinite, which formed the basis for Chomsky's own investigations into the logical structure of what he later referred to as generative grammar. Chomsky relied on Cantor's discoveries to demonstrate how a language could both be indefinitely capable of new growth while at the same time never reaching a point where one could speak of a set of all possible statements. It also helped explain how individuals can continue to deploy language creatively even in semantic communities with long histories or limited members.

Chomsky's discovery constitutes the corollary of Cantor's own pioneering discoveries. The logic of Cantorian mathematics was foundational to Chomsky's project. Chomsky argued that empiricist theories of language could not account for how languages grow and evolve; how novelty can emerge in other words. Chomsky argued that languages change because most statements, (excepting certain colloquialisms such as hello and goodbye), are semantically novel. This means that they have never been made by a speaker before. Chomsky claims that the semantic novelty of most statements results from what he calls the "creative aspect of language." The creative aspect of a language demonstrates how individuals continuously invent and play new "games" with their semantic inheritances.[184]

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[183] Chomsky references Humboldt's quote in several different works. See Chomsky. *Language,* 213

[184] Chomsky's reference to games appears to largely be colloquial. I refer to game in Wittgenstein's sense of the word. For instance, he famously compared language use to a chess game. See Ludwig Wittgenstein. *Philosophical Investigations*, trans. G.E.M Anscombe, P.M.S Hacker, Joachim Schulte. (Oxford, UK: Blackwell Publishing, 2001), 31.

What makes Chomsky's theory of generative linguistics interesting and novel is that it updates the rationalist thesis that consciousness cannot be reduced to a collection of mechanical processes. But where previous rationalist arguments were purely philosophical, Chomsky's are empirically testable. Where previous rationalist accounts of consciousness maintained some form of mind-body dualism, Chomsky's argument is that the syntactic structures out of which a culturally specific grammar is generated are universal across the human species and can be explained biologically. These syntactic structures which establish the boundaries for all culturally specific grammars Chomsky calls the rules of "universal grammar", which is above all an account of how the linguistic competences of human beings emerge generally. It accounts secondarily for the particularities of an individual's specific linguistic performances.[185] As he puts it in *The Minimalist Program:*

> The human brain provides an array of capacities that enter into use and understanding of language (the language faculty); these seem to be in good part specialized for the function and a common human endowment over a very wide range of circumstances and conditions. One component of the language faculty is a generative procedure…that generates structural descriptions, including those commonly called 'semantic' and 'phonetic." These…are the expressions of the language. The theory of a particular language is its grammar. The theory of languages and the expressions they generate is Universal grammar.[186]

The rules of universal grammar emerge because of the engagement of the linguistic organ with the statements of a given semantic community. These rules establish clear boundaries on what constitutes meaning as consciousness is exposed to one of various semantic cultures throughout the formative periods of childhood. Our consciousness, Chomsky claims, does this so easily that a language can be said to "grow" in an infant like any other organ of its

[185] Noam Chomsky. *On Language: Chomsky's Classic Works Language and Responsibility* and *Reflections on Language.* (New York, NY: The New Press, 2007), 66.
[186] Noam Chomsky. *The Minimalist Program: 20th Anniversary Edition.* (Cambridge, MA: The MIT Press, 2015), 153.

body. Different languages, on Chomsky's model, may assume different forms because the rules of universal grammar are sufficient to generate a vast array of different grammars.

Chomsky draws an important disciplinary insight from this conclusion. He claims that, since generative grammar establishes the rules for the development of all languages, the task of linguistics is to discover "the general form of language that underlies each particular realization, each particular natural language."[187] In his *Language and the Problems of Knowledge: The Manangua Lectures*, Chomsky metaphorically describes the process of language development as akin to a central organizer activating a sequence of switches on a board.[188] Though there are a great many options for which switches to turn on, the entire operation assumes a law-like character that can be understood as a vast (potentially infinite) range of logical probabilities. This remarkable claim, unlike previous rationalist arguments which rested purely on philosophical arguments, can be empirically tested. The claim that the basic rules of language are universal could be falsified if one could present linguists with a human grammar that does not adhere to these apparently *a priori* rules.

At first glance, one might not think any set of logically determined syntactic structures could possibly account for the immense variety of languages one sees across human cultures. Chomsky is sensitive to this claim, and here delivers a decisive twist. It is in fact because all human languages adhere to the common rules of universal grammar that they are capable of generating new syntactic structures that can be understood by other members of a semantic community.[189] Indeed, the transformational rules of universal grammar permit the formation of a

[187] Chomsky, *On Language*, 7
[188] See Chomsky, *Language*, 133-135
[189] The relationship between syntax and semantics in Chomsky's account of linguistics remains dynamic. I shall not discuss it here.

potentially infinite number of novel semantic statements, though the statements produced within must all adhere to the rules of syntax. In the same way, the socio-historical boundaries within which we exist can be indefinitely transformed by the application of a human being's expressive capabilities.

Here, Chomsky's debt to Cantor is quite explicit.[190] When recounting the history of universal grammar, he cites the discoveries in set theory and early 20th century mathematics as foundational to developments in the field. It was only with set theory that one could conceive how a potentially infinite system could be derived by logical procedures that established clear boundaries to what could be produced. Like Kant, Chomsky sees this as a positive feature of human consciousness. If consciousness did not impose limitations on our linguistic experiences it is unlikely that structures of adequate complexity could form to generate novel semantic structures in line with transformational rules.[191]

To provide a more concrete example; semantic novelty has shown that most of the non-colloquial statements individuals encounter throughout their life are semantically distinct from all others; they likely cannot be put into a one to one correspondence with any another statement we might have encountered, or indeed that has ever occurred. None the less they remain comprehensible because the structuring rules defining the parameters of all statements are common to us all. Subjects can therefore comprehend the indefinite number of new statements

[190] See Chomsky, *Selected Readings*

[191] The flip side to this is that if we are ever confronted with a language that did not adhere to the rules of universal grammar, we might be unable to understand it at all. At best we would have to decipher it through painstaking processes of scientific evaluation. In an even more Kantian vein, Chomsky argues that his theory might imply that there are fundamental limitations to what humans are able to understand about the empirical world.

they encounter because the rules for their expression are constant and universal, regardless of their semantic content. This is why the statement:

1) Is the man who is tall angry?

would be translatable into all human languages while

2) Is the man who tall is angry?

is grammatically nonsensical. On the other hand Chomsky's famous statement,

3) Colourless green ideas sleep furiously

is semantically nonsensical while being grammatically correct. One can comprehend it while acknowledging it denotes nothing because the term "idea" bears no relationship to colour in our community of speakers.[192] [193]

The novel statements produced in accord with the transformational rules of universal grammar are indicatory of what Chomsky later refers to as the "creative aspect" of language. In his paper "Recent Contributions" he defines the creative aspect of language as follows:

> By this phrase I refer to the ability to produce and interpret new sentences in independence from "stimulus control" – i.e., external stimuli or independently identifiable external states. The normal use of language is "creative" in this sense, as was widely noted in traditional rationalist linguistic theory.[194]

[192] Margaret Drach. "The Creative Aspect of Chomsky's Use of the Notion of Creativity." *The Philosophical Review* 1 (1981)
[193] See Noam Chomsky. *The Architecture of Language.* (New Delhi, India: Oxford India Paperbacks, 2000), Noam Chomsky. *What Kind of Creatures Are We?* (New York, NY: Columbia University Press, 2016) and Chomsky, *Language*, for elaborated accounts of theory of language and its relationship to consciousness.
[194]Noam Chomsky. "Recent Contributions to the Theory of Innate Ideas." *Synthese* 17 (1967): 4.

5) Novelty, Expressive Capabilities, and Agency

The "creative aspect" of language use can be linked to our expressive capabilities as part of a more general conception of agency. Roberto Unger has already taken a pronounced step in this direction by making the connection between a robust conception of agency and Chomskyan linguistics clear. As he puts it in *The Self Awakened*:

> …The Capacity to produce the infinite out of the finite - changes everything, shaping our conscious experience in its entirety. It gives us our power of using limited means to generated unlimited variations in language and thought, to express different contents or meaning through similar formal relations among symbols, and to convey the same contents or meaning through different series of symbols. It results in the most signal trait of our conceptual-intentional experience: our ability endlessly to revise our thoughts by bringing pressure to bear against their presuppositions: an ability we acquire only through our more basic power to generate endless variation and complication. This power in turn informs our sensational-motor experience by allowing us constantly to change the tacit stories with which we infuse our perceptions and guide our movements.[195]

Expressive capabilities are those which human beings employ to define themselves by redefining the contexts within which they live. Our creative capacity to use language, both as an abstract cognitive power and as a concrete entitlement that should be realized and amplified by the political and legal systems within which we exist, provides an ideal example of how this process of re-definition takes place. By employing the creative powers of language every day to bring novel semantic structures into the world we can transcend a socio-historical boundary which once limited us.[196] It is therefore amongst the most important expressive capabilities, but not the only one of great importance. As detailed, those expressive capabilities related to our material capacity for agency are also tremendously important. And as we shall see in the next

[195] See Roberto Unger. *The Self Awakened:* Pragmatism Unbound. (Cambridge, MA: Harvard University Press, 2007), 127

[196] This is especially important given the ideological connotations that can be associated with established semantic formations.

Chapter, they have all too often been undervalued by the excessive focus classical liberal theorists place on liberty.

Through deploying expressive capabilities, agents can define themselves by re-defining the boundaries within which they exist. This is why, to use Unger's terminology, expressive capabilities are our set of "context transcending" powers.[197] Or as he put it more recently:

> Part of consciousness, I earlier remarked, is machine-like: that is to say, modular and formulaic. However, another part of consciousness is an anti-machine. In this second aspect of its life, consciousness can recombine structures and functions in a fashion that is prefigured and enabled, though left unexplained, by the plasticity of the brain. Consciousness exhibits a faculty of recursive infinity: the ability to recombine finite elements - of a natural language, for example, in infinite numbers of ways.[198]

This suggests that agency, as the capacity to bring novelty into the world by redefinition, cannot be understood as an abstract potentiality. One must look at what individuals are actually able to create given both their intrinsic capabilities and the empirical socio-historical boundaries within which they actually live.[199]

There is another connection to Cantor and Chomsky which should be made more explicit. As mentioned before, I do not believe that the expressive capabilities of individuals can ever be fully realized even through an indefinite process of amplification. This, in turn, suggests, that our agency cannot be made unlimited. In other words, our agency is not Absolute, an important clarification which corresponds to Cantor's own distinction between the potential and the Absolute infinite detailed in Section One of this Chapter. The trade off from this is that, because our agency is not Absolute we shall never realize all potentialities and therefore face the prospect of a life without the possibility of redefinition. Novelty, both semantic and otherwise, will

[197] See Unger, Roberto. *Politics Volume One: False Necessity.* (London, UK; Verso Press, 2004) at pg 4
[198] Roberto Unger and Lee Smolin. *The Singular Universe and The Reality of Time.* (Cambridge, UK: Cambridge University Press, 2014), 273
[199] For the most part I will eschew discussing questions related to natural talents except briefly in Chapter 2.

always emerge in the human world.[200] This open ended texture of our existence, and our capacity to change our lot through the employment of expressive capabilities, is the source of human agency. Unfortunately, this agency remains deeply and unnecessarily constrained by many of the various socio-historical boundaries which impose limitations on what many individuals would be able to accomplish were their expressive capabilities amplified to the extent possible. I do not believe such a situation can be justified indefinitely, since it imposes fundamental constraints on our potentially infinite capacity for agency; constraints which not be permitted to stand. This is especially true since many of these constraints are perpetuated and justified through appealing to approaches to agency, and related theories of moral dessert in the distribution of resources and property, which I do not believe can be justified.[201] The most prominent of these is the liberty oriented approach to agency popular amongst classical liberals. Unfortunately, as I shall explore later, the contemporary post-modern alternative to the liberty oriented approach is subject to similar ideological limitations. This highlights the need for a more robust approach to agency such as the one sketched in this, and the previous two, Chapters.

Conclusion to Chapter Three

In this Chapter I have argued that agency stems from the potentially infinite capacity of consciousness to transcend the socio-historical boundaries within which it exists. This capacity enables human beings to develop novel concepts that find expression in our various languages.

[200] There is a temporal dimension to these issues which I do not take up systematically here. None the less there is clearly a relation between the emergence of novelty and the character of time. In a future work, I will attempt to discuss this more systematically. Until then, the reader can refer to my comments in Chapter One about the existential barriers facing the exercise of human agency. These most clearly highlight the direct and individual human relationship to time. The notion of socio-historical barriers is also important when considering the mutability or not of human history as a whole. For an informative account see Unger and Smolin, *The Singular Universe*

[201] I have discussed this at some length in Chapter Two.

This argument was then grounded through an account of Chomsky's theory of universal grammar. I also clarified that, while this power of consciousness may be infinite, it is not therefore without analytically definable limitations which correspond to the distinction I drew between the existential and socio-historical boundaries human beings face when developing the capacity for agency.

In the next two Chapters I will discuss two competing accounts of agency and argue that they cannot provide as rich a model as the model I propose. These two competitors are the liberty oriented and the post-modern accounts of agency.

Chapter Four:
The Liberty Oriented Approach to Agency

Introduction

In the previous Chapters, I argued that we should accept and implement a dignity oriented conception of rights. This was linked to an account of agency that centered on our potentially infinite capacity to transcend the socio-historical boundaries within which we exist and bring novelty into the world. Having run through this abstract material, I will now start to ground my project by engaging in a more directly political discussion, unencumbered by the need to engage in constructive theorizing. The point of this section is to critique the liberty oriented approach to agency most closely associated with classical liberalism. I will focus on some of the most canonical liberal thinkers whose arguments are most directly associated with the liberty oriented approach to agency. These figures include: Thomas Hobbes, John Locke, John Stuart Mill, and finally Isaiah Berlin. I will then argue that the liberty oriented approach to agency, and its associated conception of human rights as barriers to the exercise of state power, is inadequate. By contrast if one adopts a dignity oriented approach to agency, as I argue for, one would understand the reach of human rights to be much broader.

1) The Basis of the Liberty Oriented Approach

This liberty oriented approach of agency, formulated at its most basic, can be understood as follows: individuals should be free from coercion by state institutions, except where coercion can be justified to prevent a greater infringement of the liberty of other individuals or anyone

else of relevant moral standing.[202] The classic expression of this view is associated with John Stuart Mill. Where and how such coercion might be justified remains an ongoing debate among liberal thinkers, but the fundamentals of the approach are rarely questioned.

At the base of the liberty oriented approach is a belief that the agency flows from a singular power that can be exercised if just left unconstrained. In Hobbes and Locke, this power is desire, to Mill it is the self-realization of the individual, and to Berlin it is our ultimate choice on what end to pursue out of a pluralism of options. This human power, which enables us to be agents willing our own destiny rather than simply naturally determined objects, is not directed to any ends except those which the agent themselves choose. This reductionist conception of agency has had significant political and legal consequences.

For instance, the standard package of liberal rights, conceived from the 17th century onwards, was not designed as a means of claiming certain positive entitlements.[203] Rather, rights were understood as counters to the extension of state power.[204] Through an ongoing process of political and legal deliberation, rights possessing individuals would delineate an independent private sphere within which free human behavior took place. This private sphere would be where individuals could be free to formulate and execute life plans without fear of coercion by the state, and would ideally be free from the influence of law.

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[202] Relevant moral standing is important to consider when we acknowledge the open-ended impact of actions. Until recently, liberal political theorists have largely been unconcerned with the moral impact individual decisions might have generally. Developments in economic theory which indicated that individually rational actions can have undesirable impacts in the aggregate, or at least impacts that are not uniformly beneficial to all, as well as the environmental movement, have led to some movement on this front.

[203] Of course in many respects they had the practical effect of conferring entitlements; for instance, property and inheritance rights.

[204] This trend goes back to at least Hobbes, to the extent one can infer a theory of rights from the account of legitimate authority given in *Leviathan*.

This has always been a tenuous claim for those who hold to the liberty oriented approach to agency, since it points directly to the Janus faced ideological function of law in a liberal society.[205] On the one hand, law is seen as restricting the liberty of individuals, and therefore must be prevented from interfering with the private lives of individuals. On the other hand, law is also seen as the pre-requisite to protecting this same liberty in the private sphere. This function persists for two reasons. The first is because law prevents the unwarranted extension of state power where it has no business. Law serves as a check to the arbitrary application of state power. This point, that one should be ruled by law and not by men, has often been a standard liberal claim. But, more importantly, law also protects liberty by ensuring that, when formulating and executing life plans, no individual goes so far as to infringe the basic liberties of anyone else. In this way law is not just a check to the arbitrary application of state power, but on individual human powers as well. It does this through a process of ideological transference; the status of an activity shifts from being acceptable within the private sphere to becoming a matter of concern in the public sphere. In these instances, the activity in question can then be subjected to legal regulation.

The dynamic nature of law has proven an exceptionally difficult pill for many liberals to swallow, since it suggests that the nature of liberty changes with transformations due both to the public's understanding and shifts in the material conditions of society. One way around this has been to construct ideological myths which mollify lawmakers wishing to protect the significance of law. Instances where the extension of proper liberty is called into question are not characterized as symptomatic, but "exceptional" or "penumbral," to the normal operation of law

[205] See F.A Hayek. *Law, Legislation, and Liberty.* (Chicago, IL: University of Chicago Press, 1978)

as a clear and analytically derived code which can be determined and applied without controversy.[206]

Jerome Frank, a prominent legal realist of the 1930s, has helpfully characterized the insistence on establishing the objective domain of liberty by applying a narrow positivistic approach to the law as a "basic myth" of legality in liberal societies.[207] [208] As new policy concerns emerge, officials in the Justice system are often compelled to weigh in. This compulsion often results from individuals engaged in adversarial conflicts reflective of more general social tensions; though on occasion the government itself might call on Courts to answer especially pressing questions. This necessitates an ongoing legal dialogue between the state and rights holders to continually delineate the proper boundaries of liberty. These are often dealt with in a court setting to allegedly de-politicize them.[209] If these instances were acknowledged as being part of a broader debate say, over the nature of agency itself, then the liberty oriented approach might become untenable. This is because individuals might recognize that any decision a Judge makes, even if they claim to be merely interpreting the law, will enhance the political and economic capabilities of some at the expense of others.[210] In other words, it increases the freedom to act for some while constraining it for others. Instead this process of delineation is seen as the objective reaffirmation of the state's commitment to securing liberty.

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[206] The notion of these instances as "exceptions" is Schmitt's. See Carl Schmitt. *Political Theology,* trans. Tracy. B Strong. (Chicago, IL: The University of Chicago Press, 2005). The problem of the penumbra is Hart's. See H.L.A Hart. *The Concept of Law: Second Edition.* (Oxford, UK: Oxford University Press, 1997) and the important preparatory work H.L.A Hart. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71 (1958).
[207] See Jerome Frank. *Law and the Modern Mind.* (New Brunswick, NJ: Transaction Publishers, 2009)
[208] Frank himself was largely referring to the United States. I believe many of his insights can be applied more generally.
[209] The critical legal studies movement spent a great deal of time unmasking the politics of an apparently de-politicized courtroom. For example, see Duncan Kennedy. *A Critique of Adjudication (fin de Siècle).* (Boston, MA: Harvard University Press, 1998)
[210] See Robert Cover. "Nomos and Narrative." *Harvard Law Review* 97 (1982)

These theoretical and practical challenges have persisted throughout the discourse of the liberty oriented perspective, but the answer to them has almost always been the same. The normative function of the state is to develop legal institutions which secure the proper domain of liberty for their citizens. Once these institutions have been established, states may charitably decide to take a more pro-active role in improving the economic well-being of citizens, but one cannot claim they are under any legal or strong moral obligation to do so. It is also important to note that these interventions are not connoted as enhancing the freedom of citizens, since this would imply that agency has a positive, rather than just a negative, dimension. Since the state's job is to protect the freedom of individuals, and freedom is conflated with liberty, any other function it might assume merely expresses the non-political virtues of a people rather than the rectification of an intolerable injustice.

This basic overview of the liberty oriented approach to agency, and its related consequences in law, is by no means intended as exhaustive. Instead, it is meant to both summarize some of the major descriptive points of this chapter by pointing out the overlapping principles the unite adherents of the liberty oriented approach to agency, while hinting at the more critical observations to come. For now, I will undertake a brief survey of some of the major classical liberal theories, to establish these links in more depth. Afterwards, I will conclude with several critical sections.

2) The Origins of the Liberty Oriented Approach in Hobbes

In a strange historical irony, I believe the most important philosophical shift in the development of the liberty oriented approach to agency was undertaken by Thomas Hobbes, who is often mistakenly regarded as providing the last credible defence of authoritarianism. This, to Hobbes' mind, justified the centralization of state power in one source, the titular Sovereign Leviathan, who would halt the "warre of all against all" through the application of force legitimated by its law-making authority. This authority, in the Hobbesian narrative, was transferred from human beings to the Sovereign through a social contract which, once made, could only be annulled under very specific circumstances.[211] Once authority was transferred by specific grant, the Sovereign was free to formulate and enforce any laws they thought were necessary to preserve the lives of those who make up the civil state.[212] The only major empirical check to the exercise of this authority was the existence of other civil states, between which the conflict of interests identified with the state of nature still existed.

So far this is a fairly stock-in-trade interpretation of Hobbes, and indeed, I do not wish to engage this topic thoroughly here. My immediate interest lies less in Hobbes' specific arguments about the nature of government, and more in the lines of reasoning he developed to justify this position. Here, Hobbes was truly radical.

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[211]My reading of Hobbes is inspired by David Dyzenhaus, who has notably argued that we must move away from the caricatured Hobbist reading of *Leviathan* which sees the book as a defence of absolutism. Dyzenhaus draws our attention to the nuances often unnoticed in Hobbes' great work; for instance, his argument that the Sovereign can never legitimately command its subjects to lay down their lives for the state. This is because the state itself was formed by a contract between individuals and the sovereigns with the chief aim of preserving their lives. Since it would be a contradiction for the Sovereign to command its citizens to give up what they vested it with authority to protect, in the event such a thing happened, the contract between the two would be nullified and the individual would revert to the moral position described in Hobbes' narrative on the state of nature. See David Dyzenhaus. "Hobbes and the Legitimacy of Law." *Law and Philosophy* 20 (2001)

[212] See Richard Tuck. *Hobbes: A Very Short Introduction.* (Oxford, UK: Oxford University Press, 2002) on this point.

Within the opening Chapters of *Leviathan* one can see the first fully developed modern account of subjectivity and freedom. Again, in an ironic twist characteristic of Hobbes' work, this freedom only emerges from another type of determinacy. In the opening sections of the book, Hobbes develops an empirical understanding of human beings as existing within a basically deterministic universe. He criticizes scholastic conceptions of free will, predicated on the existence of a human soul granted by a loving God, as superficial accounts of an important question. Hobbes then proceeds to detail how all human activity is guided by a desire for pleasure, most especially for "power after power." [213] These powers are not teleological in the Aristotelian sense of enabling human beings to aspire after higher goals. Power is now simply a means to acquire more power to achieve more of one's desired ends. Here Hobbes was also very anti-Aristotelian. He denied that there were any worthy goals that existed beyond the pursuit of desire. The words “good” and “evil” referred simply to the increase of either pleasure or pain for human beings.

But Hobbes adds a further twist that belies an acute, if reductionist, psychological observation. His empirical conception of human beings lends itself to a very radical egalitarianism: if all that is good is the pursuit of pleasure or pain, and degrees of good and evil are to be determined by the mere quantity of either, all pleasures are equal so long as both plebeian and poet enjoy their pleasures equally. Hobbes develops robust criticisms against the classical and poetic virtues. Characteristics which led human beings to pursue any higher ends, such as a desire for nobility, led them to vainglorious pretensions of being higher than others. These pretensions were not only wrong, according to Hobbes, but dangerous, since they lead

[213] See Thomas Hobbes. *Leviathan.* (London, UK: Penguin, 1982), 161

individuals to quarrel over issues that could, by definition, never be resolved since they cannot appeal to brute facts.[214] To illustrate his position, Hobbes unironically compares human beings to other social animals in a negative light. Since insects, for example, do not compete with one another for vainglorious reasons, they are more easily able to satisfy their desires and improve collective well-being.[215] Hobbes concludes that such quarrels diminished human beings' potential to freely develop their powers in concert and therefore more adequately satisfy their desires.

Hobbes is quite radical in his position. He claims that in the state of nature, spared from such vainglorious pretensions, all individuals are free and yet all are generally in misery. This is because they can only exercise what little powers they do have in pursuit of meager desires that at any time might be taken away from them. Even the strongest individual who might, for a short while, can enslave others, will in short turn be killed or abandoned. Therefore, for prudential reasons related to self-interest, Hobbes recommended that such subjects give up an unlimited right to all things, for an exclusive right to some, backed up by Sovereign power.[216] In a Hobbesian world, law was a necessary tool to erect prudent boundaries to the "free" exercise of human powers. Law could be justified because the exercise of freedom was not good in and of itself, but valuable as the means to employ human powers in the pursuit of desires. And this the law also secured. Since it was a natural law that "men keep their covenants made" all individuals must feel obligated to obey the sovereign in all but certain extreme circumstances.[217] But with the gutting of all teleological content from nature and natural law, Hobbes also left human beings at liberty to pursue their desires as they wished within the limits imposed by law. So long as

[214] Hobbes, *Leviathan,* Chapter 8
[215] Hobbes, *Leviathan,* 225
[216] Hobbes, *Leviathan,*
[217] Hobbes, *Leviathan,* 201

they obeyed the laws designed to protect them in their epicurean revel, it would be a vainglorious and ineffective Sovereign who became determined to mold his subjects to fit some thin ideal of the good. Such a Sovereign, by toying with metaphysical concepts that, by definition, could not be defined or controlled, would be extremely foolish and unlikely to sit easily upon the throne.

In *Leviathan,* Hobbes already laid out all the metaphysical trappings to the liberty oriented approach to agency. All that was missing was the specific design for society. Hobbes contended that all individuals were basically equal, that the Sovereign became so only through public consent rather than moral worth, and that the content of morality was largely exhausted by adherence to positive law except where (again) this ran counter to all individuals' inalienable right to preserve their life, the pre-condition for the enjoyment of all pleasures. He also held that freedom was not a metaphysical, but an empirical issue. Metaphysically, since all things are subject to the law of cause and effect, it seems likely that Hobbes was a determinist. But that did not matter when conceiving the moral basis for a political system, since what mattered was how human beings could have the unconstrained liberty to pursue their desires without having the exercise of this power impede anyone else's beyond a certain point. This Hobbesian edifice laid the framework for all later, more explicitly liberal, theories.

3) Developing the Political Philosophy of Liberty in Locke

Locke went beyond Hobbes in providing not just theoretical refinement, but an entirely new dimension to the liberty oriented approach to agency. In his *Second Treatise on Government,* he developed the first systematic link between liberal philosophy and representative politics in modern thought. Later authors further refined Locke's point until a dimension of

democratic legitimacy became inextricably linked with liberalism, even if it took several centuries for this to be meaningfully implemented in practice. Indeed, in many ways Locke remained far ahead of his successors by not only by maintaining that the government of a state should be democratically representative, but that stakeholders had a right to revolt if it ceased to be so.

Much attention has been paid to Locke's innovative development of empiricist philosophy, and for good reason. It is difficult to conceive of anyone, aside from radical Behaviourists, who still holds to a strictly Lockean conception of the mind and/or brain. Admittedly, he did establish a great deal of the transcendental structure later empiricists would take up with greater scientific rigour. Saying that, it is difficult to maintain that his empiricist philosophy had significant consequences for his moral and political deviations from the framework laid by Hobbes. From the standpoint of moral and political philosophy, Hobbesian and Lockean human beings aren't metaphysically that different. Whether interpreted as a bundle of empirical impressions deterministically led to value certain objects in the world, or a mechanistic automaton driven to quest for desire after desire, both Hobbesian and Lockean human beings appear metaphysically determined but morally and politically in need of empirical freedom to adequately pursue their desires.[218] [219]

This similarity is reflected in their largely analogous accounts of the state of nature. Though many have stressed the distinction between Hobbes' and Locke's views on this matter, I find the differences to be fairly arbitrary. They are more a testament to misreading Hobbes.

[218] Locke tends to speak about enjoyment rather than desires. I find this a slightly more ambiguous term than what is found in Hobbes, but in principle it means the same thing.
[219] Locke was not a philosophical determinist in the same sense of Hobbes, but regard this as a deep inconsistency in his work.

Many forget that for all his invectives against the state of nature, he was more than willing to concede its virtues and argued persuasively that the transfer of power to a Sovereign entity was largely to secure and further our capacity to achieve the objects of our desire, rather than from some sentimental distaste over living an undignified or immoral life.

On all these fundamental points Locke is in complete agreement with Hobbes. His vision of the state of nature is slightly less dangerous, but no less burdensome. Locke maintained, like Hobbes, that in a state of nature, because of the relative comparability of all human powers, all people were generally equal. This also means that all individuals were free to pursue their desires as they saw fit, without constrains being imposed upon them by anyone else. While reason does play a regulative function in the state of nature, Hobbes would not have afforded it by advising all people that it is wrong to "harm another in his life, health, liberty, or possessions", while Locke believed that many would not obey this ("dictum"; "maxim"; "tenet"; "precept") in the absence of enforcement mechanisms.[220] Both accept that reasons' dictates are often ignored in the state of nature. It is this which persuades rational human beings to establish a government over themselves. More specifically, it is to enable them to enjoy their property.[221]

> If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? Why will he give up this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a

[220] See John Locke. *Second Treatise of Government.* (Indianapolis, IN: Hackett Publishing Co, 1980)
[221] Locke. *Second Treatise of Government*, Chapter Five.

> mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.[222]

Like Hobbes, Locke believes that the foundation of civil society consists in a contract between ruler and ruled for the protection of individuals. Where the latter differed was in stressing that the contract was to ensure not just that individuals could survive unmolested, but also so that they might enjoy their property. Property for Locke is understood more expansively than for Hobbes (who seems to have never taken up the issue of private property systematically). For Locke, all individuals are entitled not just to the enjoyment of their own lives and liberties, but also anything an individual had mixed with the "labour of his body, and the work of his hands."[223] This includes, for instance, the land itself. Any labour invested in the land, whether to grow crops or harvest precious minerals, transfers ownership of it to the individual. Rather than have it taken from an individual against the laws of reason, government offered protection and security for individuals to enjoy their property.

This expansive definition of property is why Locke maintained that government must be representative and not absolute. Indeed, he characterized the legislative power of government as the "first and fundamental positive law power of all Common-wealths" even though he conceded it did not always operate.[224] If the state was established to ensure that individuals were free to enjoy their property, it became necessary to impose strict limitations on the government to prevent it from molesting the private sphere for its own purposes. Here Locke is again fully modern; he denies that a state can have any interest that supersedes the aggregated interests of the individuals who make it up. But because governments are always eager to ignore this point,

[222] Locke. *Second Treatise of Government*, 65-66
[223] Locke. *Second Treatise of Government*, 19
[224] Locke. *Second Treatise of Government*, 69

it is important to impose a check on absolutism by ensuring that governments remain responsive to the interests of the body-politic.

As many have noted, Locke does not here mean the entire population. He refers only to men who own a certain volume of property. His justification for this position is that, since the state is created to protect individuals in the enjoyment of their private property, only those who hold property have a legitimate stake in the affairs of state. They are also, naturally, the only ones who would have an interest in the specifics of legislation. All others who make up the body politic may have interests, but do not have the means to pursue them. Therefore Locke was deeply worried that, if given any representative clout, those without property would make a mess of things by demanding that those who held property, redistribute some of what they had legitimately earned. This is also why only those with substantial property had a right to revolt against the actions of states. Those individuals, according to Locke, who did not invest their labour into the lands they inhabited, such as members of the Aboriginal communities of North America, had no right to dispute the legitimacy of the state.[225] Of course, liberal-democratic conceptions of just who has a legitimate stake in society, and therefore a right to be represented in the legislature, has expanded over the succeeding generations.

Even in its inception, there are some very odd features to Locke's conception of representative government. If it is true, as Locke contends, that an individual's life and body are in themselves property of the individual, then how can it be that they do not have any legitimate stake in government? Locke might contend that this is because they (through intransigence perhaps?) have not taken adequate time to invest their labour in external objects and thus

[225]Locke. *Second Treatise of Government,* Chapter Five.

accumulate an adequate volume of property beyond their own person to trigger their right to participate in the affairs of state. But this is very spurious (and self-serving) reasoning; unfortunately not the only place where Locke allowed his very ideologically driven prejudices to disrupt the logical coherence of his arguments.

None the less, Locke should be admired for formulating a very modern account of representative politics. One can see in this, already, many of the ideological features that have come to colour liberal-democratic politics. While its elitist overtones would likely and rightly strike any contemporary liberal as repulsive, Locke laid the foundation for incorporating a democratic dimension into liberalism by stressing that individuals who had an interest in politics had to be consulted if the state was to retain legitimacy. This was also important to check the expansion of state power into the private sphere, unless individuals who saw it as being in their best interest to co-operate collectively, consented to it. One might characterize this as a stakeholder conception of society in which Government becomes primarily responsible for protecting and furthering the interests of those who consented to be governed. Beyond that, Locke saw the state as a potentially dangerous tool which could easily be appropriated for the establishment of tyranny; whether by those wishing to be governed conceding too much power to an authoritarian tyrant, or by granting power to the mass of people who would inevitably use it to further their illegitimate interest in having wealth redistributed to their benefit.[226]

Between Hobbes and Locke, the metaphysical and political basis for the liberty oriented approach to agency was laid. But in its nascent form it remained rather crude and abstract. It would take several more generations to refine the liberty oriented conception of agency into the

[226]Locke. *Second Treatise of Government,* Chapter Eighteen and Chapter Nineteen

hegemonic world-view it is today. Jumping many generations ahead the most important figure in this transition, and perhaps still the most cited classical liberal philosopher, was John Stuart Mill.

4) John Stuart Mill and the Development of the Modern Understanding of Liberty

Mill's account of the liberty oriented approach to agency remains perhaps the most cited because of the distinctive simplicity and admirable tenacity with which the case is presented. Saying that, the simplicity in presentation belies the deeper conceptual ambiguities within Mill's text. There is a strange lack of systematic cohesion running throughout the text, as Mill attempts to justify granting citizens' liberty by drawing on several different principles and empirical arguments. Some of these appear to have some integral connection to one another, others appear to be freestanding. This protean quality is both the great virtue and the strange defect of *On Liberty*. To employ a Rawlsian metaphor, Mill's attempt makes it clear that one can endorse liberty by drawing on any number of different principles. On the other hand, it is not clear that any one, or even a combination, of his arguments is entirely decisive. These ambiguities only increase as Mill attempts to apply his reasoning to any number of issues, which often only further muddies the waters as Mill himself seems unclear about just how far he is willing to go.

The best way to unify the text, in my view, is to take Mill at his word that the principle of utility is the basis for all morality in the last instance. [227] This point is crucial since Mill seems to flirt with many non-Utilitarian moral principles throughout *On Liberty,* especially regarding the inherent value people derive from freely developing their individuality. This ultimate concern

[227] See John Stuart Mill. *On Liberty and Other Essays,* ed. John Gray. (Oxford, UK: Oxford University Press, 2008). The qualifications to Bentham's doctrine takes up the bulk of *Utilitarianism*

for utility can explain the complex moral balancing Mill engages in throughout *On Liberty*. Utilitarianism, understood with any sophistication, is unlikely to ever point unambiguously in a single direction. This is because Utilitarianism, like the theories of Hobbes and Locke, is an empirical conception of justice. It is therefore dependent on producing contingently good results through application rather than derived on principle. Notably, this empirical contingency itself can become a justification for the liberty oriented approach to agency. Since Utilitarianism precludes the idea that anything is good in and of itself, and makes all evaluations dependent on the preferences of individual actors, it is not a great leap in reasoning to decide that individuals should be left free to pursue those preferences without paternalistic interference.[228]

Mill's opening discussion of tyranny and liberty helps clarify his reasoning. Mill's position is that a representative liberal-democracy which grants wide liberties to individual citizens is the best form of government because no individual is truly impartial in the way required for a Benthamite democracy. Individuals are prone to giving in to the opinions and whims of others, which all too quickly can lead the state to become tyrannical. This leads to what I will call Mill's First Argument for Liberty: as a matter of moral and political epistemology it is better both for individuals whose freedom would be oppressed, and would-be oppressors, to not restrict the basic liberties of any citizens. This is because we can never be entirely confident we know the best way to live, and can only test this by looking to the experiences of others. The

[228] There is some tension here between the democratic and liberal tendencies within Utilitarianism. Mill clearly favours the former.

only point where liberty would be prudently limited, Mill points out shortly after, is where the actions of an individual would "harm" others.[229] [230]

This First Argument for liberty strikes me as architectonic to the essay since it directly relates back to the structures which enable legislators to determine what is conducive to the greatest happiness for the greatest number. Here, Mill makes explicit the socio-psychological point nascent in Locke's more elitist characterization: that people often cannot be trusted to know what is best for them, let alone what is best for everyone. For this reason, it is better for society to become a laboratory of lives which enable us to test which ways of being-in-the-world seem to be most valuable.

Reinforcing this point takes up the bulk of Chapter Two of *On Liberty*. Mill here focuses on why we can never be entirely confident our moral principles are correct either in whole or in part.[231] Even if we can be quite certain, or beyond that at least quite certain than an opposing view is simply wrong (take Nazism as a now standard example), it would not be beneficial for this viewpoint to be silenced. Mill offers four reasons for this point:

> First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for

[229] This "harm principle" is of course the most enduring idea in *On Liberty*. But in point of fact, it takes up a fairly minor portion of the essay, and rightly so. This is because it is a limiting principle; it points out where liberty should be circumscribed for the benefit of others. But one cannot derive an argument for liberty from the harm principle, which Mill himself knew very well.
[230] See Mill, *On Liberty*, 14.
[231] Mill, *On Liberty*, Chapter Two

> good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.[232]

None of these is a knock down blow against interventionism. They are prudent guidelines, derived from political experience, which testify to Mill's canny political insights and understanding of both human psychology and history. It is also noteworthy that, in reinforcing this First Argument for Liberty, Mill makes a long sequence of both positive and negative arguments, usually in succession. This strange dialectical quality is both a virtue and a vice, since it both attests to the enormous prudence of what Mill is saying while suggesting that his argument is, in some way, incomplete. It seems philosophically strange, for example, to draw principled positions from what amounts to a collection of brilliant inferences about moral epistemology.[233]

What I will characterize as Mill's Second Argument for Liberty seems to evade these difficulties, but is also not entirely successful. The Second Argument for Liberty is: that the development of our individual selves is the most important human project, and to engage in it authentically individuals require liberties to experiment without being subject to coercive social conformity. Much of Chapter Three of *On Liberty* is taken up with defending this position on self-realization. Mill makes the extremely important observation that Bentham was likely wrong to believe that all pleasures can be measured per the same metric. This gave rise to his famous quip that "it is better to be Socrates dissatisfied than a pig satisfied."[234] Mill believes that there are qualitatively higher pleasures which reflect the value of the most important project we

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[232] Mill, *On Liberty*, 59

[233] In other words, Mill is trying to develop a moral position out of what he believes to be the limitations to our moral reasoning capacities. But I do not see how the two follow. One could just as easily make the skeptical claim that Mill's position indicates that, since we can never be sure we have moral truth, we might as well adopt a nihilistic position towards morality. This skeptical argument, though not its gloomy conclusion, was made by Nietzsche.

[234] See Mill, *On Liberty*, 140

engage in: ourselves. On this line of reasoning it is not just important that we enjoy our lives, but that we make something meaningful of them since this, alone it seems, gives us a sense that we have achieved real value. This leads directly into his Second Argument for Liberty; a demand for absolute moral conformity would prevent many people from developing themselves as individuals.

For these two reasons, Mill and his admirers concluded that individuals should enjoy a legal right to liberty, except where the exercise of this right would unduly harm another person. It is hard to overestimate the impact his argument has had in both political theory and liberal legalism.[235] While some liberals had made a similar argument before, it was always given a much more negative twist. Many classical liberals, and here Locke again comes to mind, were concerned that allowing the government, whether monarchial or democratic, to control how people behaved would lead to tyranny. But Mill was one of the first liberal thinkers to argue that being free from such coercion might also have a positive dimension, since liberty is what enables people to make something of themselves. Unfortunately, as I have indicated, Mill's exposition of this claim is occasionally muddled and sometimes even confusing.[236]

I therefore think that, although there is a great deal of value to be found in Mill's classic polemic, it remains philosophically vague in some of its deepest claims. Perhaps more importantly, it has also proven difficult to apply in legal practice as our understanding of "harm"

[235] Canada's own Chief Justice, Beverley McLachlin, frequently cites Mill.

[236]This is not surprising since it runs rather counter to the basic thrust of Utilitarian reasoning, which holds that utility is the ultimate source of all value, and measurement of pleasure and pain the way it is to be assessed. It is, of course, possible to maintain that, since choosing to live life well would give an individual more pleasure than being forced to do so, more liberty can be justified on a Utilitarian basis. Buttressed with the conceptual resources of the First Argument, particularly the claim that we can never be sure what the good is, the link between liberty and Utilitarianism might even appear plausible.

has broadened to include new forms of social aggression.[237] I believe that Berlin's argument for a negative concept of liberty, and its direct association with a pluralism of values, is ultimately far clearer.

5) Liberty and Pluralism of Values in Isaiah Berlin

Isaiah Berlin's seminal essay "Two Concepts of Liberty" is perhaps the most important modern work defending the liberty oriented approach to agency. This is despite the claims of major political and rights theorists who argue that Berlin's carefully drawn distinction, inspired by a close reading of the history of political thought, breaks down in theoretical and concrete practice.[238] Interestingly, Berlin might find some satisfaction in that. He notably begins and concludes his essay by highlighting the reality of deep disagreement on the ends individuals should pursue throughout their lives. I will argue that the overarching theme in "Two Concepts of Liberty" is to demonstrate that what looks like an insolvable and undesirable difficulty to the political theorist, may be quite valuable in the real world. This is because Berlin is committed to the idea that there are a plurality of ends which individuals can pursue. Some of these might be consistent with one another, but others are mutually exclusive. One cannot pursue one such end without abandoning a commitment to another. The underlying value of liberty, and why Berlin tends to favour its negative rather than its positive understanding, is that it enables individuals to choose for themselves between these ends. Since he rejects the notion of metaphysically

[237] See my paper "Cyber-Bullying and Privacy: New Forms of Social Aggression" in *Privacy Rights in the Global Digital Economy*, ed. Lesley Jacobs. (Toronto, ON: Irwin Law, 2014)
[238] Henry Shue is amongst the most notable modern philosophers to argue that the distinction between negative and positive liberty, and their associated rights, cannot be upheld in practice. See Michael Payne. "Henry Shue on Basic Rights." *Essays in Philosophy* 9 (2008).

arbitrating between ends, Berlin also believes the state should not be involved in making such important determinations.

After commencing his essay by distinguishing between means and ends in politics, Berlin goes on to characterize the "open war" which was then dividing the world as being between groups who adhere to two competing concepts of liberty. Berlin feels that liberty relates to the most basic of political questions; who should I obey and why?[239]

The first concept Berlin examines is "negative liberty," which he associates with the English-speaking world. This concept suggests that "I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which men can act unobstructed by others."[240] Shortly later on, Berlin importantly links interference with direct coercion of others. This is because he does not wish to connect obstruction to inability or indirect influence by others.[241] The negative concept of liberty implies that one's freedom is limited only by the direct coercion of others "within the area where I could otherwise act."[242]

Berlin argued that those who believed in negative liberty often held conflicted opinions on the intrinsic value of democracy.[243] As he points out, the question "how far does the

[239]Note that even the way Berlin formulates this question indicates his preference for negative liberty
[240] Isaiah Berlin. *The Proper Study of Mankind: An Anthology of Essays,* ed. Henry Hardy and Roger Hausheer. (New York, NY: Farrar, Straus and Giroux, 1997) 194
[241] I also draw insight from the compilation Isaiah Berlin. *The Crooked Timber of Humanity: Chapters in the History of Ideas, ed.* Henry Hardy. (New York, NY: Knopf, 1991)
[242] Berlin, *Proper Study*, 194
[243] Berlin discusses the intellectual history of negative liberty in some detail. He mentions that many philosophers who argued for the expansion of negative liberty none the less disagreed, often quite fundamentally, about how widely it should be extended. Some philosophers with "optimistic views" of human nature believed that social harmony could be made consistent with giving individuals a wide purview in private life to pursue their own objectives without being coerced to behave in a certain way by the state or any other authority. Others, such as Hobbes and various conservative reactionaries, believed that if individuals were given too much liberty, they would give into their worst impulses and destroy the order established by the state.

government interfere with me?" is logically distinct from the question "who governs me?"[244] It is this distinction that Berlin sees as being at the heart of the difference between negative and positive liberty. This is because the desire to have a say in the governance of the state is quite different, though perhaps no less valuable, than the desire to govern the affairs of one's own life. For Berlin, the latter question connects closely to what kind of person I should be. This leads to the positive concept of liberty.

For Berlin, the positive concept of liberty might be understood as answering the question: what should I do with my life? In some respects, it is both a deeper concept and one which is more fraught with ideological dangers.

> The positive sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not be causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer-deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realising them.[245]

This rather ambiguous summary, which draws upon a wide array of different terms, some analogous and some rather distinctive, reflects in microcosm the different ways Berlin sees positive liberty as having been formulated. He points out that, on the surface, it may seem no great distinction to speak on the one hand of not being coerced by others and on the other of being one's own master. And in some respects, Berlin acknowledges that they can be brought together. But he points out that in the history of thought and political practice, the two concepts have diverged until ultimately they came in direct conflict with one another.

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[244] Berlin, *Proper Study*, 202
[245] Berlin, *Proper Study*, 203

The most basic way that the positive concept of liberty can be distinguished from the negative concept is the former's belief that there is a basic "nature" to human beings which exists ontologically and morally prior to the emergence of the various types of historicized subjects. Put more simply, those who hold to the concept of positive liberty believe that all human beings possess a true self that should be realized in the world. Much of their intellectual and spiritual efforts are directed against those external and internal barriers that prevent that realization.

Those who advocate for positive liberty believe that true freedom only flows from the realization of one's most basic inner nature, however that is conceived. As such Berlin believes it becomes clear why the negative concept of simply having the ability to do what one wishes "will not do" for those who believe in positive liberty. If an external body, or mere necessity, causes individuals to abandon their most basic life goals, one cannot say that any true liberty has been lost if one adheres firmly and exclusively to the negative concept.

> If I find that I am able to do little or nothing of what I wish, I need only contract or extinguish my wishes, and I am made free. If the tyrant (or hidden persuader) manages to condition his subjects (or customers) into losing their original wishes and embracing (internalising) the form of life he has invented for them, he will, on this definition, have succeeded in liberating them. He will, no doubt, have made them feel free -as Epictetus feels freer than his master (and the proverbial good man is said to be happy on the rack). But what he has created is the very antithesis of political freedom.[246]

Berlin is skeptical of positive freedom, seeing it as ultimately giving philosophical credibility to authoritarian and ultimately totalitarian movements which claim to represent the true "will" of the people.[247] As he nicely put it: "The triumph of despotism is to force the slaves to declare themselves free. It may need no force; the slaves may proclaim their freedom quite

[246] Berlin, *Proper Study*, 211

[247] Berlin goes on in his essay to explore how the positive concept developed in the philosophies of rational self-willing in Rousseau and Kant, and later became extended to the external world through the work of Hegel, Marx (most famously), Bradley and others.

sincerely, but they are none the less slaves."[248] He expresses the well-founded liberal worry that advocates of positive liberty will wish to concentrate greater power in their own hands for the purposes of the common good, and who will then, inevitably, misuse it. By contrast, he none too subtly endorses "barriers" put in place to prevent the exercise of indiscriminate authority even when it is dignified by appeals to the general will. In the position of modern liberal legalism, this would involve establishing a system of "rights" which preclude the application of state coercion to choices that are to be left to individuals. Unsurprisingly, many who favour liberal legalism characterize these as "negative rights."[249]

In the final section of his seminal essay, Berlin gives his endorsement of negative liberty a unique twist. He expresses admiration for the often-profound insights into human history and nature given by those who advocated for positive liberty. However, Berlin maintains that it is not true, as the philosophers believed, that all good things must go together. Some categories of values may harmonize with difficulty; others may well be mutually exclusive. Thus, the rationalist desire to develop a harmonious totality in which "all riddles are solved, all contradictions reconciled...to reduce everything to a system" is doomed to be a failure, albeit an occasionally insightful and even magnificent one.[250] Because of this, Berlin believes negative liberty, and one assumes its associated rights, are valuable because they allow us to choose between such competing ends without the state coercing us into adhering to a positive concept of what liberty must entail.

> The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others. Indeed, it is because this is their situation that men place such value upon the freedom to choose, for if they had assurances

[248]Berlin, *Proper Study*, 236
[249] See Tibor Machan. "The Perils of Positive Rights," *Foundation for Economic Education,* April 1st, 2001
[250] Berlin, *Proper Study*, 238

> that in some perfect state, realisable by men on earth, no ends pursued by them would even be in conflict, the necessity and agony of choice would disappear, and with it the importance of the freedom to choose.[251]

Berlin goes on to remark that this argument for a pluralism of values, and the associated endorsement of negative liberty, is itself not to be taken as an absolute. He agrees that there are situations where it might be valuable to curtail liberty, say for the common good or to promote happiness, and that we must accept that this involves limiting the capacity of some individuals to act as they might otherwise wish.[252]

There is a great deal to be said for Berlin's position. I believe it represents the most well-developed and articulate defences of the negative concept of liberty. However, there are also deep flaws in his argument. The first, and perhaps most glaring, is that it rests on the philosophical presumption that discovering or conceiving a convincing positive concept of liberty is unlikely. His evidence for this is conjectural rather than analytic; Berlin believes that the controversies which have emerged in the history of Western thought indicate that no consensus has ever emerged about the substantive dimensions of positive liberty. But this, of course does not preclude that they might yet be discovered and/or conceived. Indeed, many critiques of Berlin's position suggest that the distinction he draws is less clear cut than he seems to presume. I also agree with this, as I will indicate below.

Aside from the philosophical possibility that a positive concept of liberty might be conceived, I do not believe that Berlin has successfully indicated how his argument for "negative liberty" leaves individuals absolutely free to embrace a pluralism of values. This is because

[251] Berlin, *Proper Study*, 239

[252] One wonders whether he believed that in exercising their negative liberty, individuals could ever interfere with one another in contradictory ways and how such conflicts would be mediated; for instance through rights balancing. Check this sentence.

Berlin's argument for negative liberty is predicated on a developed moral view which itself precludes others. His argument for embracing a pluralism of values, like Mill's, is dependent on the belief that the free development of the self through selection and pursuit of different values is an intrinsic good.[253] Berlin believes that, because there is no way one can successfully deploy philosophy to arbitrate between competing values, it makes sense to allow individuals the maximum liberty to choose between them and realize their selves as they see fit, rather than according to a pre-established meta-ethical or political program. This not only involves making a complex meta-ethical judgement, but derives a considered political position from this same judgement.

Saying that, I do not believe Berlin's position to be wrong. If anything, it is very close to my own argument that individuals should be enabled to define themselves by redefining the contexts within which they exist. However, my position goes considerably further in linking this capacity of the development of the self to an argument for democracy and equality of human capabilities. This is because I believe Berlin does not go far enough in pushing his argument for a pluralism of values. If it is true *a priori* there are many ends which individuals might morally pursue, it is also true that pursuing them concretely requires different types of capabilities.[254] Like Mill and Locke, Berlin believes that the power to determine one's identity, whatever that may turn out to be, is a singular will which we are responsible for deploying.[255] But this does not strike me as plausible. As there might be a pluralism of valuable ends which individuals can pursue, there are many capabilities which individuals may require to pursue them in fact. For

[253] Berlin. *The Crooked Timber of Humanity*, 207-237

[254] This argument does not just apply to physical and material capabilities. Transcendental capabilities, for instance to be able to reason free from the effect of coercive ideologies might well be more important in the pursuit of some ends.

[255] See the conclusion to his essay "Historical Inevitability," where he asserts the importance of individual responsibility despite making few arguments concerning its ultimate philosophical credibility. 189

this reason, I also believe that limiting our understanding of rights purely to those which are "negative" is both conceptually implausible and undesirable.

A focus on capabilities isn't limited to simply asking whether I am unconstrained by someone else in pursuit of these ends. Agency is dependent on how capable I truly am of choosing between ends and actively pursuing them. In other words, if Berlin's meta-ethical judgement is correct, and the free development of the self is what matters, then we should reject the political position he derives from that judgement. We need to unhook the liberal insight about the importance of choosing and pursuing the development of the self from the limitations of the negative concept of liberty, and the associated limitations of liberal legalism. I will elaborate on this in my next section.

6) The Limitations of the Liberty Oriented Approach to Agency

Throughout this Chapter I have unpacked several authors' systematic justifications for the liberty oriented approach to agency. Hobbes established many of the parameters for the approach by eschewing the old Aristotelian arguments about the good life and maintaining that what mattered was the realization of human desires within the boundaries determined by experiential prudence. Locke did not deviate significantly from this position, but was the first to associate this metaphysical position with a representational theory of government that stressed the right of (some) interest groups to have a say in governance. This right, made most express in Locke, was necessary to protect their private right to enjoy property. Mill developed a very robust set of arguments for why individuals should have a great deal of liberty except when their actions might lead to harming others. These arguments boil down to two claims; the first being

that liberty enables individuals to test the validity of their worldviews in a manner conducive to everyone's benefit, and the second being that it is necessary for the architectonic good of individual self-realization. Beyond that, while individuals should take it upon themselves to develop robust moral virtues, the state cannot demand that they must do so. Finally, Berlin argued that individuals should be free to choose between which competing values to pursue in their lives. This involves accepting and implementing the negative concept of liberty.

While there are obviously many more articulations of the liberty oriented approach to agency,[256] I believe the overview provided is sufficient to give a snapshot of the most powerful arguments. In these final sections, I will illustrate why I feel the liberty oriented approach to agency is inadequate and leads to both a deficient politics and an inadequate conception of rights. In these following sections I will draw quite extensively from the considerable literature dealing with this topic as well as from my own approach to agency presented in Chapters One to Three. In particular, I believe that the liberty oriented approach improperly conceives of our agency as being fundamentally limited. As such, it regards the primary obligation of the state to be simply to maintain the conditions necessary for individuals to exercise their liberty, without ever asking whether there might be additional moral obligations to amplify agency. Amongst other things, this has inclined many liberal thinkers to pay inadequate attention to the actual exercise of democratic rights to assume authorship of political and legal institutions, and the laws which flow from these.[257]

[256] I have referred to some of them in footnotes or offhandedly.
[257] As indicated in Chapter 2, this is in part because liberal theorists offer justificatory accounts which assume that any rational individuals would endorse liberal principles. This precludes the need to engage in actual deliberation about them.

The basic error underpinning the liberty oriented approach is the assumption that the human capacity to expand our agency is limited. This is most explicit in Hobbes, though it underpins the work of Locke and (in some respects) Mill as well.[258] To reach the conclusion that agency is limited exclusively to liberty, each of these thinkers must establish that there is a central power of human consciousness that is both open ended and reductive. In Hobbes and Locke it is desire, to Mill, self-realization, and to Kant (who I have not discussed in this Chapter) it is nothing but the will of practical reason itself.[259] This human power, which enables us to be agents rather than simply naturally determined beings, is not directed to any ends save those which the agents themselves choose.[260] The human power to become agents is always treated as singular and free to the extent it is unconstrained. Freedom means liberty because its realization is a matter of mere empirics.[261] The liberty oriented approach cannot account for other capabilities agents might also exercise; for instance, democratic capabilities that could be realized by recognizing individuals' rights to be authors of the political and legal institutions which govern them, and the laws which flow from these.

[258] Berlin doesn't seem to adopt this position *a priori*, but it seems implicit within his endorsement of the negative concept of liberty.

[259] There has been a great deal of philosophical literature on the question of the will, and whether it requires any content or end to exist as a robust concept. I think that it does, but this content need in no way be empirical and so have followed Kant consistently and without critique.

[260] As we have seen, the issue is more complicated for Kant, though the basic argument remains the same. This is because Kant, of all the thinkers discussed, was open to religious questions the others either ignored or treated with comparative superficiality.

[261] In this respect, the liberty oriented conception of agency is reflective of what I have elsewhere called the technical mindset; indeed, in many respects it is the technological mindset's most important ideological product. When consciousness is conceived of as a finite thing, it can be seen as an object, the product of a set of ontologically quantifiable relations which could be subsumed under mutually consistent epistemological laws. As with all beings within space and time, coercion can be applied when the inner workings of consciousness become apparent and can be broken down from a mechanistic unity into a set of malleable relations that can be independently manipulated. The only way to get around this is for consciousness to employ the power which enables us to be agents capable of transforming the empirical world to obtain enough mastery to be free of coercion in the future.

As indicated, I do not think this account of agency is adequate because, by treating human agency as flowing from a singular power that is free to the extent it is not coerced, the liberty oriented approach overly simplifies what is really a complex question concerning what individuals are actually capable of doing. Therefore, I believe we need to shift from focusing on the liberty of the agent, to discussing their potentially infinite dignity. If one abandons the idea that our capacity for agency is finite and instead embraces the potentially infinite dignity oriented approach argued for in the preceding three chapters, the liberty oriented approach to agency becomes deeply problematic. A dignity oriented approach understands agency as something that exists potentially and must be realized through engagement with the actual existential and socio-historical boundaries in which individuals exist. This was the insight gained from thinking through Chomsky's account of the creative aspect of language formation.

While the existential boundaries cannot be done away with, the socio-historical boundaries are entirely malleable. Indeed, I have maintained that we in fact realize our agency through employing our expressive capabilities to define ourselves by redefining the contexts within which we exist. We can speak of the extent that individuals are able to achieve this in terms of degrees of freedom. Each increase in the degree of freedom leads to new opportunities to further reconfigure the socio-historical boundaries within which we live to achieve yet a higher degree of freedom and more advanced human dignity..

While in theory the liberty oriented approach to agency is, to my mind, inadequate, in practice most liberal-democracies are unlikely to deviate from it any time soon. Some of this is due to prudential reasons, such as those Hayek points out when attempting to wholesale apply

principles of justice to something as complex as an entire society.[262] This challenge will always persuade some individuals that broad change can never, and should never come. The most that can be achieved is incremental steps towards justice; for instance, by realizing the first of the twinned rights by further democratizing political and legal institutions and enabling individuals to be authors of the laws which flow from them.

But the persistence of the liberty oriented approach to agency, despite its limitations, is also due both to its hegemonic power as an (often official) ideology, and the extraordinary lengths that some elites will go to preserve the status quo. This is especially true when one looks at the way voting processes and elections have become diluted in certain liberal-democratic countries. One need only look at the American Supreme Court's decision in *Citizens United*, or the Koch Brothers' attempts to manipulate the public on a national scale, to see evidence of that.[263] This is in spite of the growing swath of raw empirical evidence, as for instance provided by Thomas Piketty in his *Capital in the Twenty First Century*, that inequalities in our society are growing and cannot be justified on the moral lines of dessert.[264] Elites have proven gifted at applying their resources to conceal the reality of unwarranted inequalities and shrinking democracy, as well as their own involvement in proffering these self-serving messages. For these reasons, it is unlikely that reform will soon take place on anywhere near the scale required to fully realize the twinned rights; particularly the right to equality of expressive capabilities.

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[262] See F.A Hayek. *Law, Legislation, and Liberty.* (Chicago, IL: University of Chicago Press, 1978)
[263] I will be discussing this issues further in a later Chapter.
[264] See Thomas Piketty. *Capital in the Twenty-First Century*, trans. Arthur Goldhammer (Boston, MA: The Belknap Press of Harvard University Press, 2014)

But while the right to an equality of expressive capabilities might seem impossible to realize in practice given current conditions, it might well be possible to realize the right to democratic authorship on a far wider scale than has been achieved thus far. Creating spaces for individuals to increasingly become authors of legal and political institutions, and subsequently the laws which govern them, would be an excellent starting point for further transforming the socio-historical boundaries which limit individuals in contemporary liberal democratic societies. As well, I mentioned in Chapter Two that the right to equality of human capabilities, while just as important, cannot assume the same theoretical status and the dimension of democratic right. As important as equality is, it must be chosen by individuals in a free democratic context rather than theoretically imposed. For these prudential and moral reasons, from here on in I will be focused on how to realize the democratic right argued for throughout this dissertation. I will be looking at individual's voting rights.

Conclusion to Chapter Four

In this Chapter, I briefly ran through the history of the liberty oriented approach to agency. I argued that its most immediate origin point was the Hobbesian argument that the good was determined by human desire, and not the result of a teleological morality. This implied that political power should be organized to ensure individuals can most enjoy the pleasures of life without interfering with one another. This argument was furthered in the work of Locke and Mill, each of whom progressively expanded and deepened the moral argument for the liberty oriented approach to agency. Finally, it culminated in the work of Berlin, who openly defended "negative liberty" because of his metaphysical commitment to "value pluralism."

I then argued that this approach to agency, while of great value, was ultimately limited. I maintained that a richer approach to agency doesn't simply address the immediate constraints on an individual's actions, but looks concretely at what they are actually able to do. In particular, I argued that the liberty oriented approach has devalued democratic rights by arguing that the sole obligation of the state is to maintain the conditions for individuals to pursue their own ends. For this reason, liberal theorists have often been unwilling to consider how individuals might become authors of the political and legal institutions that govern them. I will shortly unpack how this might be achieved through law in considerably further detail. But before then, I must account for one other competing approach to agency; the post-modern.

In the next Chapter, I will be critiquing the post-modern approach to agency, which offers an important alternative to the liberty oriented approach. In many respects the post-modern conception has taken liberalism to task for ignoring impediments to agency along the lines I suggest are important. But I will argue it has become handicapped by an unwillingness to provide a more constructive alternative.

Chapter Five:
The Post-Modern Approach to Agency and Its Limitations

Introduction

In this Chapter I develop a critique of the post-modern approach to agency. I begin by briefly running through the major theoretical characteristics associated with this approach. I argue that the unifying characteristic of all post-modern accounts is the belief that human subjectivity is constituted by the socio-historical boundaries within which we exist, especially cultural and linguistic boundaries. Their understanding of agency is therefore grounded by conducting critical analyses of the socio-historical boundaries that constitute marginalized subjectivities to try and show how individuals might play a more active role in determining their own identity.

Later in the Chapter, I draw from my critique of discursive approaches to language and argue that the post-modern account of agency is inadequate. I will offer a myriad of reasons on why post-modern theorists often have a great deal to teach us about the socio-historical boundaries, but can offer little guidance on how or why individuals should be further able to exercise their agency. Finally, I will conclude by suggesting that we should reject post-modern theories of agency while trying to draw on their corollary: substantive and often highly interesting critiques of the socio-historical boundaries which constrain the freedom of individuals. The negative insights gleaned from these critiques should be incorporated into to a more positive approach to agency.

1) The Post-Modern Approach to Agency

I would like to preface my brief summary of the post-modern account of agency with a few qualifications. The most important is that my summary will operate at a broad level of generalization. Consequently, I will be ignoring or only briefly touching on many of the particular points that distinguish various post-modern theories from one another. Secondly, it should be noted that my summary here relies mainly on interpreting certain primary authors who I regard as setting the agenda for the many and various post-modern discourses which emerged subsequently.

The forerunners of post-modern theory emerged in the 1940s, during an unusual time in the history of European thought. Many Europeans had been deeply horrified by the atrocities perpetuated during the Second World War. More cynically, European intellectuals also reacted staunchly to the growing awareness that both the ideological and concrete influence of the Continent was on the wane. It seemed to many that the promise of Modernism, and Western Civilization more generally, had proven a bust. Some, like Martin Heidegger, looked upon this shift with cautious pessimism.[265] Others, such as Herbert Marcuse, Theodor Adorno, and Max Horkheimmer, took it upon themselves to explain how Western reason, and the Enlightenment promises associated with it, could be turned to such violent and seemingly nihilistic ends.[266] In so doing, they undertook a novel effort to fuse the Marxist critique of society with psychoanalysis, the newly discovered science of the individual psyche.[267]

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[265] See Martin Heidegger. *The Question Concerning Technology and Other Essays,* trans. William Lovitt. (New York, NY: Harper Perennial, 1977)
[266] See Theodor Adorno and Max Horkheimer. *Dialectic of Enlightenment: Philosophical Fragments,* trans. Edund Jephcott. (Stanford, CA: Stanford University Press, 2002) and Herbert Marcuse. *One Dimensional Man.* (Boston MA: Beacon Press, 1964)
[267] See Herbert Marcuse. *Eros and Civilization: A Philosophical Inquiry into Freud*. (Boston, MA: Beacon Press, 1974) and Erich Fromm. *Escape from Freedom.* (New York, NY: Henry Holt and Company, 1994)

While the work of the Frankfurt School was important in initiating the shift away from modernism and its optimistic rationality, the post-modern conception of agency truly blossomed in France during the 1960s.[268] It was initiated by a group of young scholars against the then dominant schools of thought in French intellectual circles. These include: semiotics, Hegelian dialectics (particularly as understood by Alexandre Kojev and Jean Hippolyte), Sartrean existentialism, and (especially for many) Marxism. Each of these became associated with some vestige of the rationalized established discourses, whether it was the historical tyranny of dialectics or the transcendental narcissism of Sartre. Thinkers such as Michel Foucault, Gilles Deleuze, Felix Guattari, Jean Francois Lyotard, Jean Baudrillard, and Jacques Derrida have since become synonymous with the intellectual attempt to undermine not just these discourses, but the very idea that one can ever get beyond discourse and reach and objective philosophical standpoint from which to see the world as it truly is.[269] Many came up with insightful and even brilliant accounts for why this realization should help liberate us, particularly by revealing the contingency behind powerful and often institutionally backed discourses. Others came up with important social theories which purported to explain how the discourses of modernity emerged and were propagated across society. Most critically, while these thinkers differed on many important issues, all (excepting perhaps Deleuze) stressed that their criticisms were neither objective observations, nor did they rest on some alternative normative theory that should be

[268] The relationship of French post-modern theory and the critical theories of the German Frankfurt School is the subject of ongoing debate. It seems clear that both have had a formative impact on North American critical theory.
[269] The case of Deleuze is somewhat more complex. While his logic of transcendental empiricism does stress the need to continuously create new concepts in line with "deterritorializing" one's subjectivity, his earlier work on univocity and difference occasionally suggests there are such things as ontological truths. See Gilles Deleuze, *Difference and Repetition,* trans. Paul Patton. (New York, NY: Columbia University Press, 1994)

propagated in place of the discourses they criticized.[270] This leads to the question of what type of theoretical approach was being offered.

While the post-modern theorists differed on a great many of their central points, they shared two crucial beliefs in common. The first was that there could be no objective standpoint from which a subject could assess the world. To invoke Richard Rorty, we must become anti-foundationalists.[271] And the second related belief was that previous theories of morality and agency, themselves based on those objectivising discourses, were both unsustainable and undesirable. These were explosive claims, though the ramifications of each were of course unpacked differently depending on the thinker in question.

Each of the major post-modern theorists arrived at their belief that there was no objective standpoint from which to assess the world differently. Lyotard, who coined the designation "post-modern," based his belief on his empirical observation that individuals had lost faith in "meta-narratives" which bridge disciplines and social practices.[272] As he puts it in his classic work *The Postmodern Condition:*

> In contemporary society and culture – post-industrial society, postmodern culture - the question of the legitimation of knowledge is formulated in different terms. The grand narrative has lost its credibility, regardless of what mode of unification it uses, regardless of whether it is a speculative narrative or a narrative of emancipation.[273]

Baudrillard was more historically minded. He claimed that modern societies had gradually gone beyond even Marx in surrounding themselves with simulacrum of real simulacra. Instead, we exist in an increasingly hyper-real environment in which simulacrum do not stand in for

[270] On the Deleuze point see Deleuze, *Difference and Repetition*, 1994.
[271] See Richard Rorty. *Philosophy and Social Hope.* (New York, NY: Penguin Books, 1999), 155.
[272] Jean Francois Lyotard. *The Postmodern Condition: A Report on Knowledge,* trans. Geoff Bennington and Brian Massumi. (Minneapolis, MN: University of Minnesota Press, 1984)
[273] Lyotard, *Postmodern Condition*, 37

anything; what is being presented to the subject is not standing in as a representation of something, a "parodic rehabilitation of all lost referentials."[274] Or as he put it in *The Agony of Power:*

> The entire Western masquerade relies on the cannibalization of reality by signs, or of a culture by itself. I use 'cannibalize' here in the derivative sense of cannibalizing a car, using it as spare parts. Cannibalizing a culture, as we do it today, means tinkering with its values like spare parts imasmuch as the whole system is out of order.[275]

Other thinkers went even deeper than these socio-historical observations. Derrida argued that logocentric societies privileged the idea of representation in language because they believed that signs could make present what was absent. This in turn flowed from a phonocentric understanding of subjects as making statements which have specific meanings which in turn must be interpreted by other subjects. What wasn't acknowledged in this was that language could not make something present that was absent, and that the belief that it could do so involved pathologically attempting to suppress the other possible meanings latent within both an individual proposition and language as a whole.[276] Part of the goal of deconstruction, as it came to be called, was to demonstrate that these meanings could not be so suppressed and to follow the "trace" back to determine what an author or speaker was attempting to keep buried.[277]

Finally, Foucault developed a discursive approach to language and knowledge that I have already discussed in Chapter Three. I will only add here that he attempts to follow Nietzsche's *Genealogy of Morals* in privileging history as an ur-discourse that casts insight into the

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[274] Jean Baudrillard. *Simulacra and Simulation,* trans. Sheila Fraser Glaser. (Ann Arbor, MI: University of Michigan Press, 1994), 39

[275] Jean Baudrillard. *The Agony of Power,* trans. Sylvere Lotringer. (Los Angeles, CA: Semiotexte(e), 2007), 36. The point is also made consistently in his essays. See Jean Baudrillard. *Screened Out.* (London, UK: Verso Press, 2014). It also appears in his political commentary on the gestation of reactionary violence. See Jean Baudrillard. *The Spirit of Terrorism.* (London, UK: Verso Press, 2012)

[276] See Jacques Derrida. *Of Grammatology*, trans. Gayatri Spivak. (Baltimore, ML: The John Hopkins University Press, 1976)

[277] For an indicative text applying Derrida's approach to the "ethnocentrism of knowledge" see Gayatri Spivak. *A Critique of Post-Colonial Reason: Toward a History of the Vanishing Present.* (Cambridge, MA: Harvard University Press, 1999), 289

continuous transformation of all other discourses.[278] One of the virtues of genealogical analysis is that it can reveal what might appear to be an objective discourse on truth as instead being a very specific episteme which emerges in a given place and time for complex socio-historical reasons.[279] Often, Foucault believes this have far more to do with power simultaneously providing support for, and being supported by, a given episteme than that episteme's intrinsic truth. The power of these discourses can often blind us to their disturbingly pervasive affect, particularly when they become associated with disciplinary institutions such as prisons and schools.[280]

This brief summary is meant to demonstrate how an array of otherwise distinct thinkers reached similar conclusions about the possibility of subjects making objective assessments about the world.[281] Whether they reached this conclusion through empirical observation of contemporary society in the case of Lyotard, a historical assessment of (post)-modernity relative to other time periods in the case of Baudrillard, or by illustrating the inability of language to adequately represent the world as it is in Derrida and Foucault, the outcome was the same. We should abandon the long-held belief that one could arrive at anything resembling what has traditionally been understood as truth.

Once this step towards epistemological skepticism was taken, it is not hard to see why post-modern theorists would quickly reach related conclusions about the status of theories concerning agency and morality. This relates to the second point of agreement between the

[278] See Friedrich Nietzsche. *Basic Writings of Nietzsche,* trans. Walter Kaufmann. (New York, NY: The Modern Library, 2000), 437-599
[279] Michel Foucault. *The Order of Things: An Archaeology of the Human Sciences* trans. (New York, NY: Routledge, 2002) and Michel Foucault. *The Archaeology of Knowledge,* trans. (New York, NY: Routledge, 2002)
[280] Michel Foucault. *Discipline and Punish: The Birth of the Prison,* trans. Alan Sheridan. (New York. NY: Vintage Books, 1977)
[281] I will not be addressing their more purely philosophical claims about truth in this dissertation.

major post-modern theorists: like epistemic theories of knowledge, most moral theories, especially those associated with the political and economic status quo, rest on an insecure foundation. Indeed, almost all the post-modern theorists agree that one of the tasks theory should take upon itself is to liberate us from moralizing demagogues by unmasking the spuriousness of their moral claims. This can often be very difficult, since many demagogues operate from entrenched positions of power and socio-economic influence which are institutionally perpetuated over time.

It is important to note here that most of these accounts rest on a moral assumption that increasing the agency of individuals is desirable. Why and whether agency is good in and of itself is rarely discussed. But given my agreement with this position, I will not take substantive issue with this assumption here. Instead, this section will conclude by discussing what the post-modern theorists understand to be constraints imposed on the exercise of human agency, and what they offer as an alternative model.

Each of the major post-modern theorists offers a distinctive and unique account of what constraints are imposed on the exercise of human agency. Many, such as Lyotard, Baudrillard,[282] and Deleuze and Guattari[283] offered frequently brilliant analyses of Western modernity and the many complex forces which enforced and even fostered support for anti-democratic and even fascistic impulses.[284] Foucault went even further with penetrating genealogies of knowledge/power formations; particularly medical associations, the penal system,

[282] For an indicative example see Jean Baudrillard. *The Spirit of Terrorism,* 25
[283] An interesting literary work that explores many of the same themes in prose is *The Atrocity Exhibition,* which looks at how social geometries of modernity can be invested with a libidinal energy that borders on agency. See J.G Ballard. *The Atrocity Exhibition.* (London, UK: Forth Estate, 2006)
[284] For the Deleuze and Guattari reference See Gilles Deleuze and Felix Guattari. *Anti-Oedipus: Capitalism and Schizophrenia,* trans. Robert Huerley, Mark Seem, Helen B. Lane. (New York, NY: Penguin Books, 1977), 296-322

sexual norms, before finally announcing that we had entered a new age of bio-politics wherein the state would become responsible for the biological functioning of its populations.[285] Strangely, Derrida wrote very little about political and ethical concerns until very late in his oeuvre.[286] But all his writings imply the need to dissociate one's self from propounded certainties, whether through breaking them down wholesale or approaching them ironically.

> If I had invented my writing, I would have done so as a perpetual revolution. For it is necessary in each situation to create an appropriate mode of exposition, to invent the law of the singular event, to take into account the presumed or desired addressee, and at the same time, to make as if this writing will determine the reader, who will learn to read (to 'live') something he or she was not accustomed to receiving from anywhere else. One hopes that he or she will be reborn differently, determined otherwise, as a result...[287]

Each of these analyses has features to recommend them, and I shall not evaluate each here. Unfortunately, as I will elaborate below, both the post-modern theorists and their many admirers have been notably wary of providing a model of what unconstrained agency would look like, or what positive measures can be taken to realize it.[288] Indeed, beyond appeals to the virtue of greater democratization, non-fascist living, and the ecstasy of a liberated aesthetics of the self, it is hard to tell what emancipated agency might look like. As I shall discuss later, this silence is not incidental. Indeed, I believe it flows from the structure of post-modern accounts of the relationship between subjectivity and agency. Despite their many innovations, I believe post-

[285] See Michel Foucault. *The History of Sexuality Volume One: An Introduction,* trans. Robert Hurley. (New York, NY: Vintage Books, 1980), 139-140 and Michel Foucault. *The Birth of Biopolitics: Lectures at the College De France 1978-1979,* trans. Graham Burchell. (New York, NY: Picador, 2008)
[286] See Jacques Derrida. *The Gift of Death and Literature in Secret,* trans. David Wills. (Chicago, IL: University of Chicago Press, 2008), 54-81 and Jacques Derrida. *On Cosmopolitanism and Forgiveness.* (London, UK: Routledge, 2001)
[287] See Jacques Derrida. *Learning to Live Finally: The Last Interview,* trans. Pascale-Anne Brault and Michael Naas. (Brooklyn, NY: Melville House Publishing, 2007), 30-31.
[288] Deleuze and Guattari are the notable exception. See Gilles Deleuze and Felix Guattari. *A Thousand Plateaus: Capitalism and Schizophrenia,* trans. Brian Massumi. (Minneapolis, MN: University of Minnesota Press, 1987)

modern theories of subjectivity and agency are dependent on many of the same presuppositions they sought to disprove. This means that their accounts are bound by the same restrictions.

2) The Limitations of the Post-Modern Approach to Agency

In this section, I will argue (demonstrate?) that the unwillingness of many post-modern theorists to develop a more robust approach to agency is unsurprising for two interrelated reasons. I will unpack both in some detail to suggest why my forthcoming dignity oriented alternative might seem both conceptually plausible and politically desirable.

Firstly, if post-modern theorists pushed their philosophical position to its logical conclusion, they would once again be forced to place the contingent individual, in all his/her particularity, at the center of their theory.[289] This would abnegate the entire political motivation behind adopting post-modernism as a philosophical position. Indeed, it comes perilously close to the Lockean position that individuals begin as a blank slate whose subjectivity is gradually constituted through engagement with the determinants of the empirical world.[290] Moreover, given that the individual is regarded exclusively as the product of various socio-historical affects, a post-modern theorist is handicapped when developing a robust theory of freedom. This is because the post-modern approach remains beholden to what I claim is a deterministic "technical mindset" common to scientism and its offshoots throughout Western thought.

Secondly, I believe the claim that agency is determined entirely by socio-historical circumstances is unattractive not just because of its ramifications, but because it is, at base,

[289] I refer to the internal logic of the position rather than the criteria of another logical system.
[290] I say perilously with a bit of sarcasm. Given Locke's peerless bourgeois credentials, I cannot imagine any post-modern theorist would accept such an association.

fallacious. Therefore, I suggest we should instead embrace the potentially infinite model of agency I offered in Chapter Three.

My first claim can be illustrated by an appeal to the late Ludwig Wittgenstein, and his argument that a private language cannot be conceived. This is because he defines language by focusing on its communicative function in each semantic community. Wittgenstein denied that one could conclusively discover a determinate master rule from which all potential "language games" branch. If there were such a determinate rule, it might be possible to develop a rationalistic model of human consciousness that could then account for the universal objectivity of empirical phenomena.[291] This is because the universal rule which determines all semantic "forms of life" would have been understood. From there, one could try to move from the particularities of language use to its universal pre-conditions. Since Wittgenstein was convinced that there was no such rule, we are left with accepting that language, and thence all linguistically mediated approaches to "truth," can only leave things exactly as they were. Much as in his earlier work, one who truly understands this realizes that there are better things to engage in. As Wittgenstein artfully put it in the *Tractatus*:

> My propositions serve as elucidations in the following way: anyone who understands me eventually recognizes them as nonsensical, when he has used them - as steps - to climb up beyond them. (He must, so to speak, throw away the ladder after he has climbed up it.) He must transcend these propositions, and then he will see the world aright.[292]

Languages emerged because of the "games" that we played in various "forms of life", making up a "vast system" of interconnected semantic meanings. None of these could be arranged in some philosophical hierarchy. As he composed the *Philosophical Investigations* in

[291]See Ludwig Wittgenstein. *Philosophical Investigations*, trans. G.E.M Anscombe, P.M.S Hacker and Joachim Schulte. (Oxford, UK: Blackwell Publishing, 2001)
[292] Wittgenstein, *Tractatus*, 89

the 1940s and early 50s, Wittgenstein seems to have become convinced that the very attempt to draw a one-to-one correspondence between classes of linguistic statements and forms of knowledge did a disservice to the variety of language games existing in the world. He came to feel that one could not determine *a priori* whether some language games were more valuable than others. The only way to determine whether a given language game might serve a valuable purpose within a historical community of speakers was to internally understand the "forms of life" common to that community.[293]

By extension, Wittgenstein felt it made little sense to speak about a private human consciousness whose inner content can be analyzed independently of the social world around it.[294] To do so would be to presume that one could think the "I" without some language inherited from a given set of socio-historical contexts. Consciousness is now seen, at best, as the ability to assimilate and engage in linguistic behavior.[295] Many post-modern theorists have attempted to build on this insight. Post-modern theorists hope to diffuse how diffuse forms of discursive formations, presented in texts, and the micro-power of modern legal and political institutions, inhibit the agency[296] of individuals.[297] These are what I have called the socio-historical boundaries. However, they have been very reluctant to suggest what this agency itself is, even in such an uninhibited form. Pushed to their extreme, I think post-modernist arguments would wind up back in the very liberal modernism they seek to eschew.

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[293] Wittgenstein, *Philosophical Investigations,* para 241

[294] This was central to his argument in Ludwig Wittgenstein. *On Certainty,* trans. Dennis Paul and G.E.M Anscombe (New York, NY: Harper, Torchbooks, 1969)

[295] Rorty employs the term “mind” rather than “consciousness.” For the sake of consistency I have chosen to stick with the terminology I have worked with throughout this piece.

[296] In many respects this runs counter to Wittgenstein's belief that even a critical analysis of language can only leave things as they are; philosophy cannot impede on what he called "forms of life."

[297] I rely primarily on Foucaultian terminology here both because I think it is the clearest and most consistent, and because I have already discussed the discursive account of language in Chapter 3.

If one accepts that all things are determined through being interpolated within diverse socio-historical boundaries, then one is pushed to accepting a political variant of liberal universalism. This is because, the post-modernist must believe all experiences can be made explicit through a shared language, in effect becoming universalized. Otherwise the post-modern theorist would be pushed to believing that there was some private self that transcended and stood outside the determinations of the socio-historical boundaries. From this, some post-modern theorists have argued that no subjective position can be epistemically privileged over any other. In other words, the post-modernist is pushed towards valuing all epistemic positions equally. This is because one can no longer claim that there are private experiences that operate at a radical level beyond the socio-historical boundaries through which subjects interact and define themselves.[298] If it is true that all subjectivities are determined by their socio-historical boundaries, there are no such private experiences.

This has obvious normative consequences. If there is no private subjectivity that transcends the determinations of the socio-historical boundaries, and we cannot privilege any epistemic position over another, it seems plausible that each individual's opinions should be accorded equal weight on normative issues. This is because there is no transcendent position from which one might speak "truth" to the power dynamics which determine the makeup of our society and our subjectivity.[299] Ironically, as Jeremy Waldron claimed, this would compel post-modernists to also accept the strong claims of liberal universalists who argue for the metaphysical, rather than just political, tenability of their position.[300] Or, as put by Brian Barry,

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[298] The classical example is of course the Marxist emphasis on the class consciousness of the proletariat. Marx cannot be accused of being a liberal in disguise however, either at a political or philosophical level.
[299] For the references to "forms of life" see Wittgenstein, *Philosophical Investigations,* para 241.
[300] See, amongst other works, his paper "Particular Values and Critical Morality" in Jeremy Waldron. *Liberal Rights: Collected Papers 1981-1991* (Cambridge, UK: Cambridge University Press, 1993)

claiming that there is no universal core from which one can derive values must lead one to the uncritical acceptance of all systems of value, including the systems of those who believe there is such a universal core.[301]

If, on the other hand, there is something incommunicable in the experiences of persons that must be understood in and of itself, and not truncated by semantic translation into communicable discourses, post-modern theorists are forced into a different position. They would have to argue that there are some features of knowledge and human agency that cannot be accounted for through a critical analysis of the socio-historical boundaries. This would include the experiences of legally marginalized individuals whose voices have been silenced. There must exist some core of self-hood and agency which exists beyond that determined by the socio-historical boundaries we share with others. In other words, the perfect post-modern theorist becomes a Kantian in the end, much like Foucault himself did by re-engaging with the critical project.[302]

Post-modern theorists have avoided these theoretical consequences by focusing on the practical activity of those who engage in socio-political struggles to avoid theorizing about foundationalist accounts of knowledge and agency. All other attempts to mute these limitations theoretically, for instance by engaging in "strategic essentialism," can only evade them by appealing to the sensibilities of those already converted to the worth of a particular cause.[303]

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[301] See Brian Barry. *Culture and Equality: An Egalitarian Critique of Multiculturalism.* (Boston, MA: Polity, 2000), 252

[302] See Michel Foucault "What is Enlightenment?" in *The Foucault Reader*, ed. Paul Rabinow. (New York, NY: Pantheon Books, 1984), 32-50.

[303] Political engagement in "strategic essentialism" was pioneered by Spivak in a number of works. See Spivak, *Critique of Postcolonial Reason*, 282-284

Moreover, my argument stresses that the political consequences of a wholesale embrace of a post-modernist approach to agency is not at all desirable. Indeed, if my argument is right the political consequences would be directly contrary to the wishes of many post-modern theorists. This is because many post-modern theories are predicated on accepting the ultimate determinacy of socio-historical boundaries. As such, a post-modern theorist unable to consistently develop any robust theory of agency which deviates significantly from those common to the Western tradition is unsurprising. This is because post-modern theory is beholding to what I call the "technical mindset."

The claim that human agency is primarily or entirely determined by socio-historical boundaries is predicated on accepting determinism. More particularly, post-modern theorists take socio-historical contexts to be the true determinants constituting the various forms of human subjectivity. If the determinants of human subjectivity are the socio-historical boundaries within which we come into existence, then the particularities of a subject's experiences must occupy a privileged explanatory position when determining who we are, and how we relate to social phenomena such as legality. Since these particularities are unique to each subject, there can be no fixed, or "Archimedean" point, from which to begin constructing a universal theory of human subjectivity beyond saying that difference is the only universal.[304] To invoke Foucault, our intersectional subjectivity is molded into a soul which becomes a prison for the body through interactions within distinct socio-historical boundaries.

The embrace of such a historicized account of human subjectivity is often seen as highly emancipatory. The claim is that universalistic discourses on the "proper" essence of human

[304] The idea of an Archimedean point is critiqued by Rorty. See Rorty, Richard. "Solidarity and Objectivity" in *Relativism: Interpretation and Confrontation*, ed. Michael Krauscz. (Notre Dame, IN: University of Notre-Dame Press, 1989)

nature were employed as a weapon intended to marginalize the experiences, and thus the subjectivity, of various "others." It would not be going too far to claim that, for some scholars, this polarity between accounts of "universal" consciousness, always understood as being consistent with Western metaphysics and values, and the production of its deficient "Other" is what most defines our intellectual history. This polarity between the legitimate universalism of Western liberal "agency " and its pre-determined and deficient "Others" is seen as contributing to the emergence of sexism, racism, and a host of other historically significant prejudices. The counter claim is that by embracing the post-modern account of subjectivity one can avoid making essentialist claims either about human beings or the phenomena they experience.[305] Post-modern theorists often take this as laying the critical groundwork for a more emancipatory politics to follow; one that would do away with the prejudicial polarities which define the intellectual history of the Western world. As I shall indicate below, I do not believe this genealogy is inaccurate.[306]

3) Post-Modernism, the Technical Mindset, and Human Agency

Heidegger claimed that at the base of Western thought is not simply an emphasis on crude polarities, but the ontological claim that reality consists of what Heidegger calls "beings in Being." He held that this ontological presumption, far from simply being the purview of a few philosophers, influenced the way most individuals understood both themselves and the world around them. The ontological claim maintains that the world is ultimately divisible into different

[305]Chomsky has often touched on the political association frequently drawn between empiricism and the emancipation of marginalized subjectivities. See Noam Chomsky. *On Language: Chomsky's Classic Works Language and Responsibility and Reflections on Language.* (New York, NY: The New York Press, 2007), 90.
[306] The reference to "one dimensionality" is drawn from Marcuse, though adapted here. See Marcuse, *One Dimensional Man,* 12

fragmented things, each of which exists in a complex set of relations with other similarly fragmented things.[307] This is what I call the technical mindset; the belief that the world is ultimately a collection of "things"; with individuals being a specific class of things.

As Heidegger put it in *What is Called Thinking:*

> Accordingly—what is called thinking, insofar as it follows this call. Thinking means: letting-lie-before-us and so taking-to-heart also: beings in being. Thinking so structured pervades the foundation of metaphysics, the duality of beings and Being. Such thinking develops its various successive positions on this foundation, and determines the fundamental position of metaphysics.[308]

The account of subjectivity offered by post-modernism is beholden to this same ontological presumption that reality consists of "beings in Being"; specifically, that individuals are determined by the various socio-historical boundaries within which they exist. The entire subjectivity of an individual, on this account, can be understood by looking at the bundle of determinants that constitute them. In this respect, post-modern theory does not break from the parameters of modern Western thought, which is largely oriented by the technical mindset.

If post-modern theorists indeed take human subjectivity to be exclusively determined by socio-historical boundaries, they understand human beings in a manner that is analogous to that of "things." Once a post-modern theorist has developed a properly mechanical understanding of the impact of particular, but intersecting, socio-historical boundaries on the plastic *tabula rausa* of our un-determined subjectivity, the theorist can then understand how a given type of subject emerges. Of course, developing a post-modern analysis powerful enough to make entirely

[307] Heidegger's most sustained commentary on the metaphysics of "beings in Being" appears in Martin Heidegger. *What is Called Thinking?*, trans. Gray, J. Glenn. (New York, NY: Harper Torchbooks, 2004)
[308] See Heidegger, *What is Called Thinking?*, 224

accurate claims about all the determinants of subjectivity may be practically impossible. But by definition, the possibility of developing such a technique cannot be ruled out *a priori.*

This variant of the technical mindset exemplified by post-modernism also has serious political consequences. The claim that human subjectivity is entirely determined by socio-historical boundaries has not just been embraced by those focused on theorizing how individuals might deploy their agency to be rid of prejudice and structural forms of injustice. It is also, as Arendt brilliantly assessed in *The Origins of Totalitarianism,* the working assumption of authoritarian and totalitarian regimes bent on molding the perfect human beings to ensure the functioning of the regime.[309]

This is no coincidence. Post-modernism emerges with the development of the technical idea that human subjectivity is indefinitely plastic because there is no core set of features which define us. The idea that human subjectivity is plastic is a precondition for arguing that those subjects who grew up in socio-historical contexts not amenable to the technical requirements of our modern and now post-modern world should be treated unequally.[310]

Of course, few post-modern theorists have argued for authoritarianism; quite the contrary. For many, the post-modern position is adopted to show sensitivity to the plurality of human experiences in given socio-historical contexts, and reflects a rejection of authoritarianism. But it is hard to see how post modernism can generate what Chomsky referred to as a "soft theoretical" boundary against the idea that the subjectivity of human beings is indefinitely malleable, and therefore open to manipulation by authoritarian institutions.[311] This is because

[309] See Hannah Arendt. *The Origins of Totalitarianism.* (New York, NY: Harcout, 1955) especially Part III.
[310] The basis of this critique goes as far back as Rousseau. See Jean Jacques Rousseau. *The First and Second Discourses*, trans. Roger D and Judith R. Masters. (London, UK: Bedford/St Martins, 1969), 171
[311] See Chomsky, *On Language*, 90-91

post-modernism cannot develop an account of human agency beyond a negative one. Post-modern arguments can only critique the socio-historical boundaries which constrain individuals. But it is not enough to examine which socio-historical boundaries impede human agency if one does not have an account of what agency is.

The post-modern approach to agency cannot explain how, despite the emergence of an immense plurality of human subjectivities, there none the less remain tremendous commonalities in the way we think, interact, and develop even within very different socio-historical boundaries. Superficially, the idea that there are tremendous commonalities between people might appear to be simply false. How could it be true given the immense plurality of differences one can encounter, for instance in moral, political, and religious systems? But what post-modern theorists do not sufficiently appreciate is that no such particularities would be possible unless the capacity to transcend such contexts was also possible. The most evident example of this is language. It is entirely possible to imagine a private individual, or a collection of entirely private individuals, who are incapable or perhaps even unwilling to speak to one another or even with themselves. In such circumstances, the range of variation one would see in human subjectivities would be entirely minimal.

But, as indicated in Chapter Three, this is not the case for human beings. As Chomsky indicates, our common capacity to develop novel syntactic structures is what accounts for the linguistic diversity we see in the world. Chomsky attributes this shared capacity to a linguistic organ which develops a language in accord with the rules of universal grammar. This capacity is what enables the development of a wide variety of syntactic structures which then assume

different semantic meanings in given socio-historical communities.[312] The members of such communities can then plausibly speak of themselves as having a unique group history. Without this common capacity, no diversity could emerge. In other words, what is common to us all is what enables us to be different. Therefore, I have characterized the capacity to creatively develop a language as amongst the most important expressive capabilities; it indicates how human beings have a potentially infinite capacity for agency.

What I have characterized as our potentially infinite capacity for agency indicates the limitations of post-modern theory. Post-modern theories characterize human beings as things whose identities and capacities are determined by the socio-historical boundaries within which we exist. This demonstrates how post-modernism remains beholden to the technical mindset; the approach regards human beings as ultimately the product of their environment. For these reasons, post-modern theorists are unable to develop a more robust approach to human agency without going beyond the theoretical limitations of the mindset. They become limited to developing critiques of the socio-historical boundaries without accounting for what an emancipated agency would look like either in theory or in practice.

This is not to suggest we should abandon the insights of post-modern theories. In many respects, I think their political and historical critiques of the socio-historical boundaries to agency provide a great deal of insight on why and how we must overcome their false necessity. What is required is linking the critical approach post-modern theory takes towards contemporary society to a more robust normative conception of what emancipated human agency should be.

[312] See Noam Chomsky. *Language and Politics* (Oakland, CA: Ak Press, 2004) He refers to his hypothesis that there exists a "language organ" several times.

Therefore, I see my dignity oriented approach to human agency as running parallel to the critical post-modern approach.

This is especially true regarding the emphasis both place on democracy. One of the great virtues of the post-modern theory has been exposing the still deeply undemocratic propensities that exist in our society. This is true along many dimensions which have been exposed by a variety of post-modern theorists. Whether it is through disciplinary institutions, an emphasis on the positivity of law, or favoring a simulated democratic public sphere over an authentic one, there are many sites in our society which call for greater democratization and public involvement.

In subsequent Chapters, I will try to highlight how law, often a tool for repression, can be used to foster such democratizing trends in line with the normative thrust of my twinned model of human rights. If we were to take such steps, we might go a considerable way in overcoming the false necessity of the socio-historical boundaries while amplifying the agency, and thus the dignity, of individuals. I will begin by briefly discussing post-modern theories of democracy in more detail before offering my final criticisms.

4) Post-Modern Democratic Theories

Despite the inability or unwillingness of many post-modern theorists to develop a robust model of agency, this hasn't prevented many from engaging in positive normative theorizing on the great political issues of the day.[313] Perhaps unsurprisingly, most are self-declared democrats

[313] It is worth noting that all of the theorists I subsequently mention share an often under-theorized belief that increasing agency is valuable because they presume that the free development of the self is "what matters." The same accusation could be directed against this work. Unfortunately this meta-ethical position, and its consequent

who make consistent and impassioned calls to emancipate the demos from the limitations of the liberty oriented conception of agency in theory, and of liberal-capitalism in practice. Indeed, the propensity of post-modernists to become democrats is so common that some radicals, most notably Alain Badiou and Slavoj Zizek, have taken to caricaturing post-modernism as the guiding ideology of modern "critical theory."[314]

Democracy is invoked by many post-modern theorists as a way of shifting a population away from the "conservative" autocratic narratives of traditional philosophies which privilege the totalizing views of experts over the considered opinions of people faced with practical tasks.[315] Other post-modern theorists place tremendous stress on the need to develop the authentic "democratic intuitions" of individuals[316] which can be directed against the false-idols of representational parliaments where the rituals of democracy are falsely "staged."[317] In some cases, the possibility of a democratic multitude coming to inherit the earth is all but transformed into a true political theology, as in this indicative statement by *Empire* authors Michael Hardt and Antonio Negri:

> Certainly, there must be a moment when reappropriation and self-organization reach a threshold and configure a real event. This is when the political is really affirmed - when the genesis is complete and self-valorization, the cooperative convergence of subjects, and the proletarian management of production become a constituent power. This is the point when the modern republic ceases to exist and the postmodern posse arises. This is the founding moment of an earthy city that is strong and distinct from any divine.[318]

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limitations, are rarely scrutinized directly. For an epochal work that does see Derek Parfit. *On What Matters: Volume One*. (Oxford, UK: Oxford University Press, 2011) and Derek Parfit. *On What Matters: Volume Two*. (Oxford, UK: Oxford University Press, 2011)

[314]See Badiou's dismissive references to democratic materialism which opens Alain Badiou. *Logics of Worlds: Being and Event II*, trans. Alberto Toscano. (London, UK: Continuum, 2006), 1-9 and Slavoj Zizek, October 28th 2001, "Democracy is the Enemy." *LRB Blog*, http://www.lrb.co.uk/blog/2011/10/28/slavoj-zizek/democracy-is-the-enemy/

[315] See Richard Rorty. *Philosophy and Social Hope.* (New York, NY: Penguin, 1999), 29-30.

[316] Rahul Gairola. Interview with Gayatri Spivak. *Occupy Education: An Interview with Gayatri Chakravorty Spivak.* September 25th, 2012. https://politicsandculture.org/2012/09/25/occupy-education-an-interview-with-gayatri-chakravorty-spivak/

[317] Spivak, Critique of Post-Colonial Reason, 257

[318] Michael Hardt and Antonio Negri. *Empire*. (Boston, MA: Harvard University Press, 2000)

Or as they put it more directly in a later work:

> Freedom and equality also imply an affirmation of democracy in opposition to the political representation that forms the basis of hegemony...The logic of representation and hegemony in both these instances dictates that a people exists only with respect to its leadership and vice versa, and thus this arrangement determines an aristocratic, not a democratic, form of government, even if the people elect that aristocracy.[319]

On the one hand, it might appear odd that so many post-modern theorists would argue so consistently and uniformly for greater democracy given their rejection of foundationalism. But many post-modern theorists seem to regard their skeptical position towards the epistemological and ontological status of knowledge as a corollary to a normative disposition which is highly emancipatory. By breaking down a belief in meta-narratives, post-modern theorists hope to create greater space at the philosophical level for new epistemes to emerge which might serve to challenge hegemonic ideologies; for instance, the widespread belief in the universality of the liberty oriented conception of agency critiqued in my last Chapter. This is also related to the critiques of the socio-historical boundaries engaged in by many post-modern theorists.[320] Once belief in these meta-narratives is shaken, many post-modern theorists believe the institutional arrangements they support will be similarly undermined as their false necessity is recognized and rejected.[321]

It is important to note that while many post-modernists might acknowledge that the rejection of meta narratives means that there can be no necessary connection between their philosophical and normative positions, the latter are characterized as immanently implied by the

[319] Michael Hardt and Antonio Negri. *Commonwealth.* (Boston, MA: The Belknap Press of Harvard University Press, 2008), 304-305.
[320] See Hardt and Negri, *Empire*.
[321] See Roberto Unger. *Politics Volume One: False Necessity*. (London, UK: Verso Press, 2004). It is worth noting that Unger himself is not a post-modern theorist.

former.[322] Critical theory means taking a critical approach to the hegemonic practices inhibiting the "multitude" from organizing and emancipating itself.

However, I think that this radicalizes the immanent political dimensions of post-modern theory too much. There seems little reason why one must become politically radicalized at the normative level, even if one accepts the democratizing potential of the post-modern philosophical position. To paraphrase Barry again, the rejection of foundationalism needn't lead to the view that all normative positions are or should be considered equal.[323] It is just as possible that one might accept Rorty's generally liberal vision of a pragmatic approach to politics. One could also draw conclusions about the need for a strong, even authoritarian state required to arbitrate between moral disagreements given the existence of moral relativism.[324] It is even possible that, by rejecting foundationalism, one might draw more conservative conclusions about what is morally proper. Indeed, Edmund Burke directly linked his skepticism towards philosophical foundationalism and rationalism with a distinctively British conservatism.[325]

That post-modernism has often led theorists in a democratic direction is, to my mind, partly explained as an accident of culture, given that it initially arose in France as a reaction against modernist meta-narratives associated with the political status quo, or the Marxist alternative as manifested by the Soviet Union. But to my mind, the deeper reason is that many post-modern critiques are predicated on normative judgments which are meant to be universalized. Most importantly is their belief that the authentic development of the self is

[322] For the reference to "immanence" see Mark Tushnet. "Postmodernism and Democracy" *American Literary History*, 7 (1995), 584
[323] See Barry, *Culture and Equality*, *252*
[324] This is how Tuck interprets Thomas Hobbes. See Richard Tuck. *Hobbes: A Very Short Introduction.* (Oxford, UK: Oxford University Press, 2002), 62-65
[325] See Edmund Burke. *Reflections on the Revolution in France.* (Oxford, UK: Oxford University Press, 2009)

morally desirable. One must presume that even anti-essentialist post-modern theorists such as Gayatri Spivak express concern over whether the "subaltern" can speak because they believe that expression is of some intrinsic value to those who have been marginalized.[326]

This inability to evade the burden of moral judgment seems to demonstrate Dworkin's point about the impossibility of doing so.[327] However, it is worth noting that I do not believe that the democratic arguments of many post-modern theorists are therefore invalid. I simply believe that they should be made explicit. If it is true that individuals should have the agency to define themselves, as many post-modern theorists implicitly seem to believe, then this can be directly linked to a moral argument for both democracy and the amplification of individuals' expressive capabilities. By linking this to the potentially infinite model of agency, post-modern theorists can also avoid the limitations of the technical mindset I accounted for in the section above.

Conclusion to Chapter Five

In this Chapter, I unpacked what I take to be the basic features of the post-modern approach to agency. I began by briefly summarizing the history of the approach, and outlined the positions of some of the major theorists. In the next two sections, I argued that post-modern theories were unable to get beyond certain limitations. Firstly, if the logic of the post-modern position was unpacked thoroughly it would wind up re-embracing the liberal individualism it sought to eschew. Secondly, I argued that this was not coincidental. This is because post-

[326] See Gayatri Spivak. "Can the Subaltern Speak?" in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg. (Chicago, IL: University of Illinois Press, 1987)
[327] See Ronald Dworkin. "Objectivity and Truth: You'd Better Believe It." In *Philosophy and Public Affairs,* 25, (1996)

modern theorists are unable to develop a more robust approach to agency as they remain bound up in the limitations of what I called the technical mindset. Ultimately, post-modern theorists must regard human beings as determined by the socio-historical boundaries within which we exist. This problematizes the arguments many post-modern theorists make for greater democracy.

Given these problems, I concluded by suggesting we take what is historically and empirically valuable in the post-modern critiques of society and link them to my dignity oriented approach to our potentially infinite agency. This is especially pertinent where post-modern theories grant us insight into where society can be further democratized. In the next three Chapters I will be exploring how law, often a tool of repression, can be used to realize further democratization.

Chapter Six:

Realizing Human Dignity in Contemporary Jurisprudence on the Right to Vote (Canadian Jurisprudence)

Introduction

In this Chapter, I will begin to ground my approach to amplifying human dignity through the realization of the twinned rights by looking at contemporary jurisprudence concerning voting rights in Canada. I begin by arguing that we should see law as a useful, albeit dangerous, tool for realizing democratic rights. To buttress this argument, I will run through several Canadian theories on the relationship between law and democracy to assess their varied strengths and weaknesses. I will argue that if legal officials engage in a normative approach to jurisprudence, which takes the amplification of human dignity to be the unifying ideal of law, we can begin to approach legal decision making in a reasonably just manner.[328]

To demonstrate the strength of my normative approach to jurisprudence, I will then apply it to several consequential decisions in Canadian law concerning human dignity, and the right to vote. First, I will look at the *Law* decision, in which the Supreme Court formulated a relationship between Section 15 of the *Charter* and the protection of human dignity. Unfortunately, the Court has recently backed away from drawing such links because it regards human dignity as an overly vague concept. I will demonstrate how my definition can provide needed conceptual clarity on this important point. I will then apply a normative approach to jurisprudence which stresses the link between law and human dignity to the *Sauvé* and *Opitz*

[328] Here I draw very heavily on the work of Aharon Barak. See *Human Dignity: The Constitutional Value and the Constitutional Right.* (Cambridge, UK: Cambridge University Press, 2015). Also important is the work of Benhabib and Waldron on this subject. See Seyla Benhabib. *Dignity in Adversity: Human Rights in Troubled Times.* (Cambridge, MA: Polity, 2011) and Jeremy Waldron. *Dignity, Rank, and Rights.* (Oxford, UK: Oxford University Press, 2015), though both accounts are more empirical and historical than my own more theoretical approach.

decisions, which concern voting rights and democratic procedures. Doing so will demonstrate how a normative approach to jurisprudence can use law as a tool to foster democratization in legal and political practice.

1) Judicial Interpretation of Rights in the Canadian Context (And Its Controversies)

Human dignity is realized when individuals can engage in authentic self-authorship by defining themselves through redefining the socio-historical contexts within which they exist. The most immediate and expansive way to accomplish this is by their becoming authors of the legal-political institutions which govern them, as well as the laws which flow from them. This entails not simply direct democracy, but respect for individual rights.

As Dworkin has often claimed, it is only a crude conception of democracy which understands its central feature to be simply majoritarianism.[329] Most constitutional democracies embed those jurisgenerative rights which are to be respected and realized within the foundational framework of the law not simply out of respect for the individual, but out of necessity.[330] Removing or significantly reducing citizens' ability to exercise the unlimited power to make determinations on the general nature of rights and who benefits from them, is one of the ways a rights respecting democracy ensures its own continuation as such. One example of this, as highlighted earlier, is ensuring that powerful majorities (or influential minorities) are not able to

[329] This point is a consistent theme in his work. It finds its most express treatments in his post-Law's Empire Work concerning law as integrity. See Ronald Dworkin. *Freedom's Law: The Moral Reading of the American Constitution* (Boston, MA: Harvard University Press, 1997) and Ronald Dworkin. *Law's Empire.* (Cambridge, MA: Belknap Press, 1988)

[330] See Seyla Benhabib. *The Rights of Other: Aliens, Residents, and Citizens.* (Cambridge, UK: Cambridge University Press, 2004)

employ democratic processes to disenfranchise or outright discriminate against vulnerable communities. This might point to a tension in the basic principles of a constitutional democracy; and indeed, this is so. But the tension produced by placing boundaries on what the public may decide need not damage or even undermine a constitutional democracy so long as these tensions are productive rather than destabilizing.

On the other hand, this leads to the perennial problem of who is to be responsible for interpreting these boundaries and the instances in which they apply. Moreover, does this tension imply that some institutions, by being given final say, are "exceptions" which determine the normal functioning of law?[331] Dworkin certainly would not think so. To him, Judges can rightfully play the role of constitutional interpreters in a liberal-democracy. This is because the political procedures through which rights are interpreted constitute an objective good if the interpreters are committed to conducting their office with integrity. Here Dworkin believes that Judges hold to this commitment, though he never provides substantial reasons for his faith in the judiciary except at an extraordinary level of abstraction.[332] On the other hand, Dworkin expressed deep concern that conceding too much interpretive power to a community would result in a fractured "patch-work" collection of laws which could not possibly lead to the inculcation of an authentic fraternal community where rights bearing individuals treat one another with formally equal respect.[333]

In Canada, the Supreme Court has played a major part in catalyzing its role; for example, in the *Andrews* decision.[334] Regardless, there remains a significant academic, and increasingly

[331] See Carl Schmitt. *Political Theology: Four Chapters on Sovereignty*, trans. Tracy B. Strong. (Chicago, IL: The University of Chicago Press, 2005)
[332] It is no wonder that his ideal Judges all derive from myths.
[333] See Dworkin, *Law's Empire.*
[334] See *Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143*

public, debate surrounding the Court's role in Canadian society. This is especially true in the aftermath of the constitutional repatriation and the adoption of the *Charter of Rights and Freedoms* in 1982. Since then, the Court has found itself at the epicentre of numerous controversial debates on its authority to interpret the rights of citizens, and whether this infringes on the autonomy of the legislature. Somewhat surprisingly, these attacks have consistently come from both the left and the right. This somewhat distinguishes the Canadian debate from its American counterpart, where support for the American Supreme Court tends to overtly shift depending on the political slant of its decisions.[335]

On the Canadian left, critics such as Michael Mandel and Allan Hutchinson have criticized the Court for its failure to adequately address the needs of Canada's marginalized peoples including: aboriginals, women, and most prominently, the lower economic classes. These critiques have become especially pointed since the 1980s when the *Charter* was introduced. Many left-wing critics see the Court, and even the rights embedded in the *Charter*, as ideological tools used to maintain the essentially bourgeois liberal framework of Canadian society. The argument is that, by transferring political debates into the judicial arena, where privileged Justices are mistakenly seen as guardians of the rights of all, the left makes a Faustian bargain that can only end in a tireless cycle of waiting for and regretting the non-arrival of a truly just society. Left wing critics would prefer power be taken away from Judges and transferred to

[335] It was not at all uncommon to see left-wing scholars look at the American Court with contempt throughout the early 20th century, especially after numerous decisions condemning the economic reforms undertaken by Roosevelt's New Deal. This shifted considerably as Americans moved into the era of the Warren Court, where the judiciary was frequently attacked for de-segregating schools, allowing abortion, and disallowing capital punishment. This persisted until the arrival of the Reagan-Bush appointees, such as Clarence Thomas and Antonin Scalia, who shifted the court decisively back to the right to the cheers of many American conservatives who formerly would have condemned the Court.

the legislature, where the expectation is that mass movements would have more long term success.[336]

On the right, critics have been equally vehement about the Court's role in pursuing a progressive "liberal" agenda which would not receive the support of a more conservative legislature. In the 1980s and 90s the most systematic arguments to this effect were found in Morton and Knopff's *The Charter Revolution and the Court Party* [337] and Robert Martin's *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and our Democracy.*[338] Unsurprisingly given these works were written by Canadian Conservatives, no small hay is made of the fact that Pierre Trudeau, who is seen as having had socialist leanings, was the chief architect of the *Charter*. The authors maintain that from the moment Prime Minister Trudeau "shoved the *Charter* down the throats of Canadians" in 1982, progressive Judges (and their clerks) have used the *Charter* as a means of achieving what they could not gain through democratic politics. This includes the legalization of abortion, the enhancement of gay rights, and the recognition of an array of criminal defendants' rights which make it more difficult to institute a "tough on crime" agenda. They are backed up in this by left-wing interest groups and authors, who provide the *Charter* revolution with their ideological seal of approval for pushing forward a transformative social agenda, and agenda which, the conservative authors argue, the public would not support if it was proposed more overtly in the legislature. These

[336] See Allan Hutchinson. *Waiting for C.O.R.A.F.* (Toronto, ON: University of Toronto Press, 1995) and Allan Hutchinson. *Is Eating People Wrong?: Great Legal Cases And How They Shaped The World.* (New York, NY: Cambridge University Press, 2011), Michael Mandel. *The Charter of Rights and the Legalization of Politics in Canada.* (Toronto, ON: Thomspson Educational Publishing, 1994) and Andrew Petter. *The Politics of the Charter: The Illusive Promise of Constitutional Rights.* (Toronto, ON: The University of Toronto Press, 2010)
[337] See F.L Morton and Rainer Knopff, *The Charter Revolution and the Court Party.* (Toronto, ON: University of Toronto Press, 2000)
[338] See Robert Ivan Martin. *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined our Law and our Democracy*. (Montreal, QUE: McGill-Queens University Press, 2003)

trendy groups are crucial to validating the *Charter*, and contribute to its overwhelming (and to Morton and Knopff's mind's unwarranted) popularity across the country.

Both critiques, while emphasizing different specific grievances, come from a relatively similar place. Critics on both the left and right are animated by a belief that, without the *Charter* and the Supreme Court to stand in their way, democratic polities would be free to become the left-wing radicals or staunch Conservatives they so long to be. While critics on the left point to the Supreme Court's decisions upholding property rights and clamping down on labour movements as evidence of its bias,[339] critics on the right point to the Court's consistently hostile approach towards socially conservative values.[340]

But accusing the Court of such systematic bias strikes me as somewhat imbalanced. It is based not on an assessment of the fairness of judicial procedures and reasoning, but on an assessment of the political consequences of the decisions. While I am prone to agreeing with critics on the left more than critics on the right on these points, I believe addressing the perceived problems with the Court necessitates arguing more comprehensively for why the Justices, or a majority thereof, should have reached one decision over the other given, the principles weighed and assessed in accordance with the rules of procedure and evidence forming the legal process. As it stands, critics on the left and right who don't like the decisions the Justices reach want the Court's supervisory power over the legislature to be neutered, allowing greater scope to a polity they presume will be more sympathetic to their agenda.

[339] This last point is especially true of Mandel. See Michael Mandel. *The Charter of Rights and the Legalization of Politics in Canada*, 259-334.
[340] See Robert Bork. *Coercing Virtue: The Worldwide Rule of Judges.* (Toronto, ON: Vintage Canada, 2002), 67-105

This same propensity is not true of the other famous approach to Constitutional reasoning; the dialogue theory. Dialogue theory was introduced by Peter Hogg and Allison A. Bushell in their now classic 1997 article "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)", revisited ten years later in "Charter Dialogue Revisited: Or 'Much Ado About Metaphors.'"[341] After a short comparison with the American experience, their overall position is nicely summarized early in the initial article:

> At first blush the word "dialogue" may not seem particularly apt to describe the relationship between the Supreme Court of Canada and the legislative bodies. After all, when the Court says what the Constitution requires, legislative bodies have to obey. Is it possible to have a dialogue between two institutions when one is so clearly subordinate to the other? Does dialogue not require a relationship between equals? The answer, we suggest, is this. Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.[342]

Hogg and Bushell therefore believe that, where the legislature can respond in an effective manner to a judicial decision, the relationship between the two can meaningfully be described as dialogical rather than hierarchical. There are four features found in the *Charter* that facilitate this dialogue: 1) Section 33 2) Section 1, 3) the qualifications given to Sections 7, 8,9, and 12, and finally 4) the guarantee of equality rights under Section 15, which can be satisfied by a number of remedial measures.[343] Because the third and fourth features relate to the ambiguity

[341] See Peter Hogg and Allison Bushell. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad Thing After All)." *Osgoode Hall Law Journal*, 35 (1997) and Peter Hogg, Allison Bushell, and Wade. K Wright. "Charter Dialogue Revisited (Or Much Ado About Metaphors)." *Osgoode Hall Law Journal*, 45 (2007)
[342] See Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures," 79-80
[343] Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures," 82

inherent in legal interpretation, especially regarding constitutional issues, I shall only briefly discuss them here. A more extensive treatment will come in later sections. Instead I will discuss the first two features, which relate directly to the powers allocated to the judiciary and the legislature in the *Charter*.

The central narrative of the dialogue theory goes as such. The legislature will pass laws which come under judicial scrutiny. In the event that the Court decides that a given law is unconstitutional, several options are available. The first is that the legislature can invoke Section 1 of the *Charter* and maintain that the specific law constitutes a "reasonable limit" which can be "demonstrably justified in a free and democratic society." If the Court doesn't swallow this argument and either invalidates part or the whole of a law, or reads in new stipulations, the legislature can respond using different mechanisms. The first and most obvious solution is to employ its legislative powers and draft a new law that evades the Constitutional dilemma but is in substance the same. According to Hogg and Bushell, this is the "normal" response in situations where the Court strikes down a law.[344] In the authors' words "there is usually an alternative law that is available to the legislative body and that enables the legislative purpose to be carried out, albeit by somewhat different means."[345] It is also where features 3 and 4 are relevant, since the ambiguity of the *Charter* and its interpretation (according to Hogg and Bushell especially with regard to Sections 7, 8, 9, 12, 15) enable legislatures to read the Court's decisions in a manner that can suit their agenda. Even if the new law conceived as a response to a judicial decision will likely be struck down on the same legal basis, as many think will be the case, for instance, with the Harper government's new legislation in response to the Court's

[344] Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures," 80
[345] Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures," 80

decision in *Bedford,* this can still buy time for the parties involved to rally public opinion to their cause. Finally, if the legislature is myopically fixated on preserving the old law, or is convinced they cannot alter it without facing the same constitutional dilemma, they can opt to employ the (in)famous Section 33, the Notwithstanding Clause. By so doing, the government can shield legislation from revision or invalidation by the judiciary for a period of 4 years, after which the legislation must be reviewed before Section 33 is invoked again.

According to the dialogue theory, there is no tension between allowing the judiciary to interpret the *Charter* so long as the four features exist which enable the legislature to respond in an effective manner. While Hogg and Bushell concede that there are instances where this is not possible, for instance when the very "objective" of the law is deemed unconstitutional, they feel that these are exceptional moments that don't reflect the Canadian norm.[346] As put in their conclusion:

> To be sure, the Supreme Court of Canada is a non-elected, unaccountable body of middle-aged lawyers. To be sure, it does from time to time strike down statutes enacted by the elected, accountable, representative legislative bodies. But, the decisions of the Court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty. Judicial review is not 'a veto over the politics of the nation,' but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole.[347]

There is much to be said about this understanding of the *Charter* and the role the Court plays in ensuring that it is respected, not least of which is that it avoids the occasionally inconsistent arguments offered by both left and right wing critics of the *Charter* that are often spurred largely by the Court's refusal to further their particular political objectives.

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[346] Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures," 93
[347] Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures," 105

Hogg and Bushell's admirable "metaphor" has become an example of the quintessentially even-keeled Canadian theory of balance; while they admit that the Court sometimes steps beyond its purview, the authors insist that most of the time this is not the case.[348] And even where the Court does reach beyond its authority, Section 33 exists to help maintain the balance. While there is certainly something to this view, it remains problematic in so far as neither Hogg nor Bushell offer much in the way of normative analysis. While on the surface, their understanding of "dialogue" seems intended merely as a descriptive account of how the branches of the Canadian government operate, it is hard not to also read it as a normative defence of the status quo. This ambiguity also poses significant problems for their approach since, while they might offer prudential reasons why the status quo is inoffensive, it is unclear how dialogue theory should be understood at a principled level. Against left and right critics who claim that the *Charter* gives too much power to the Court, they claim that things aren't nearly that bad since, most of the time, the Court pays at least some deference to parliament. But they don't offer much in the way of argument as to why this balance is to be preferred over some alternate process.

Superficially, they do not give any account of the Court's reasoning in the decisions they cite, thus provoking little confidence that the Justices got it right. What if, on careful analysis, the Court got the issue wrong and passed a maligned situation on to Parliament to be resolved? This has been the case before, such as in the *Rodriguez* decision, which took decades to rectify.[349] On the other front, if one does have confidence in the Court, one may ask why it should bother paying any deference to Parliament at all. If it is true, as Hogg and Bushell seem

[348] See Hogg, Bushell, and Wright, "Charter Dialogue Revisited."
[349] See *Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519*

to believe, that the *Charter* is a good thing and Judges interpret it correctly, why not simply encourage them to assertively enforce the document without hesitation?

Hogg and Bushell might, correctly, counter that these are mostly hypothetical questions that ignore the fact that the balance achieved between the Court and Parliament is the virtue of our current system. But this is the strange thing about their articles; nowhere is the virtue of balance itself defended. It is simply assumed to be a worthwhile legal-political ideal. But whether it is remains unclear in the juristic reasoning of Hogg and Bushell.

It is, again, very possible to imagine a situation of perfect balance between a court and its Parliament that none the less perpetuates gross injustices. An ideal example would by the treatment of the slavery issue by American Courts prior to the Civil war, and their willingness to modify but rarely strike down the many racist policies that emerged in its aftermath. I shall discuss this at greater length in the next Chapter. Indeed, the brief golden age of the Warren court became famous precisely because the Justices were willing to de-stabilize their contemporary socio-historical contexts without concern for the prejudices of legislatures and their constituents.

The dialogue theory therefore remains unclear and over-emphasized as a normative account of the interplay between the various branches of the Canadian government. At best, it functions only as a pragmatic argument for maintaining the status quo since, after all, things could always get worse. But in a country defined both by tremendous wealth and increasing inequalities of power, this is hardly much of an argument. Here, I agree with the left-leaning

critics of *Charter* politics, but from a more pointed normative standpoint.[350] While the Court has done some good, and will likely continue to do so, the only way to re-distribute power in a way consistent with the dimension of democratic right would be to transfer power to legislatures, and beyond that, to the people themselves.

I believe that we should accept the existence of dialogue between Court and the legislature so long as a significant amount of power is shifted to the former. In this, I concur with left and right *Charter* critics who believe the role of the Court should be downgraded. This is not simply because I disagree with the Court's specific decisions on justice, but because I believe justice demands that the Court not make many of these decisions at all. But many of these critiques have not adequately developed an account of why a more robust democracy is to be preferred over judicial fiat. One of the goals of my normative approach to jurisprudence is to tighten the link between agency, rights, and democracy to indicate the role law can play in amplifying the dignity of individuals. It can achieve this, in part, through fostering democratizing trends such as expanding the franchise.

2) The Right to Human Dignity in Modern Canadian Jurisprudence

On my model the most important hermeneutical principle one should adopt when interpreting the law is a commitment to amplifying human dignity by realizing each citizen's expressive capabilities. Human dignity is hermeneutically linked to subsequent and increasingly more specific moral commitments, such as those required to realize the twinned rights given

[350] The most articulate account is given by Allan Hutchinson, who has argued for the adoption of a pragmatic hermeneutics of law. See Allan Hutchinson. *Evolution and the Common Law.* (Cambridge, UK: Cambridge University Press, 2005)

specific socio-historical boundaries. What was presented before at a relatively high level of philosophical abstraction must now be translated into more juridical language.

The commitment to amplifying dignity is open-ended because it is linked to my potentially infinite conception of agency. As I have maintained throughout, our potentially infinite capacity for agency means there are no limits to how much it can be amplified. This has legal consequences because one cannot adopt a liberty oriented approach to interpreting the law, since this presupposes that the responsibility of the state is merely to forgo interference in the private lives of citizens. Amplifying human dignity requires that law do more than that. Translated into juridical language, we might say that amplifying a human being's dignity presupposes realizing a specific set of rights.

At a more abstract level, this would be the twinned rights to democratization and to equality of human capabilities. Concretely, we can begin to define how this would be carried out in even more detail. Justice Aharon Barak has helpfully described this process in his book *Human Dignity: The Constitutional Value and the Constitutional Right* as an instance of dignity being a framework "mother right" which births a number of "daughter rights" through a process of interpretation.[351] Through this process we move from respecting human dignity at an abstract level and come to respect it as a right with real constitutional value.

> A constitutional right formulated as a principle serves as a 'common roof' under which a wide variety of situations crowd together. Common to all of them is that they are expressions of the general principle that shapes the right... Under the canopy of the constitutional framework right, constitutional rights derived from it or that radiate from it crowd together. These rights are inherently of a lower level of generality than the framework right...A framework right is therefore a mother right. From it are derived daughter-rights. If the daughter-rights themselves are framework rights at a lower level of generality, granddaughter-rights are to be derived from them. Other imagery expressing

[351] See Barak, *Human Dignity*

this concept views the mother right as a tree and the daughter-rights as branches growing from it.[352]

Another way of expressing this same point would be to see the protection of human dignity as the, not merely a, fundamental constitutional "archetype." A given socio-political community's commitment to protecting and realizing this archetypal right should define our hermeneutic interpretation of any constitutionally embedded rights.[353] The amplification of human dignity should be the unifying ideal, and thus be expressed through the interpretive commitments of legal officials.

If we are committed to seeing the amplification of human dignity as a constitutionally archetypal "mother right," I believe that the first daughter rights which would flow from it would be the twinned rights identified in this paper.[354] One can then further concretize what this would entail in practice. Realizing the twinned rights might include developing increasingly specific rights to democratic participation up to the threshold where citizens become both authors of legal and political institutions, and authors of the laws which flow from them. Ideally, they would then express a further commitment to protecting and amplifying human dignity by embracing the second right through the widespread equalization of human capabilities. These jurisgenerative

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[352] Barak, *Human Dignity*, 157

[353] I have drawn the term "archetype" from Jeremy Waldron, though I have employed it in a more basic sense. Waldron leaves open to question whether there can be a plurality of constitutional archetypes. While possible, if this is true, it becomes difficult to see how an archetype fulfills a different and more foundational role in Waldron's theory of jurisprudence than any other "principle" does in Dworkin's approach. According to Waldron archetypes "differ from Dworkinian principles and policies in that they also operate as foreground provisions. They do foreground work – as rules or precedents – but in doing that work they sum up the spirit of a whole body of law that goes beyond what they require on their own terms. The idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, publicly, establishing the significance of that area for the entire legal enterprise." Unfortunately this does not clarify things for me, since Dworkin makes quite the same claim about those principles which flow from a commitment to integrity in the law. For this reason I have adapted the term archetype to mean a singular, unifying commitment; in this case to human dignity. See Jeremy Waldron "Torture and Positive Law: Jurisprudence for the Whitehouse" *Colombia Law Review*, 105 (2005): 47.

[354] See Barak, *Human Dignity*

democratic and egalitarian rights would in turn serve as an increasingly concrete interpretive bedrock for laws which further the process of expressing a community's commitment to protecting and amplifying human dignity.

Calling for the recognition of human dignity as a "mother right" in the Canadian context might appear rather odd since nowhere in the formal Canadian constitution, even within the *Charter*, do citizens retain an express right to have their dignity protected.[355] [356] Nor does it appear anywhere in any documents that might be considered part of the conventional constitution. The closest one finds to such an express right is in several provisional human rights codes, and the non-constitutional *Bill of Rights,* which maintains in the preamble that "the Parliament of Canada, affirming that the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person..."

This language is not repeated in the *Charter of Rights and Freedoms.* Instead, the *Charter* guarantees a broad collection of largely liberal rights, almost all of which are qualified by the government's concurrent right to appeal to Sec 1 and Sec 33.[357]

Saying that, I do not mean to suggest that a right to dignity cannot be read into the *Charter*, nor does it preclude one from regarding it as an animating ideal. Indeed, the two most abstract rights in the *Charter* move very close to speaking in the language of dignity. Sec 7

[355] See Barak, *Human Dignity*

[356] One might argue that such an express commitment can be read into Canada's commitment to various international human rights documents which do include a right to dignity. This includes the UNHDR, which expresses a commitment to human dignity immediately in the Preamble, and the ICCPR, which also includes such a commitment in the Preamble. I will discuss international law in more detail in the next chapter. For now, it is enough to say that Canadian courts have varied in their understanding of the status of international law in the domestic context. It is unlikely that they, or any political body, would go so far as to give these international commitments to respecting human dignity the legal force needed to enact broad change to the structure and character of domestic legal-political institutions.

[357] Non-liberal *Charter* rights are predominantly minority language rights and a few provisions related to Aboriginal treaties.

guarantees all rights to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Sec 15, the equality guarantee, moves even closer to emphasizing dignity. The text consists of two parts. The first is a guarantee that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." As if to further emphasize the purposive interpretation implied by Sec 15, Subsection (1) specifies that the right "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Either of these rights can easily be interpreted as expressing a commitment to realizing and amplifying the dignity of human beings, as indeed Sec 15 was in the *Law* decision. And indeed, the Supreme Court has not been reticent about drawing just such connections throughout its over 30 years interpreting the *Charter*. References to human dignity go back to some of the earliest decisions of the Court related to the Charter; including controversial decisions in the *Morgentaler, Rodriguez,* and *Zundel,* cases.[358] In *McKinney*, the Court claimed that "the purpose of the equality guarantee (Sec 15) is the promotion of human dignity."[359] The Court has determined that Canadian society is "based upon respect for the intrinsic value of human dignity of every person." Respect for this intrinsic value underlies the "basic principles" upon which the

[358] See *R. v. Morgentaler, [1988] 1 S.C.R* and *Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519* and *R. v. Zundel, [1992] 2 S.C.R. 731*
[359] See *McKinney v. University of Guelph, [1990] 3 S.C.R. 229* at pg 100

Canadian legal system is based.[360] According to Justice Wilson, human dignity "finds expression in almost every right and freedom guaranteed in the *Charter*."[361]

In *Egan*, Justice L'Heureux Dubé went even further. She claimed that human dignity was at the "heart of individual rights in a free and democratic society."[362] This is a remarkable claim, since it implies that respect for human dignity is intrinsic even in the qualifications to human rights set out in of Sec 1. Here, human dignity is directly cast as the unifying ideal between liberal rights and democracy in the Canadian context. In *Gosselin,* it was stipulated that to pay respect to human dignity and prevent discrimination, one must engage in a "purposive approach" to interpreting specific rights.[363] This respect for human dignity also explains why the Court has been willing to limit the rights of some individuals, for instance those of neo-Nazis such as James Keegstra, where their activities illustrated serious disrespect for human dignity by willfully promoting hatred against marginalized communities.[364]

These somewhat sporadic comments indicate that, although the right may not be express, the Supreme Court has historically taken human dignity very seriously as a hermeneutic principle. This respect reached its peak in the *Law* decision, where Justice Iacobucci overtly conflated Sec 15 with the right to human dignity. He developed a sophisticated test to determine whether dignity had been violated which included what, for a time, was the canonical interpretation in the jurisprudence.[365] Here I will quote Justice Iacobucci at length:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is

[360] See *R. v. Swain, [1991] 1 S.C.R. 933* at pg 23
[361] See *R. v. Morgentaler, [1988] 1 S.C.R* at pg 166
[362] See *Egan v Canada [1995] 2 S.C.R* at pg 543
[363] See *Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC* 84 at para 214
[364] See *R. v. Keegstra, [1990] 3 S.C.R. 697*
[365] It is worth noting that this definition differs significantly from mine. I believe that the ultimate reasons the *Law* precedent was abandoned is the ambiguity in this definition, as I shall discuss later.

> harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merit. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[366]

To determine whether one's human dignity was violated, Iacobucci developed what would subsequently become known as the *Law* test. This had both a subjective and an objective component. The subjective component was to determine whether the individual felt their dignity had been violated. The objective component involved looking at whether the impugned law did indeed violate one's human dignity in either its form or its intent. The test to determine these components involved looking at four contextual factors. These were: 1) pre-existing disadvantage on the part of the individual claimant's associated group, 2) a correspondence, or lack thereof, between the grounds on which the legal claim is made and the needs of the claimants, 3) the ameliorative effects of the impugned law upon the disadvantaged claimant's associated group in society, and 4) the nature and scope of the interests affected by the impugned law.[367]

Unfortunately, the Court later decided that human dignity was too ambiguous and controversial a concept on which to base judicial reasoning on the application of Section 15. Rather than contributing some philosophical heft to thee interpretation of Section 15, it had led to a confusing test which was difficult to apply in both theory and practice. Thus, in the *Kapp* decision, the Court engaged in a rare display of overt self-correction. Justices McLachlin and

[366] See *Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497* at para 53
[367] Ibid

Abella explicitly shied away from the Law *test* by adopting human dignity as an interpretive principle for the application of Sec 15. As they claimed when developing their new test:

> As critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussing on treating likes alike.[368]

Saying that, the Court did not expressly claim it would no longer understand human dignity as an animating ideal when engaging in constitutional interpretation of Sec 15, or any other Section of the *Charter*. They only claimed that, from now on, they would not be relying on the ambiguous formulation given in *Law*. It is likely that more informal references to human dignity will continue to colour the Court's reasoning into the foreseeable future.

One could be forgiven for thinking, even on the basis of this summary, that the Court remains Janus-faced on the role human dignity is to play in the interpretation of *Charter* rights. Hagiographic references to it persist throughout the Court's decisions; occasionally reaching such a pitch that human dignity is virtually understood as the basic principle animating all Canadian law. On the other hand, except for a brief flirtation post *Law,* the Court has been unwilling to substantiate this romance by clarifying precisely what role human dignity should play in a proper interpretation of Canadian law in hard cases. Indeed, *Kapp* implies that they are retreating from according it any substantial role at all in no small part because it has made it even more difficult for worthy claimants to make cogent legal arguments about their needs.[369]

[368] See *R. v. Kapp [2008] 2 S.C.R. 483, 2008 SCC 41* at para 22.
[369] Ibid

This is ironic and points to a serious problem in the Court's reasoning. The Court determined that since claimants should benefit from clear legal reasoning in precedent establishing cases, the concept of human dignity should be shucked as overly ambiguous. But, for all the concern about imposing an "additional burden" on claimants, the Court seems to be implying that the rights within the *Charter* are relevant only to the degree they are acknowledged as such by the Court.[370] For rights claims to be taken seriously, they must be taken as legal claims capable of being heard in a Court setting. Nowhere do McLachlin or Abella imply that the basis of human dignity might lie in claimants being able to reformulate other rights in a way that might eschew the boundaries ascribed to them by common law decisions. This might include, for instance, amplifying the expressive capabilities of such marginalized groups to have their rights claims heard in non-judicial forums such as the public sphere.

But that, on my model, is precisely what a normative approach to jurisprudence should do. It is not simply that Courts should adopt a new principle when engaging in judicial reasoning, *a la* the *Law* test. If amplifying human dignity is the unifying ideal of a normative approach to jurisprudence, this implies that individuals should be capable of defining themselves by redefining the contexts within which they exist. The unifying ideal of dignity could be seen as an animating "mother right" in the Canadian context, which, for instance, would entail realizing the democratic right to the extent possible.[371] This would necessitate shifting some powers of constitutional interpretation from the Court to the legislature, or better still, the general public. This would give citizens greater opportunity to employ their expressive capabilities to become authors of the laws which flow from legal-political institutions. It would enable citizens to have a

[370] See *R. v. Kapp [2008] 2 S.C.R. 483, 2008 SCC 41* para 22
[371] See Barak, *Human Dignity*

real say in defining both their country and themselves more robustly. In the next section I will discuss how this might be understood in the Canadian context. I will then move on to discussing some instances where the Court itself has admirably pushed for greater democratization, before unpacking why I believe staying true to the same principles employed in those decisions would entail ceding significantly more powers to democratically elected political bodies.

3) Moving Beyond the *Law Test:* The Concept of Human Dignity in a Normative Jurisprudence

While the *Law* decision was nominally about survivor benefits, it is the way human dignity was framed and made central that makes it a seminal, but flawed, decision in Canadian jurisprudence. The Court equated human dignity with an individual's feelings of "self worth" and/or "self respect,"[372] related to both their physical and psychological integrity. An individual's human dignity is infringed by marginalizing discriminatory practices not based on "personal traits or circumstances which do not relate to [an individual's needs], capacities, or merit." The test developed in *Law* was meant to determine, objectively and subjectively, when a law marginalized an individual or group, and diminished their sense of self-worth and/or self-respect. Such a law would constitute unjustifiable discrimination.

While there is much merit to this definition, and credit must be paid to Justice Iacobucci for undertaking the difficult task of defining human dignity for the purposes of legal analysis, it is true that the definition is quite unclear. The difficulty lies in his associating human dignity with a psychological state on the part of claimants; an individual needed to establish that their

[372] See *Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497* at para 53

feeling of "self worth" and/or "self respect" was marginalized by the impugned law.[373] While the objective features of the *Law* test were established to ameliorate the inherent subjectivism in such a definition, they do not evade it. This is further reinforced by facets of the test which look primarily at the "needs" of the group the claimant is associated with. Most confusingly of all, the *Law* test required Judges to look at the historical circumstances of the relative group by determining whether they suffered from "pre-existing disadvantage."[374]

While there are certainly many good intentions wrapped into this test, it is no doubt problematic as a means of determining whether one's human dignity has been infringed. The inherent subjectivism of the test is only evaded by an appeal to the techniques implied by the post-modern approach to agency. This is done by moving beyond the individual's subjective claim and examining the structures of power which marginalized them as a member of a given group which has been subject to repeated discrimination. This is indeed, important. By bringing to light the various ways power has played a role in constituting various marginalized subjectivities, the *Law* test continues to contribute a great deal to our historical understanding of injustice. In one important respect, captured by the *Law* test, theories of discrimination can contribute to developing programs to ameliorate injustice by making us sensitive to the contexts which produce different human needs and within which we can speak of fostering their expressive capabilities.

Unfortunately, by focusing exclusively on the determinate causes of marginalization, the post-modern approaches engaged in by the Court when defining dignity in *Law* cannot offer much more guidance on the substantive way injustices in our society should be remedied. While

[373] See *Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497* at para 53
[374] Ibid at para 63

making us sensitive to the socio-historical contexts within which human interests are fostered, or unjustly marginalized by discriminatory practices, is an important step, it is simply the beginning. One cannot say, for instance, how these injustices can consistently be rectified in a manner that would be both effective in the contexts analyzed, and fair to the remainder of legal subjects.

This last point is crucial since so many rights claims involve balancing the competing interests of different socio-historical groups against one another, and not simply looking at the rights of an individual and their associated group against the claims of state bodies. In the famous *Sparrow* decision, to give a brief example, the issue was not simply whether an Aboriginal person had a right to fish, but whether they could do so in a more advantageous way than permitted for other groups. Mr. Ronald Sparrow, a member of BC's Musqueam Band, argued that his right to fish with larger than usual nets, while contrary to the *Fisheries Act,* was permitted under the 1982 *Constitution Act* which reaffirmed Aboriginal treaty rights, specifically Sec 35 (1). In these cases the Government argued that the provisions in the *Fisheries Act* were designed to promote fairness by preventing over-fishing on the part of any one group and thereby preserving fish stocks. The Court (rightly to my mind) rejected this claim and sided with Mr. Sparrow.[375] It "recognized and affirmed" Aboriginal rights to fish as they have traditionally, though it failed to mention the historical injustices which led Mr. Sparrow to the unfortunate position of having to demand a right to fish in waters that had never been ceded to the Canadian government in the first place.[376]

[375] See *R. v. Sparrow, [1990] 1 S.C.R. 1075*
[376] Ibid at pg 15

This case demonstrates both the strengths and weaknesses of post-modern discourse theory in a nutshell, particularly when applied through the law. While the Court showed admirable sensitivity to the protected legal interests of a historically marginalized people, it was only able to do so by appeal to Aboriginal treaty rights which are, themselves, problematic for many reasons. In instances where Courts need to engage in balancing the rights of different groups against one another, they have not always been so generous. Indeed, in many situations, without a strict legal provision which protects the rights of a given historically marginalized group, the Court has ruled in favour of socially dominant parties. This constitutes a considerable affront to human dignity, but it is not clear how post-modernism could effectively prevent this situation beyond appealing to traditionally marginalized status of a given claimant. Put another way, there is no moral necessity which leads from analysis of discrimination to the protection of human dignity since the former is a critical tool of analysis rather than a prescriptive approach to justice. To get beyond this difficulty, we must determine what a dignity centered approach to justice would look like in normative legal practice.

I have argued that normative approaches to jurisprudence should take the amplification of human dignity to be a "mother right" which establishes the unifying ideal towards which all other rights, and law as a whole, aspire.[377] Here I will clarify this by saying that respecting the right to human dignity means that laws which marginalize an individual's expressive capabilities for morally arbitrary reasons cannot be considered just. An individual's expressive capabilities, as discussed in Chapter One, are broader than simply a psychological state. It refers to what they are able to do through the application of their human expressive powers. Such an approach to

[377] Barak, *Human Dignity*

dignity must respect and amplify an individual's capacity to employ his expressive capabilities in a way consistent with the twinned rights. Most immediately, it would mean democratizing legal and political institutions where possible.

To ground this further, I will suggest a two-step test to understanding the democratic right: the dignified authorship test. This flows from the justification given in Chapter Two, and will be grounded further in my later analysis of the *Opitz* decision, and especially in my later Chapter concerning American law. The first is that, when deciding cases centered on democratic rights, courts should rule in a way that best amplifies the dignity of the individuals in question by enabling them to redefine the socio-historical boundaries within which they exist. The second is that courts should ensure that democratic rights are of equal value to the broadest possible number of citizens. As we shall see, in most circumstances, I believe the two steps of the dignified authorship test will flow together. Amplifying the dignity of individuals will mean equalizing their democratic rights. But in some circumstances the two steps may conflict. In these cases, courts should decide to amplify the dignity of individuals over equalizing the value of voting rights. For instance, this would be the case when ameliorating the impact of long histories of marginalization by granting disproportionate electoral representation to the northern territories with their small but overwhelmingly aboriginal populations.

Canadian courts have generally played a positive role in the democratization of Canada by expanding the franchise (and countering the fears of some Left and Right critics that the judicialization of politics could only be a disaster for democracy in Canada). In the following sections, I will discuss several cases where the Court ruled in a manner that adequately respected human dignity and granted more equal democratic rights. I will also offer suggestions on where its reasoning might have been guided by respecting dignity as an interpretive mother right.

Finally, this Chapter will conclude with my argument on why significant powers should none the less be transferred from the Court to democratically elected bodies.

4) Democratic Reasoning in the *Sauvé Decision*

The *Sauvé* decision was likely the Court's most explicit in dealing with democratic principles. It related directly to the type of democratic society Canada was to be: would the franchise be guaranteed to everyone, or could the right to vote be revoked given certain aggravating circumstances? Fortunately, the Court decided in keeping with the principles of democratic justice, and chose to respect the dignity of prisoners in Canadian society by allowing them to participate in political decisions which would directly affect them. However, it was by no means an open and shut case. Four Justices, led by Justice Gonthier, prepared a sharp dissent that I will address further on, stating why I believe the majority made the correct decision.

The right to vote is guaranteed to all Canadians by Sec 3 of the *Charter*, and is one of the few rights that cannot be overridden by the legislature through the application of the Sec 33 Notwithstanding Clause. None the less, the right to vote remains subject to the limitations prescribed by the Sec 1 reasonable limitations clause. This became the pivotal issue in the *Sauvé* decision. The Government relied on Section 51*(e)* of the *Canada Elections Act*, which initially prohibited prisoners from voting in all Federal election regardless of the length of their sentence. After a previous bout of litigation, the Federal Government changed the law so that it prevented only prisoners serving a sentence of two years or more from voting. It was expected that, with this new revision, the limitation could withstand *Charter* scrutiny. At the trial level, Justice Weston of the Federal Court disagreed and voided the limitation. While he agreed that the

Government had a "pressing and substantial" objective in limiting the right to vote, he felt the limitation was overbroad and didn't constitute minimal impairment of prisoners' democratic rights.[378] The Federal Court of Appeal disagreed and overturned the ruling of the trial judge. The majority agreed with the government's claim that it wished both to preserve the integrity of the democratic process and deter crime by preventing prisoners from voting. They felt that denying the right to vote was within the "reasonable range" of alternatives available to Parliament to achieve these objectives. Justice Desjardins, in the minority, would have dismissed the appeal because of the lack of evidence of any real benefit derived from denying prisoners the right to vote. The decision was appealed again to the Supreme Court.[379]

In a close 5-4 decision, the Supreme Court ruled in favour of Mr. Sauvé's appeal. The majority determined that the limitations imposed on prisoners' Sec 3 rights could not be saved by appeal to Sec 1. Because of the "special importance" of the right to vote accorded by the framers of the *Charter*, the proportionality test, where the rights of the individual are balanced against the benefits incurred by society by limiting those rights, was applied very stringently. The Court determined that the damage caused by the infringement of the prisoners' right to vote was greater than, especially given the Government offered little empirical evidence that preventing prisoners from voting served any real purpose beyond making an ideological statement.

A great deal of the Court's disagreement stemmed around the relative priority accorded to the right to vote. McLachlin and the other Justices in the majority were emphatic about the special importance they accorded democratic rights. This was often given a Millian spin by

[378] See *Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68* at para 3.
[379] Ibid at para 4

Justice McLachlin, who often appears to hold Mill close to her heart.[380] This was especially true when it came to fostering a link between prisoners and the society which presumed to judge them. To deny prisoners the right to vote would suggest that they are no longer members of the community, but instead "outcasts" from our way of life and democracy.[381] It also sent the ugly message the punishment was more important than democratic rights in the case of some people who were deemed unworthy. According to McLachlin and the majority, this "ancient and obsolete" idea could do nothing but promote disrespect for society on the part of criminals.[382] In this way, the right to vote had a fundamental connection to maintaining the rule of law itself:

> The theoretical and constitutional links between the right to vote and respect for the rule of law are reflected in the practical realities of the prison population and the need to bolster, rather than to undermine, the feeling of connection between prisoners and society as a whole. The government argues that disenfranchisement will "educate" and rehabilitate inmates. However, disenfranchisement is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility (testimony of Professor Jackson, appellants' record at pp. 2001-2)…To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.[383]

She explicitly linked this conception of democratic enfranchisement to the protection of human dignity. Indeed, it would later become the pivotal issue in the case as Justice McLachlin and Justice Gonthier came to disagree over what dignity required in this case. According to Justice McLachlin:

> More broadly, denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in *August v. Electoral Commission*, 1999 (3) SALR 1, at para. 17, "[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite

[380] *Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68* at para 38
[381] Ibid at para 40
[382] Ibid at para 43
[383] Ibid at para 38

> literally, it says that everybody counts." The fact that the disenfranchisement law at issue applies to a discrete group of persons should make us more, not less, wary of its potential to violate the principles of equal rights and equal membership embodied in and protected by the *Charter*.[384]

This paragraph, with its rather telling reference to the South African Constitutional Court, expresses in latent form how human dignity can play an important role in framing the normative ideal to which the Canadian Constitution should strive. Indeed, it recognizes the fundamental link between democracy, equality, and personhood that is the moral centre of this piece, and, according to Justice McLachlin, lies at the heart of Canadian democracy.

> Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*: compare *August*, *supra*. It also runs counter to the plain words of s. 3, its exclusion from the s. 33 override, and the idea that laws command obedience because they are made by those whose conduct they govern. For all these reasons, it must, at this stage of our history, be rejected.[385]

Unfortunately, while there is much of great value and interest in what McLachlin wrote (to my mind, it remains one of her most stirring decisions) there remain some problems in relating dignity to a broader conception of democratic legitimacy. What is interesting is that Justice McLachlin never goes so far as to say that the universality of the right to vote is a measure of the legitimacy of a given legal system itself, and not just one way to foster a respectful relationship between prisoners and the rule of law. By disenfranchising prisoners, one might question the extent to which the state can still claim the moral right to so infringe their autonomy, given it treats them simply as means to the end of promoting an ideological message. This is because, if the arguments for a democratic approach to justice are correct, the state and the laws which flow from it are only legitimated through being authored by those they purport to govern. This is one of the reasons that, in my twinned model of rights, the right to democratic

[384] *Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68* at para 35
[385] Ibid at para 44

authorship proceeds all others. Unless individuals are capable of participating in the authorship of the legal and political institutions which govern them, and the laws which flow from these, then the legitimacy of the state to coerce them through law comes seriously into question.

It is true that demanding that all citizens give their express consent to participate in a democratic system, and to consequently feel beholden to the laws which flow from them, might be too stark a line to draw when discussing the legitimacy of the state. Ignoring the majoritarian problem, the very notion seems to wind itself into logical impossibilities. Indeed, it would likely be impossible to ever adequately determine what such express consent might even look like in practice. This is true even at the abstract level of determining the shape of legal-political structures. For instance, if I were to endorse a given political-legal structure at a given time, are there conditions under which I could later retract this same consent? Would it not be contradictory to even imply that such conditions can be stipulated unless I were to agree to them in the first place?

Saying that, while on the continuum of democratic legitimacy it might be too much to demand the express consent of the governed at every moment, legitimacy is undermined in instances where individuals are denied their most basic democratic rights. As Justice McLachlin herself claimed, the right to vote occupies a "special" place in democratic societies.[386] This is because, by (nominally) appealing to citizens for their legitimacy, liberal-democratic legal-political structures can claim at least a minimal democratic mandate for the laws which consequently flow from the deliberations which take place after elections. These include deliberations about the creation and application of criminal law and consequences to be applied

[386] See *Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68* at para *96*

when citizens deviate from it. Denying prisoners the basic democratic right of electing their representatives would lead to a tension: it would be difficult to see on what moral basis a liberal-democratic society could claim the right to incarcerate them. This is because disenfranchising incarcerated people would constitute such a fundamental infringement of their basic human dignity, including their capacity to participate in authorship of the laws that govern them, that the legitimacy of the criminal justice system would be thrown into question. In simple terms, by denying prisoners the right to vote, the state would lose the moral authority to incarcerate them. This moral quandary, of course, would likely have had little impact on the state's actual empirical policies if *Sauvé* hadn't been decided in favour of prisoners.

McLachlin's argument is therefore strong, but must be made more emphatically. It is not simply that denying prisoners the right to vote would undermine their respect for the rule of law and constitute an unnecessary infringement of our most basic values. It is because denying the fundamental dignity of prisoners, including respecting their right to participate meaningfully in formulating the laws which govern them, would be inconsistent with the very animating ideals of Canadian democracy. Indeed, in many respects it would undermine the very legitimacy of the Canadian State's claim to the moral authority necessary to determine and apply criminal law in a just way. A right to human dignity, as a unifying ideal or "mother right," illustrates the role which other rights, including the democratic right to vote, have in legitimating legal political institutions by establishing how individuals must always have the capacity to be part-authors of the laws which govern them.[387] Any law which deviates from the ideal of amplifying dignity by constraining democratic authorship delegitimizes the state.

[387] See Barak, *Human Dignity*

Many of the same criticisms can be levelled, more emphatically, against the reasoning given by Justice Gonthier in his dissenting opinion. He acknowledged immediately that the *Sauvé* case was unusual and "did not admit of scientific proof."[388] The dissent with the majority was premised on "fundamental" disagreements of principle.[389] Justice Gonthier accepted the government's claim that, by prohibiting prisoners from voting, Sec 51 *(e)* of the *Elections Act* asserted and enhanced the value of the right to vote by making its enjoyment subject to an important limitation: that citizens obey the most important laws of the country. In so doing, Justice Gonthier believed that preventing prisoners from voting strengthened, rather than weakened, Canadian democracy. Here he ran into the major conceptual problem of human dignity. Because Justice McLachlin so centrally related democratic participation to respect for human dignity, it was necessary for Justice Gonthier to explain why preventing prisoners from voting did not constitute an infringement of their basic dignity. This was doubly key since, if preventing prisoners from voting was an infringement of their dignity, it would no doubt constitute "cruel and unusual treatment or punishment" under Sec 12 of the *Charter* and be indefensible along those constitutional lines as well.

Justice Gonthier takes up the issue of human dignity several times in the course of his reasoning, offering rationales for why prisoners "temporarily" losing the right to vote does not constitute an infringement on their human dignity, but does express society's affront to criminal acts and increases the value of Canadian democracy generally.[390] He neatly summarizes his reasoning on all these points in Paragraphs 75 and 76. For this reason I shall reprint both in full:

> The argument that the temporary disenfranchisement of serious criminal offenders undermines the inherent “worth” or “dignity” of prisoners presents a potentially

[388] See *Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68* at para 150
[389] Ibid at para 113
[390] Ibid at para 116

> problematic line of reasoning. Is it possible to "punish" serious criminals without undermining their "worth"? It must be so. This is inherently recognized in the *Charter* itself insofar that s. 12 only renders unconstitutional punishment that is "cruel and unusual". The *Criminal Code* and its provisions are declaratory of values, values on which Canadian society rests: see *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 769 and 787. Protecting and enhancing these values through the imposition of punishment for criminal activity is not an affront to dignity. On the contrary, the temporary disenfranchisement of serious criminal offenders reiterates society's commitment to the basic moral values which underpin the *Criminal Code*; in this way it is morally educative for both prisoners and society as a whole.[391]
>
> And immediately after.
>
> The punishment of serious criminal offenders is also aimed at protecting society and the "dignity" and "worth" of those members of society who have been or may become the victims of crime. Punishment is intended to act as a general deterrent to potential criminals and as a specific deterrent *vis-à-vis* incarcerated persons. *Charter* analysis is meant to consider the *Charter* rights of other members of society: see *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 187; *Keegstra, supra,* at p. 756. Serious criminal activity is clearly often an affront to numerous *Charter* values.[392]

While Justice Gonthier's reasoning possesses a certain emotive force, down to a crude appeal to "those members of society who have been or may become the victims of a crime", it is not clear how the various principles he invokes can be made to hang together consistently.[393] This is further highlighted by the spurious examples he brings up further on in the judgement, claiming that, once given the right to vote, prisoners might claim that their Sec 6 rights to "enter, remain in, and leave Canada" have been unreasonably infringed, or that they should be allowed to run for Parliament as also guaranteed under Sec 3.[394] He also highlights that Parliament already imposes restrictions on the right to vote, for instance by preventing minors from doing so, and that this is seen as reasonable and justified by many. Justice Gonthier then goes on to make the unusual claim that whether one accepts his reasoning or that of the Chief Justice is

[391] *Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68* at para 75
[392] Ibid at para 76
[393] Ibid
[394] Ibid at para 87

largely a matter of philosophical "preference"[395] and admits that, when engaging in such complex normative deliberations, at a basic level he simply does not view the limitation as unreasonable.[396] Moreover, he is concerned that adopting an "inclusive" approach to democracy, as argued for by Justice McLachlin and the majority of the Court, might unduly skew constitutional analysis in the future.[397]

> The former [inclusive] approach, that accepted by the reasons of the Chief Justice, entails accepting a philosophy that preventing criminals from voting does damage to both society and the individual, and undermines prisoners' inherent worth and dignity. The latter approach also entails accepting a philosophy, that not permitting serious incarcerated criminals to vote is a social rejection of serious crime which reflects a moral line which safeguards the social contract and the rule of law and bolsters the importance of the nexus between individuals and the community. Both of these social or political philosophies, however, are aimed at the same goal: that of supporting the fundamental importance of the right to vote itself. Further, both of these social or political philosophies are supported by the practices of the various Canadian provinces, the practices of other liberal democracies, and academic writings. Finally, neither position can be proven empirically — rather, the selection of one over the other is largely a matter of philosophical preference. What is key to my approach is that the acceptance of one or the other of these social or political philosophies dictates much of the constitutional analysis which ensues, since the reasonableness of any limitation upon the right to vote and the appropriateness of particular penal theories and their relation to the right to vote will logically be related to whether or not the justification for that limitation is based upon an "acceptable" social or political philosophy.[398]

At various points, Justice Gonthier seems to believe that preventing prisoners from voting is not unreasonable because Parliament already makes such exceptions, because it plays a useful punitive role, because it is not an excessive infringement on the dignity of prisoners, because it respects the "dignity" of victims by further punishing their assailants, because it increases the

[395] The idea of a philosophical preference, to my mind, illustrates a rather crude understanding of philosophical argumentation.
[396] *Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68* at para 93
[397] Ibid at para 92
[398] Ibid at para 93

esteem which we associate with the right to vote by denying it to those deemed unworthy, and finally, because there is no objective way to make these determinations anyways, the right to make such a determination might as well be left to the legislature. However, it is very unclear how all of these claims are intended to hang together.

At the most basic level, I take Justice Gonthier's arguments to be premised on a flawed conception of democracy. I have already discussed several times how no genuine democracy can be premised on simple majority rule. This seems to be what Justice Gonthier implies in his final appeal to the pluralism of values and the resolution of relativistic debates through the legislative process. But, as already discussed, the legitimacy bestowed on Parliament is itself dependent on respecting the equal dignity of all citizens, so that each has an equal opportunity to be authors of the same laws which govern them. Even if one wished to grant Justice Gonthier's relativistic conclusions, this would not get us anywhere. Rights become more, not less, important in the absence of an uncontroversial set of values stemming from an objective theory of justice.

This is because, in the absence of a transcendent source of authority, fairness becomes more crucial to respecting the dignity of individuals. In circumstances where Parliament treats some individuals unequally by denying them what is, after all, a very minimal form of democratic participation, it undermines its moral authority to punish these same individuals. In this regard Justice McLachlin is correct that the right to vote holds a "special place" in Canadian democracy. This is because it is the right which most directly speaks to the democratic dimension of justice, and thus reflects the dignity that stems from citizens being authors of the legal-political institutions which govern them, as well as the laws which flow from them. Restrictions on this right constitute a very serious attack on the dignity of the individuals so

constrained, and therefore undermines the legitimacy of the law. While it is certainly true that we do, with some justice, impose limitations on the right to vote for some individuals, these are in some instances justifiable since the groups in question (children in this instance) may not have the reasoning capacity to make careful judgements about their political commitment. In other words, restricting the right to vote to adults is categorically premised on a different set of reasons than those offered by Justice Gonthier. Because the restrictions he would impose would limit the dignity of individuals, and also ascribe differing values to the democratic rights of some over others, his arguments cannot pass my two-step test for dignified authorship. For these reasons we should reject such arguments.

5) Ruling on Fair Democratic Procedures in *Opitz v. Wrzesnewskyj*

This recent case involved a dispute between two candidates in the 2011 Federal election, Liberal Borys Wrzesnewskyj and Conservative Ted Opitz, over who won in the riding of Etobicoke Centre. On the night of the election, Mr. Optiz was declared winner by a margin of only 26 votes, which a judicial recount subsequently confirmed. Over a year later, allegations that the Conservatives had maliciously interfered with the electoral process prompted Mr. Wrzesnewskyj to take the case to court with the Liberal Party's blessing. Convinced that there had been irregularities in the casting of 79 votes during the election, the Ontario Supreme Court determined that the results of the election were moot and ordered a by-election. The

Conservatives decided to fight this decision, leading to the issue being decided by the Supreme Court in 2012.[399]

As in *Sauvé,* the decision in *Opitz* was delivered by a slim majority of 4-3. Justices Deschamps, Abella, Rothstein and Moldaver JJ overturned the decision of the Superior Court and ruled that the results of the election should hold. Chief Justice McLachlin and Justices Lebel and Fish dissented quite forcefully.[400]

In this case, the crucial issue came down to whether the votes of several dozen individuals should be invalidated due to procedural irregularities which occurred when the votes were cast. Because the election was won by such a slim margin, each of these contested votes counted for quite a bit, further complicating what was to become as much a technical exercise in fact finding as a legal debate on the nature of democratic principles. What became the key ideological debate in the *Optiz* decision was whether invalidating the election winning votes for reasons of procedural fairness would itself undermine the value of the voting process. The majority described this as a conflict between two distinct approaches to determining whether votes should be invalidated for procedural reasons: a strict procedural approach, and a substantive approach. Both had been employed by lower Courts in the past. According to the former, a vote becomes invalidated if election officials did not follow the rules of procedure in place at the time. Under the substantive approach, such a failure would not be determinative.

The decision of the majority, co-authored by Justices Rothstein and Moldaver, held that the substantive approach was correct. Drawing on the *Charter,* they claimed that such a decision

[399] See *Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76*
[400]Ibid

respects citizens' Sec 3 right to vote, while casting the election results aside would uphold "merely the procedures used to facilitate that right."[401] Not wanting to go too far, the majority determined that applying a "substantive approach" to determining whether a vote should be cast aside for irregularities had two steps.[402] First, an applicant had to establish that there had been a breach of a statutory provision governing a person's right to vote, resulting in an irregularity at the polls. Secondly, the applicant had to demonstrate that a person who was not entitled to vote had in fact done so because of this irregularity. This step establishes that the irregularity determined by the first step had an actual impact on the election. If the applicant could meet these two steps, they would be within their rights to call for a vote to be rendered invalid.[403]

Because of the significance the Court had accorded the right to vote in the past, the majority felt that the burden of proof required to establish that there had been such an election determining irregularity had to be considerable. They also felt that procedures designed as electoral safeguards had to be balanced against making sure that all citizens had their right to vote safeguarded, and that where there were acceptable imperfections the "mere" procedures were doomed to lose. As they put it in Paragraphs 56 and 57:

> In our view, adopting a strict procedural approach creates a risk that an application under Part 20 could be granted even where the result of the election reflects the will of the electors who in fact had the right to vote. This approach places a premium on form over substance, and relegates to the back burner the *Charter* right to vote and the enfranchising objective of the Act ...and is contrary to the principle that elections should not be lightly overturned, especially where neither candidates nor voters have engaged in any wrongdoing. Part 20 of the Act should not be taken by losing candidates as an invitation to examine the election records in search of technical administrative errors, in the hopes of getting a second chance...The substantive approach is recommended by the fact that it focuses on the underlying right to vote, not merely on the procedures used to facilitate and protect that right. In our view, an approach that places a premium on substance is the approach to

[401] *Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76* at para 57
[402] Ibid at para 55
[403] Ibid

> follow in determining whether there were "irregularities . . . that affected the result of the election". On this approach, a judge should look at the whole of the evidence, with a view to determining whether a person who was not entitled to vote, voted.[404]

After examining a number of the contested polls, they decided that, although there had been irregularities surrounding the 79 contested votes, most of them were related to trivial "mere procedures."[405] Indeed, they held that in all but 20 cases the evidence was not strong enough to properly demonstrate that the contested votes were cast by ineligible voters. Because even invalidating those 20 votes would not be enough to change the results of the election, the majority concluded that Mr. Opitz's victory should hold.

Writing for the minority in dissent, Justice McLachlin came to a very different conclusion about the role these "mere procedures" play in Canada's democratic processes. While she agreed that being a "qualified elector" was a necessary condition, it was not sufficient to be entitled to vote.[406] While she agreed with the majority that it would fundamentally devalue the right to vote by allowing an election to be set aside for trivial reasons, she disagreed that the balance should be weighted so heavily towards protecting controversial electors. Justice McLachlin felt that the majority erred in conflating the qualification of individuals to vote with their entitlement to do so on election day as determined by the procedures set up to preserve the integrity of the process. She was unable to accept the argument that a qualified voter who failed to follow proper procedures should none the less be entitled to have their vote respected after the fact. Justice McLachlin argued that the "mere" procedures dismissed by the majority, such as

[404] See *Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76* at para 56-57
[405] Ibid
[406] Ibid at para 140

identifying oneself and registering before being entitled to vote, were not just formal guidelines, but "fundamental safeguards" to maintain the integrity of the electoral process.[407]

> An individual must be entitled to vote before casting a ballot for the Member of Parliament for the riding where she is ordinarily resident. The *Act* sets out a comprehensive scheme defining entitlement to vote. In general, there are three prerequisites: qualification, registration and identification. First, a voter must be qualified, by being a Canadian citizen and 18 years of age or older. Second, she must be registered, generally either by being on the list of electors or filing a registration certificate. Third, she must be properly identified at the polling station, whether by providing appropriate pieces of identification or by taking an oath and being vouched for by another elector. Being a qualified elector, in terms of age and citizenship, is a necessary but not sufficient condition for entitlement to vote. The registration and identification prerequisites of entitlement must also be satisfied. These are fundamental safeguards for the integrity of the electoral system. Nothing in the *Act* suggests that a person who on election day is not entitled to vote should be permitted to do so and to establish her entitlement later.[408]

The *Opitz* case is fundamentally about balancing the integrity of democratic procedures against an individual's right to have their vote counted if they are qualified to cast one. The majority in this case felt that, due to the relative triviality of the procedural errors made by officials, and the fundamental nature of protecting citizens' right to vote, it would be unjust to discount the votes cast in favour of Mr. Opitz and to resultantly call a new election. A minority, led by Justice McLachlin, took a different approach. They argued that the majority was hasty in dismissing breaches of procedure as too trivial to warrant a by-election. What the majority took to be "mere" formal procedures designed to support the smooth function of democratic elections, the minority regarded as "fundamental" safeguards designed to ensure an election's substantive integrity both in fact and in the eyes of the Canadian public. [409]

[407] See *Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76* at para 140
[408] Ibid at para 139-140
[409] Ibid at para 140

I believe that the minority made the right decision in this case and that the majority erred in deciding that there is a basic distinction that can be made between the form and the substance of democracy. The metaphysical distinction commonly drawn between form and substance is a common ideological product of the technical mindset, reflecting an even deeper social distinction now commonly made between means and ends. Due to the ideological prominence of the technical mindset, it can often be tempting to rely on these distinctions when rendering subtle judgements on complex issues of public policy. This temptation should be rejected, however, since it reifies in and through law a judgement not accurate in fact. While procedures such as registering to vote, providing identification, and living within a certain geographical space, might appear trivial in any other circumstance, these requirements to be entitled to vote are, as the Chief Justice iterated, "fundamental safeguards" that preserve the "integrity" of the democratic process.[410] Moreover, as I shall explain, they reflect a basic commitment to human dignity by ensuring that each individual's right to vote has equal value as everyone else's.

As I mentioned, I believe there are two steps courts should make in cases such as these. The first is to determine what result would most amplify the dignity of citizens. The second is to try and accord equal value to the democratic rights of all citizens. On both steps, the majority erred in this case. It erred on the first step by abstractly presuming that the mere exercise of the formal right to vote was sufficient to exhaust the requirements of the democratic right. But democracy, understood as the co-authorship of citizens, is linked to the integrity of electoral procedures, and the related legitimacy individuals accord electoral outcomes. Failing to uphold this integrity constitutes a significant blow to legitimizing procedures, and so inhibits the process

[410] See *Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76* at para 140

of dignified authorship. This is better understood by looking at the second step concerning the equal value of democratic rights.

Maintaining and enhancing robust democratic procedures cannot be logically separated from the amplification of democracy itself in a modern state context. The complexity of an election, especially a federal election, where the citizens of 338 separate ridings vote to send one representative chosen from several different parties to serve in Ottawa, demands that safeguards be in place to ensure that the process is carried out in a manner that doesn't grant individuals in one riding precedence over another. Therefore, the Chief Justice correctly identified a distinction between being qualified to vote, and being entitled to vote. The requirements for entitlement do not exist to make things more difficult for voters; they exist to ensure that all qualified voters in each riding have the exclusive opportunity to determine who will represent them in the next Federal Parliament.

Undermining such procedures, and potentially allowing individuals to vote who are not entitled to do so, undercuts that value of Canadian democracy for citizens of a riding who were both qualified and entitled to vote on election day. This disrespects their human dignity, from which, as I have explained, the right to vote itself flows. The majority over-reacted by hyperbolically claiming that to recognize that mistakes were made and to act would itself undermine the value of the votes cast in the last election. Voting itself is valuable, not as the substance of democracy, but as one of its most important procedures. To discuss the form of democracy as being procedural safeguards and the substance to be the right to vote is misguided. We should instead recognize that the moral value of democracy would be the equal value it accords to individual's democratic rights. As put by Lani Guinier, "a system is procedurally fair

to the extent that it gives each participant an equal opportunity to influence [democratic] outcomes."[411] Looked at in this manner, though the value ascribed to the act of voting should indeed be very high, we must recognize that it is only one democratic procedure amongst several. Other procedures which also seek to preserve the equal value of voting must also be protected if the value of Canadian democracy is to remain equal for all. Indeed, in ideal circumstances many socio-political institutions in Canada would be democratized to amplify the equal value of our democracy for all. As it stands, the capacity of an often-small minority of voters per riding to determine who will represent the entire riding in Parliament strikes me as fundamentally unjustifiable in a modern context.

This does not suggest that those individuals who voted and whose ballots were mishandled should see their votes cast aside. This, again, is where I feel the majority mishandled the very practical solution available to resolve this problem. It is almost comical that, given an election result marked by obvious controversy and accusations of misconduct, they would not take the obvious route of simply holding a by-election. Unless marred by another series of unfortunate events, the result of such a by-election would itself be less controversial and affirm the Court's commitment to upholding the integrity of Canada's democratic procedures and the human dignity of its citizens.

[411] Lani Guinier. *The Tyranny of the Majority: Fundamental Freedoms in Representative Democracy*. (New York, NY: The Free Press, 1995), 156

Conclusion to Chapter Six

In this Chapter, I looked at how amplifying human dignity through the realization of democratic rights could be achieved through the law. I began by looking at several Canadian theories on the relationship between law, the Courts, and democracy and suggested that we should take a normative approach to jurisprudence which takes the amplification of human dignity to be the unifying ideal of legality. In the words of Justice Barak, human dignity can be seen as a mother right from which all other rights flow.

I then went on to analyze several prominent cases in Canadian jurisprudence to illustrate how dignity enhancing processes of democratization might be fostered by law. In the *Sauvé* decision, I indicated how the majority on the Supreme Court ruled correctly by recognizing prisoners' right to vote. I also highlighted why dissenting opinions, drawing on contractarian theories, were untenable. Then in the *Opitz* decision, I indicated why I thought the Court erred in dismissing electoral regularities as mere procedures. I agreed with Justice McLachlin that these procedures, far from being simply bureaucratic hoops, are necessary to preserve the integrity of the democratic process. In the next Chapter, I will be looking at how the right to vote, and other salient democratic rights, have been understood in the United States throughout its complex political and juridical history.

Chapter Seven:
American Jurisprudence and Democratic Rights

Introduction

This Chapter will be structured similarly to the last one, but with a considerably different theoretical emphasis which addresses the particular history of American jurisprudence. I will be defending my dignity oriented "normative" approach to jurisprudence against its most powerful American opponent, the textualist approach developed by the late Justice Antonin Scalia. A textualist approach to the law, while admirable in its democratic sensitivity, is ultimately both untenable as a hermeneutics and in the links it draws between legality and democracy. Instead we must accept that many legal decisions are by necessity much more indeterminate than the textualist can allow. Therefore, to the extent that Judges will still be given the authority to make major decisions on the content and substance of law, they should do so in a manner consistent with the morally preferable model I advocate.

After running through these philosophical and methodological questions, I will ground this argument by analyzing several major cases in American law which relate to equality and voting rights, particularly as they relate to the democratic capabilities of ethnic and economic minorities. The first is the infamous case of *Williams v Mississippi*, which concretized many of the overtly racist trends which would go on to undermine the legitimacy of American democracy for decades. I then flash forward to analyzing two major decisions concerning the voting rights of criminals: *Richardson v Ramirez* and *Hunter v Edwards*. I will then go on to analyze the *Citizens United* decision, which affects a different but related dimension of democratic rights in America. I will argue that a normative approach to jurisprudence that takes realizing and

amplifying human dignity as the goal of law can help us understand why these decisions were wrong.

1) Human Dignity, Democracy, and American Law

American law has been notably silent on the topic of human dignity since the beginning. The *Declaration of Independence* famously proclaims that all individuals are entitled to "life, liberty, and the pursuit of happiness" and later notes that individuals can institute a government to "effect their Safety and Happiness." Nowhere does it reference the dignity of human beings, though the "rights of man" are invoked persistently and provocatively.[412] The same is true of the American Constitution.

This isn't entirely surprising given the highly Protestant makeup of the United States at that time and the relative absence of any deep theorization on dignity outside of the Scholastic tradition of Roman Catholicism.[413] Indeed, despite the pioneering efforts of Kant and other philosophers, human dignity only became a constitutional staple in the aftermath of the Second World War. Unfortunately, as a consequence, American law has tended to be particularly grounded in the liberty oriented conception of agency. As we shall see later in the Chapter, this has peculiar consequences both for American jurisprudence generally, and regarding rights in particular.

This is not to imply that one cannot read dignity into the American Constitutional framework, as some have indeed suggested. The Fifth Amendment, which establishes that "no

[412] Alexander Hamilton and James Madison and John Jay. *The Federalist Papers,* ed. Charles R. Kesler. (New York. NY: Signet Classics, 2003),528-532
[413] Michael Rosen. Dignity: Its History and Meaning. (Cambridge, MA: Harvard University Press, 2012)

person…shall be deprived of life, liberty, or property, without due process of law" and the Fourteenth Amendment, which guarantees equal protection of the law, have both been cited as possible dignitarian sources.[414] Ronald Dworkin has most notably spent much of his career arguing that the Fourteenth Amendment births a dignitarian conception of integrity-based justice.[415] Vicki Jackson has cited the Eighth Amendment prohibiting "cruel and unusual punishment" as a dignitarian source.[416] Finally, one can also find references to human dignity in various state laws and Constitutions; for instance, in Montana, Illinois, and Louisiana.[417]

Unfortunately, these various arguments and scattered references have not resulted in a sustained engagement with human dignity by American Courts. Human dignity is often referenced in a positive light, and occasionally is referred to as an American value. For instance, the Supreme Court invoked dignity in the *JEB* decision relating to sexual discrimination, and notably in the *Rice* decision involving racial discrimination in a state election. Perhaps most famously, dignity was cited as an important principle in the landmark *Lawrence* decision, which determined that states could no longer prohibit homosexual relationships. As put by Maxine Goodman:

> In the most recent privacy/liberty case, *Lawrence v. Texas*, human dignity played its most explicit role thus far in American constitutional jurisprudence. The Court in Lawrence again tied human dignity to liberty in striking down the Texas anti-sodomy statute. Justice Kennedy, writing for the Court, spoke of dignity three times. He noted the indignity of a conviction under the Texas law 'The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal

[414] See Aharon Barak. *Human Dignity: The Constitutional Value and the Constitutional Right.* (Cambridge, MA: Cambridge University Press, 2015) and Ronald Dworkin. *Justice for Hedgehogs.* (Boston, MA: Belknap Press, 2011)
[415] Dworkin, *Hedgehogs*
[416] Vicki Jackson. "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse." *Montana Law Review*, 65 (2004), 16
[417] Barak, Human Dignity, 190-191

> convictions.' In a similar vein, Justice Kennedy wrote that upholding *Bowers v. Hardwick* as law, 'demeans the lives of homosexual persons.' In discussing the privacy interest at stake, Justice Kennedy wrote of dignity as follows: 'It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.[418]

The *Lawrence* decision was therefore not just a landmark decision for the rights of queer individuals in the United States, but for advancing a dignitarian conception of agency more generally. It is noteworthy that Justice Kennedy invokes dignity in relation to freedom and privacy, which both have a more familiar basis in American law. Unfortunately, while this constitutes a considerable advance, human dignity has not become a central principle for interpreting American law as it has in Canadian and European law. While some scholars, such as Dworkin and Goodman for example,[419] have tried to claim that human dignity is or will become a central principle for constitutional interpretation, the jurisprudence does not seem to bear out this grand claim. Indeed, I am inclined to agree with Justice Barak's view that although the importance of dignity as a "constitutional value is growing in American constitutional law…it has not yet attained across the board recognition."[420]

Further recognition of the centrality of human dignity would be desirable and, I believe, result in more normatively desirable decisions by American Courts. Unfortunately, this will not come to pass as long as a significant contingent of the Supreme Court is beholden to the quintessentially American textualist approach to jurisprudence, which is the latest in a long line of originalist hermeneutics. In the next two sections, I will analyze and critique the originalist tradition as presented by its most prominent advocates: Robert Bork and Justice Antonin Scalia. I will suggest that, though the democratic ethos underpinning some of their claims is admirable,

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[418] Maxine Goodman. "Human Dignity in Supreme Court Jurisprudence." *Nebraska Law Review,* 84 (2006), 761-762.
[419] See Dworkin, *Hedgehogs* and Goodman, "Human Dignity,"743, 748
[420] Barak, *Human Dignity,* 205-206

consistent application of originalist principles can and has resulted in many bad legal decisions. I will then demonstrate this though an analysis of several cases in American law concerning democratic rights.

2) Originalism and Conservatism

Textualism developed in the writings of Justice Scalia as the latest iteration of "originalism." Before discussing what makes textualism unique and powerful, I will briefly unpack my understanding of the originalist position more generally. The originalist argument can be broken up into three dimensions. The first is an ontological thesis about the origin of law. The second is an epistemological thesis about the possibilities of legal reasoning. Finally, both theses come together in a set of normative conclusions about how the law should be interpreted, most notably by the Judges who are its nominal guardians.

The first dimension, which consists of an ontological thesis about the origin of legitimate law, is perhaps the most ambiguous aspect of originalism. However, in many respects it remains the least openly questioned; largely, I suspect, for ideological reasons pertaining to the historical narratives presented to aspiring lawyers in American law schools.[421] The basis argument is that law is a system of legalized norms whose normative legitimacy flows back to a founding moment. In this founding moment, a collection of individuals determined the formal structure of political and legal institutions and accorded them diverse and discrete powers to determine the content of subsequent legal norms. In American jurisprudence, this founding moment is taken to

[421] This criticism has deep roots in American jurisprudence. See Oliver Wendell Holmes. "The Path of the Law." *Harvard Law Review*, 457 (1897) and Oliver Wendell Holmes Jr. *The Common Law.* (Boston, MA: The Belknap Press of Harvard University Press, 2009), 34-36 for two classic expositions.

be the ratification vote in favor of the new Constitution in 1788 by 10 states of the original Continental Congress. After this junction, originalists claim one can regard all norms which were produced in accordance with the new Constitution as legally binding.

This ontological claim about the foundation of law, despite being problematic along several lines I will discuss later, is usually accorded secondary importance next to the central epistemological dimension. This is the claim that, once given, we can formally demarcate the founding moment wherein mere norms became legal norms. From there, it also becomes possible to unambiguously determine what the content of law is at any point. This applies not simply for cases of transparent clarity, such as constitutional laws concerning the number of Senators who shall be elected from each state. It also applies in so called "hard cases" where both the text of the legal norm, and how it should be applied, might be unclear and controversial.[422] Historically, this epistemological belief has been affiliated with various branches of legal positivism and the belief that legal interpretation should aspire to the status of a syllogistic science. As such, controversies on how to interpret the law must have an objective answer, even if Judges may fail to discover it in every cases. This is why originalists have maintained that controversies surrounding how a legal norm should be interpreted can be resolved by looking at the intent of the legislature when the legal norm was determined and voted on.

This brings me to the third dimension of originalism. This is the belief that Judges should rule in a manner that respects the original meaning of the law. Here the originalist argument blurs the (problematic) distinction between facts and values by assuming the moral

[422] See Ronald Dworkin. "Hard Cases." *Harvard Law Review* 88 (1975)

legitimacy of the founding moment wherein the political and legal forms for determining norms was determined. Why and how the founding was legitimate is often under-theorized beyond invoking the untrue belief that the American Constitution was determined and agreed upon through a fair process of democratic deliberation.[423] But this is also where the key turn comes. Since the legal system as a whole is regarded as morally justifiable because the laws were determined by the people as a whole, and since it is always possible to interpret what the law is and how it should be applied correctly as a matter of legal epistemology, originalists believe that Judges should simply engage in an objective process of interpretation and avoid applying their own moral judgments in legal cases.[424] This is especially true in Constitutional cases, where Judges are responsible for interpreting the foundational norms which make the entire legal system possible.

It is noteworthy that, superficially, originalists often maintain that their approach to legal interpretation needn't privilege any specific political ideology.[425] After all, their arguments about proper interpretation of the law apply only to the reasoning engaged in by Judges and other legal practitioners. If law is regarded as itself a morally neutral medium, there is no reason to suppose originalism must favor one particular political ideology over any other beyond striking down laws which are forbidden by the Constitution agreed upon during the founding.[426]

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[423] The unfortunate fact that women, slaves, and Native Americans were accorded little say in the makeup of the Constitution, though they were occasionally considered when determining the relationship between quantities of property and state powers, is often disregarded.

[424] There is some controversy surrounding this point. Partly in response to historical criticisms that the United States was, in fact, a very limited democracy in the beginning, some have tried to maintain that it is morally justified because the Constitution, at least in the abstract, embodies natural rights.

[425] Indeed, as we shall see, Scalia holds to the textualist interpretation of originalism in part because he believes it is the closest one can get to a value free "science" of legal interpretation that doesn't involve Judges making controversial moral judgments. See Antonin Scalia. *A Matter of Interpretation: Federal Courts and the Law.* (Princeton, NJ: Princeton University Press, 1997)

[426] I believe this itself is a deeply problematic argument that goes too far in divorcing the form of law from its moral content. I agree with Fuller that the form of law precludes the incorporation of certain moral content. On a more

Despite this apparent neutrality, in recent years many have come to associate originalism in legal interpretation with conservatism in politics. And indeed, there are some decent if ideologically driven reasons to hold this position. Depending on one's evaluation of the general political opinions of Judges relative to the general population, one might see originalism as offering a methodological defense against a predominantly liberal judiciary influenced by political radicals. For instance, this is the position of the conservative lawyer (and one time Reagan nominee for the Supreme Court) Robert Bork. As he puts it with admirable clarity in *Coercing Virtue: The Worldwide Rule of Judges*:

> The New Class's problem in most nations is that its attitudes command only a political minority. It is able to exercise its influence in many ways, but, when cultural and social issues become sufficiently clear, the intellectual class loses elections. It is, therefore, essential that the cultural left find a way to avoid the verdict of the ballot box. Constitutional courts provide the necessary means to outflank majorities and nullify their votes.[427] The judiciary is the liberal's weapon of choice. Democracy and the rule of law are undermined while the culture is altered in ways the electorate would never choose.[428]

Here, Bork is unusually candid in articulating his unhappiness with judicial activism. He believes that members of the judiciary overwhelmingly belong to, or are at least influenced by, what he alternately calls the "New Class," the "cultural left," the "intellectual class," and "liberals." The New Class believes in universalism, and is therefore inherently attracted to "socialism" as the only remaining secular theology which has worldwide, or "universal" appeal.[429] It also "despises" the few Conservatives[430] who become intellectuals because they are

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pessimistic dimension, I also believe that when law becomes overly beholden to the technical mindset it can further promote a social logic of difference that exacerbates tensions within a given society. See Lon Fuller. *The Morality of Law: Revised Edition.* (New Haven, NJ: Yale University Press, 1969)

[427]Given the changing demographics of American society, which some expect will lead the majority to increasingly vote for the left liberal causes, one wonders if Bork might have to revise his thesis.

[428] Robert Bork. *Coercing Virtue: The Worldwide Rule of Judges*. (Toronto, ON: Vintage Canada, 2002) 8-9

[429] Bork, *Coercing Virtue*, 5

[430] Oddly, in Bork's case this does not appear to extend to respecting individuals of different sexual orientations, acknowledging the adverse circumstances which still prevent women from obtaining equality with men in the workplace, recognizing the parallel moral histories of America and other states which share its "Anglo American

prone to believing in "particularity-respect for difference, circumstance, history, and the irreducible complexity of human beings and human societies."[431] He believes that Judges should strictly interpret the letter of the law when making decisions and refrain from involving themselves in activism, especially since that typically involves upholding liberal values.

The problem with originalist positions such as Bork's, as Justice Scalia was well aware,[432] is that it relies on a problematic set of assumptions about the role of Judges and how they interpret the law. For instance, when Bork claims that "the question in each of these cases should have been the understanding of the ratifiers of the *Bill of Rights*, not the current views of foreign nations,"[433] his motivations are obviously political rather than purely juridical. Indeed, even Bork's respect for democracy is qualified by his belief that majorities are more prone to adopting his politics than Judges.[434] Since he does not explain why conservatism is morally superior to the principles argued for by the New Class beyond drawing simple dichotomies between the degenerate values of universalism and the wise and pragmatic virtues of particularism, he comes across as doing little more than applauding those political actors who happen to agree with him and condemning those who do not.[435] In an indicative paragraph, he states that:

> Most members of the Court seem to be gnostics, firmly believing they have access to wisdom denied the rest of us. "What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court?" Scalia has asked. "Day by day, case by case, [the Court] is busy designing a Constitution for a country I do not recognize. This last term was unusually rich in examples. The Court moved a long way toward making homosexual conduct a constitutional right, adopted the radical feminist

heritage" when making legal decisions, or acknowledging that it might be "useful" to look at how countries with complex relations to capital punishment might render decisions in cases related to the death penalty.

[431] Bork, *Coercing Virtue*, 5

[432] See Scalia. *A Matter of Interpretation*, 46-47

[433] Bork, *Coercing Virtue*, 152

[434] This comes out even more expressly in Robert Bork "The End of Democracy? Our Judicial Oligarchy." In *First Things*, November 1996

[435] Indeed, some conservatives have criticized Bork precisely for superficiality in not believing in "natural rights" which hold sway universally. Perhaps the most notable was Harry Jaffa. See John J. Miller. "The House of Jaffa." *The National Review*, January 12, 2015.

> view that men and women are essentially identical, continued to view the First Amendment as a protection of self-gratification rather than of the free articulation of ideas, and overturned two hundred years of history to hold that political patronage is unconstitutional.[436]

By contrast, Justice Scalia's vision of originalism, as embodied in his textualist approach to judicial interpretation, is considerably subtler and more powerful. This is in part because it is more directly linked to his belief that judicial restraint is integral to preserving the rule of law, which is meant to safeguard the functioning of a democratic society. In this respect, despite his reputation as a stalwart conservative, Justice Scalia in fact comes across as a committed democrat. In this respect, I believe textualism can be understood as the most powerful and persuasive iteration of the originalist argument to date. However, as we shall see, Justice Scalia's own approach is ultimately problematic in many respects which can be generalized across the swath of originalist arguments. This is true even if one takes democratic authorship, as I do, to be the source or normative authority for legal norms.

3) Textualism and Democracy

As stressed above, Justice Scalia's textualist approach to jurisprudential interpretation is the strongest iteration of the originalist position yet conceived. While attracting relatively few open adherents, there is no doubt that the impact of his approach has been tremendous. No small part of this is due to his nearly 30 years sitting on America's highest court, and the voluminous decisions which bear Justice Scalia's indelible stamp. Indeed, he is undoubtedly one of the most

[436] Bork, "The End of Democracy"

influential jurists of his generation; as testified to by the countless articles, some passionately admiring and others borderline derisive, published in the wake of his recent passing.[437]

While his juridical decisions constitute the living example of Justice Scalia's textualist approach, it is made most explicit in his admirably concise and articulate essay "Common Law Courts in the Civil Law System" presented, alongside rebuttals and commentary, in *A Matter of Interpretation: Federal Courts and the Law.* In his essay, Justice Scalia identifies a notable gap in American legal scholarship; namely, a settled account of how Judges are supposed to go about interpreting the law. He finds this both unfortunate and dangerous, given the important role that Judges play in contemporary liberal democracies as interpreters of the common law. Notably, Justice Scalia claims to be in favor of judicial review as a "desirable limitation upon popular democracy."[438] However, he is deeply concerned about the attitude Judges take when engaged in this essential task. Most particularly, Justice Scalia takes issues with those Judges who believe it is their responsibility to develop an "evolving common law" in line with a more general approach which takes the Constitution to be "living."[439] This testifies to the need to resolve such controversies and develop a genuine "science" of judicial (specifically statutory) interpretation if such a thing is possible.[440]

Justice Scalia then goes on to observe that most scholars who have set themselves the task of developing such a science have focused on the intent of the legislature when deliberating on a piece of legislation. To avoid the invariably subjectivist tendencies that might flow from

[437] See for example Jeffrey Rosen. "What Made Antonin Scalia Great." in *The Atlantic.* February 15, 2016, Jeffrey Toobin "Antonin Scalia-Looking Back." the *New Yorker,* February 29th 2016, and Lawrence Tribe. "The Scalia Myth." in *The New York Review of Books,* February 27th, 2016.
[438] Antonin Scalia. "Common Law Courts in the Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" in *A Matter of Interpretation.* (Princeton, NJ: Princeton University Press, 1997), 12.
[439] Scalia, "Common Law Courts," 13
[440] Scalia, "Common Law Courts," 14-15

such an interpretive practice, these scholars paid less attention to what a specific legislator might have intended. Their focus was on the more meaning implied by the specific semantic connotations of the law.[441] But Justice Scalia rejects this approach as still overly subjectivist. When one asks not what a legislature meant but what they intended to say, too much confusion arises, providing Judges leeway to ascribe their own interpretations to the law in question.[442] For instance, in the (in)famous *Holy Trinity* decision of 1892 the Court, unable to proceed using express materials, looked at the "unexpressed" legislative intent of the legislature to create a new class of individuals exempt from a statute prohibiting aliens from entering the United States to perform labor.[443]

By contrast, Justice Scalia argues that Judges should look at what the words of a law "objectively" meant at the time it was passed. The possibility of making such a determination depends of Justice Scalia's beliefs about semantic determinacy. He concedes that there may be room for differing interpretations about what the objective meaning of a word might be, but that there are clear limitations to such indeterminacy. In a key passage, Justice Scalia maintains that:

> ...While the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation beyond that range is permissible...To state otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.[444]

In much of the remaining essay he proceeds to criticize constructivists, who maintain that there is are a set of logical rules which allow good legal reasoners to literally "construct" the proper meaning of a law by relying on canons and presumptions, such as legislative debates which illustrate the intent of lawmakers. Justice Scalia regards this as a waste of time, since

[441] Scalia, "Common Law Courts," 17
[442] Scalia, "Common Law Courts," 18
[443] Scalia, "Common Law Courts," 21
[444] Scalia, "Common Law Courts, 24-25

many Judges will find evidence that will pull them in different interpretive directions.[445] Instead, one should determine the objective meaning of words by looking at the contexts, both historical and semantic, which indicates how the words were used at the time the law was passed. In this way, Judges can (most often) arrive at an unobjectionable answer.

There is also a notable moral dimension to Justice Scalia's arguments. He indicates that adopting an evolutionary vision of the Constitution, most notably the *Bill of Rights*, misunderstands what these documents were meant to achieve. They were adopted because the Founders were "skeptical[446] that evolving standards of decency always meant progress and that societies always mature as opposed to rot."[447] He does not disagree that there are moments where societies need to evolve, and points out that there are constitutional amending formulas in place for such eventualities. But Justice Scalia fundamentally believes that it should be up to democratic majorities, and their representatives, to make such determinations rather than unelected Judges.

Justice Scalia continues his essay by noting that those who argue for a "living Constitution" are divided amongst themselves over what society should evolve into. Their main point of agreement is that such decisions shouldn't be left to the people. This suggests to Justice Scalia that an evolutionary approach is not simply undemocratic, but impractical.[448] Finally, Justice Scalia concludes his essay by arguing that these important decisions must be left to the people, if the judicial system isn't to become simply an adherent to these competing political philosophies, which in the long term would benefit no one.

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[445] Scalia, "Common Law Courts," 37
[446] To express some admiration, this is no doubt a beautifully composed turn of phrase.
[447] Scalia, "Common Law Courts," 40-41
[448] Scalia, "Common Law Courts," 45

> Whatever he might propose, at the end of the day an evolving constitution will evolve the way the majority wishes. The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is (like the interpretation of a statue) essentially lawyer's works...If the people come to believe that the Constitution is not a text like other texts; that it means not what it says or what it was understood to mean, but what it should mean...they will look for judges who agree with them as to what the evolving standards have evolved to; who agree with them as to what the Constitution ought to be.[449]

I believe the summary above captures the essential features and justifications of Justice Scalia's considered position on legal interpretation. As indicated in earlier Chapters, I am prone to agreeing with Justice Scalia's belief that Judges play far too considerable a role in our society. However, I none the less regard the textualist approach as ultimately both implausible and morally undesirable and shall unpack my reasoning below.

I believe that Justice Scalia's argument is wrong on two fronts. The first is that he holds incorrect semantic beliefs about the strict determinancy of language. This implies that, at the epistemological level, textualism is unsustainable as an approach to legal interpretation. It certainly does not reach the level of a strict "science" as Scalia seems to believe.[450] However, in some respects, his claims about semantics are irrelevant to the appeal of his approach. Ultimately, I believe Justice Scalia argues for textualism because he holds to a set of considered moral beliefs about how law should be interpreted by Judges, and the role judges should play in a liberal democracy. Given that, Justice Scalia's textualism is not a scientific or objective argument. It is predicated on a considered set of moral judgements which falter because Justice Scalia's conception of democracy is ultimately inadequate. Instead, we should understand democratic rights as flowing from human dignity, and interpret the law along those lines.

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[449] Scalia, "Common Law Courts," 46-47.

[450] This is not even taking into account important questions about Constitutional conventions and precedents that play such an important role when engaging in interpretation that some might be considered de facto part of the constitution. This objection is powerfully made by Tribe. See Lawrence Tribe. *The Invisible Constitution.* (Oxford, UK: Oxford University Press, 2008)

I shall first deal with Justice Scalia's semantic argument. As indicated above, he believes that, while words are open to interpretation, the range of interpretation is considerably more limited than some believe. In particular, it is his position that the socio-historical context existing at the time a statement was made can provide (often) decisive indications of the meaning a word had at that time. The role of an interpreter is therefore to look for this objective meaning by analyzing the socio-historical context of the statement to develop an understanding of the general semantic framework from which the statement emerged. This framework would guide the search for the linguistic meaning of the statement.

This seems at first to be a common-sense view. However, meaning is not so simple. Indeed, one can question how deeply Justice Scalia thought about this question given that throughout his essay his references, even on issues related to semantics, are exclusively legal scholars. He does not refer to a single philosopher of language, specialist in hermeneutics, or linguist to validate his theory of semantic meaning. Indeed, the only justification he gives for this theory is an example pulled from *Smith v United States* where the defendant offered to trade an unloaded gun for cocaine, and was subsequently charged with using a firearm in relation to drug trafficking. Justice Scalia argues that this was foolish since the phrase “uses a gun” should have "fairly connoted use of a gun for what guns are normally used for, as a weapon. As I put it in my dissent, when you ask someone, "Do you use a cane" you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway."[451] While I agree with Justice Scalia's legal argument, such appeals to singular examples do not get us anywhere at all in arguing for something as complex as a theory of meaning. Indeed, the unusual forcefulness of Justice Scalia's claims in the absence of strong intellectual evidence was noted by Ronald

[451] Scalia, "Common law Courts," 24-25.

Dworkin, who contributed a critical essay to *A Matter of Interpretation*. Dworkin's tongue was no doubt firmly in cheek when he noted that "Justice Scalia has managed to give two lectures about meaning with no reference to Derrida or Gadamer or even the hermeneutic circle..."[452] While slightly pretentious, this does give one pause when asking about the soundness of Justice Scalia's arguments about semantics.

I have already discussed the issue of language in several earlier Chapters, mainly to criticize the discursive theory of language popular amongst post-modernists. I will not rehash my arguments here except to say that Justice Scalia's position is largely the inverse of theirs. Both Justice Scalia and post-modern theorists believe that socio-historical contexts (what I have called boundaries) determine the meaning of statements in a given semantic situation. But where the post-modernist believes that a reflective look at history indicates that the belief in the objectivity of semantics is ill-founded given the complex knowledge/power structures which falsely determine meaning both situations and generally, Justice Scalia simply takes objectivity as a given. Ironically, he ignores Madison's own advice on this topic in *Federalist 37* where, after arguing for qualified skepticism about knowledge, the Founding Father discusses the ambiguity of words.

> Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by

[452] Ronald Dworkin, "Comment" in *A Matter of Interpretation: Federal Courts and the Law.* (Princeton, NJ: Princeton University Press, 1997), 115

> the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less according the complexity and novelty of the objects defined.[453]

Madison saw clearly what Justice Scalia tries to avoid; that the determinate meaning of words is often up for grabs depending on what Wittgenstein called the language games being played in each semantic situation.[454] There is no way to objectively pin down the meaning of a word by looking at the socio-historical contexts because, extended consistently, a context dependent theory of semantic meaning reveals an indefinite plurality of possible ways even simple "positive" words can be used. This is even truer of non-positive words, for instance those which express general principles *à la* the Fourteenth Amendment which guarantees all citizens "equal protection of the law."[455] Indeed, if one takes the approach of universal grammar, and its claims about semantic novelty seriously, one can claim that there are an indefinite and growing number of ways we deploy words. Language, after all, involves the "infinite use of finite means."

This is not to say that indeterminacy, and therefore ambiguity, applies in all legal circumstances. Indeed, as Lawrence Tribe observed in his commentary on Justice Scalia's essay, there are some circumstances in which the range of possible interpretations is limited by the comparative straight-forwardness of a legal provision, which denies legal officials the scope to dream up new interpretations.. For instance, Article I Sec 3 of the Constitution, which indicates that the "Senate of the United States shall be composed of two Senators from each State..." is not particularly open to radical interpretation. This will likely be the case in many legal situations

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[453] Alexander Hamilton and James Madison and John Jay. *The Federalist Papers,* ed. Charles R. Kesler. (New York, NY: Signet Classics, 2003), 225

[454] See Ludwig Wittgenstein. *Philosophical Investigations*, trans. G.E.M Anscombe, P.M.S Hacker and Joachim Schulte. (Oxford, UK: Wiley-Blackwell, 2009)

[455] Dworkin, most notably, has drawn significant conclusions from just this principle.

where the positive character of the law, or its settled history in the jurisprudence, renders interpretive decisions clear. But it is certainly not the situation in "hard cases" where debates about the semantic meaning of law belie deeper moral disputes about the proper principles to be applied.

And indeed, I believe this moral position lies at the heart of Justice Scalia's position.[456] While he presents his "science" of textualism as an objective way of engaging in legal interpretation, at the heart of his concerns is the belief that a society adopts a constitution because it is "skeptical that evolving standards of decency always mark progress and that societies mature as opposed to rot."[457]

Indeed, without this moral belief, there might well be little of interest in Scalia's position. It is the appealing but ultimately confusing conflation of textualism with Constitutional conservatism, of facts and norms/values, that gives textualism its ideological power. But the connection itself is not made particularly clear by Justice Scalia, who wants both a "science of law" and to calcify Constitutional and legal interpretation to prevent moral rot. But the two objectives in no way need intersect in the intimate way he conceives. Even if one accepted that the objective meaning of words could be pinned down, there is no reason why that should be of any intrinsic moral interest. For instance, it in no way would overcome the central claim of sophisticated positivists such as Hart, who maintained that law and morality were two separate things.[458] Without its Burkean core, textualism would be both wrong at an epistemological level and of little interest from a moral point of view.

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[456] Saying that, I find Ely's moral arguments more persuasive. See John Ely. *Democracy and Distrust: A Theory of Judicial Review*. (Boston, MA Harvard University Press, 1981)
[457] Scalia, "Common Law Courts," 40-41.
[458] Hart notably believed that in "penumbral" situations Judges must indeed make law.

But Justice Scalia's position is of interest because it is, at its heart, a Burkean conception of law given a uniquely American twist. Justice Scalia wants judges to be restrained in their interpretations of law simply because he believes that is what they should do. The textualist theory of meaning is simply the epistemological justification for why it is possible to achieve this successfully. Once the textualist theory of meaning is dropped as implausible, what we are left with is an injunction for Judges to defer often to conservative norms. Progress in morality should be left to the "people" and their representatives.

I agree in part with Justice Scalia's point here. Judges should practice more restraint in respecting democracy. But where he goes wrong is in considering the function rights are meant to play in this process. A true democracy is one where the opinion of all, not just the majority, is taken into account. As I have argued above, taking this position seriously would necessitate adopting the realization and amplification of human dignity as the animating ideal of law. This leads to an expansive conception of rights as enabling individuals to increasingly determine the structure of legal and political institutions, and the laws which flow from them. It means not seeing democratic authority as flowing from a Constitution determined by a minority of men in the past, but rather as a continual process wherein individuals employ their expressive capabilities to define themselves by redefining the socio-historical boundaries within which they exist. As put by Unger,

> [The] fetishism of the institutional formula, most completely manifest in the cult of the Constitution, is an extreme instance of a conformism that is now in danger of seducing the whole world...the greatest price that it has exacted from American democracy is failure to progress in the realization of the most persistent American dream - an American variant on what has now become a worldwide aspiration. This aspiration is the dream of a society made for the little guy...[459]

[459] Roberto Unger. *What Should the Left Propose?* (London, UK: Verso Press, 2005), 103

Such a conception, I believe, is closer to realizing the democratic ideal Justice Scalia himself endorses than his own vision of a "dead" Constitution. It accords central place to the realization of human dignity through adopting an expansive conception of rights, rather than one which sees them as Constitutional bulwarks adopted by men centuries dead against dangerous moral progress. In the next few sections, I will illustrate how such a conception might be realized in American law more practically.

4) *Williams v Mississippi* and the Concrete Requirements for Democratic Government

Williams v Mississippi began with a debate around jury selection and ended with the Supreme Court authorizing a two-tiered voting system with embedded racial prejudices. It is amongst the most shameful legal decisions in any common-law country; a testament to the sad divide between the promise of constitutional protections and the utter failure to apply them in a principled manner where doing so contradicted racist intentions. It is also an important case because it indicates the substantial damage that can be caused where law is approached in the manner advocated by originalists, and especially textualists. While I by no mean wish to accuse contemporary originalists or textualists of holding the same racists views as the Justices in *Mississippi*, it is difficult for me to see how one could reach a different decision when applying their approach to jurisprudence consistently. As we shall see, one of the arguments given by the Justices was an appeal to the positive character of the Constitutional provisions debated, and a dismissal of the more principled claims made by Mr. William's attorney. By contrast, I will demonstrate how my normative approach to jurisprudence, which places the realization and amplification of dignity at the center of law, would enable Judges to decide the case differently.

Mr. Williams had been indicted for murder in the state of Mississippi by an all-white jury, and later was sentenced to be hanged by another all-white jury.[460] Mr. Williams, understandably concerned that the jurors may have been inclined against him from the start, took the issue to court. He argued that, since jurors were drawn from eligible voters, his trial was inappropriate given that individuals from his race were unlikely to be represented on a state jury. This was due to provisions in the state's constitution which disenfranchised voters who could not pass a literacy test or demonstrate that they paid poll taxes. These provisions were intended to disenfranchise most blacks, an example of the infamous Black Codes many Southern states passed in the aftermath of the American Civil War. Unfortunately, in many respects they were very successful in further marginalizing African Americans. This was despite passage of the equal protection clause of the Fourteenth Amendment, which was passed in no small part to prevent Southern states from violating the rights of anti-slavery advocates.

Mr. William's was ultimately heard by the Supreme Court 1898, which in a brief decision unanimously rejected his appeal wholesale. They reasoned that the Equal Protection clause did not apply to the restrictions imposed by the *Mississippi Code* of 1892 because:

> They did not, on their face, discriminate between the white and negro races, and do not amount to a denial of the equal protection of the law, secured by the Fourteenth Amendment to the Constitution, and it has not been shown that their actual administration was evil, but only that evil was possible under them.[461]

The Judges noted Mr. William's argument that, prior to the adoption of the *Mississippi Code*, a majority of the voters in the state would have been black rather than white. They also noted that the makers of the new post-slavery constitution refused to submit it to the voters of the state for approval, but ordered it adopted before holding an election in which an overwhelming

[460] *Williams v. Mississippi*, 170 U.S. 213 (1898)
[461] Ibid

number of white legislators were elected. They subsequently enacted further provisions to disenfranchise African American voters, including Sec 241 of the State Constitution which established the voter requirements complained of by Mr. Williams.

Justice McKenna, speaking for the Court, denied Mr. William's appeal. He conceded that the Fourteenth Amendment had been enacted in no small part to prevent Federal or State governments from discriminating against individuals on the basis of their race. But he noted, that the letter of Mississippi's Constitution did not discriminate "against the negro race, either as to the elective franchise or the privilege or duty of sitting on juries." Justice McKenna noted that the state's Supreme Court in *Ratliff v Beale* overtly claimed that the point of these constitutional provisions was to discriminate against the "characteristics" of African Americans. But he also claimed that "nothing tangible" can be deduced from this, since on the face of it, the law also discriminated against illiterate and non-taxpaying whites. He went on to observe that "nothing direct or definite" could be inferred from Mr. William's allegations, since the Court could only weigh in if a state constitution enacted a convention explicitly to disenfranchise African Americans.[462] Justice McKenna then went on to dismiss the precedent set in *Yick Wo v Hopkins*, where San Francisco arbitrarily discriminated against Chinese citizens, as inapplicable in Mr. Williams' case. Thus, Henry Williams was executed and other Southern states took the Supreme Court's decision as licence to enact provisions similar to Mississippi's.

The *Williams* case is, unfortunately, simply one example of many of how African Americans have been purposefully and systematically disenfranchised by political institutions.

[462]*Williams v. Mississippi*, 170 U.S. 213 (1898)

Sadly, this is true even of institutions such as courts which were granted the prerogative to protect the rights of African Americans.[463] As put by Alexander Keyssar:

> Mississippi led the way in 1890…In short, other states followed suit, adopting - in various combinations - poll taxes (demanding that past as well as current taxes be paid), literacy tests, secret ballot laws, lengthy residence requirements, elaborate registration systems, confusing multiple voting-box arrangements, and eventually, Democratic primaries restricted to white voters. Criminal exclusion laws were also altered to disenfranchise men convicted of minor offences, such as vagrancy and bigamy…Many of the disenfranchising laws were designed expressly to be administered in a discriminatory fashion, permitting whites to vote while banning blacks.[464]

The legacy of this shameful history continues to be debated and corrected, and in some unfortunate circumstances revitalized. Echoes of *Williams* appear in the Republican Party's attempts to impose stricter conditions on exercising the right to vote, such as demanding government issued identification. On a more positive front, one can also see evidence of the backlash against *Williams* in the Supreme Court's recent decision in *Harris,* where the majority ruled in favour of Arizona's redistricting policy that was largely felt to favour democrats by granting more say to urban over rural districts.

These cases are obviously controversial, both theoretically and as a result of their impact on party politics. Controversies over the latter issue emerge in no small part because taking the expansive approach to enfranchisement and voter participation is often seen as empowering minorities who are less likely to vote for conservative candidates.[465] Such controversies illustrate the importance of addressing the logic deployed in *Williams* in the contemporary era.

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[463] For an informative account of this history see Lani Guinier. *Tyranny of the Majority: Fundamental Fairness in Representative Democracy.* (New York, NY: Free Press, 1995)

[464] Alexander Keyssar. *The Right to Vote: The Contested History of Democracy in the United States.* (New York, NY: Basic Books, 2000), 111-112

[465] Much of the aftermath surrounding the infamous *Bush v Gore* decision centered on this controversy. Allegations persist that many African American Floridians were discouraged from voting as part of a strategy to ensure the success of the Republican nominee.

While it is true that many (but not all) of the overtly racist policies employed to disenfranchise African Americans specifically have been uniformly condemned, in practice African Americans remain far less likely to vote both as a direct and indirect consequence of government policies, which in some states includes disenfranchising individuals who are either imprisoned or, in some extreme situations, even those who simply have a criminal record. In 2011 this included no less than 5 million Americans, including roughly 13 per cent of African American adult men.[466] This number is absurdly high; by way of comparison, it would be the equivalent of disenfranchising an entire urban space larger than the total population of metropolitan Boston. The gravity of this issue, even contemporaneously, suggests why it remains important to discuss and confront the application of *Williams* type logics to issues of voter participation. This is especially true given that individuals from historically marginalized communities largely remains the predominant subjects of voter restrictions, intentionally or unintentionally.

Williams reflects the unfortunate consequences of adopting the originalist and textualist approaches to legal interpretation. Justice McKenna sought to avoid making a substantive judgement about the merits of Mississippi's law by appealing to what he understood as the literal meaning of the law. While Justice McKenna and his colleagues on the Court acknowledged that the point of voter restrictions had historically been to disenfranchise one racial group, they denied that this violated the Fourteenth Amendment since the law only did this in practice and not in the text itself. Without giving any significant account of their reasoning for adopting this position, the Court dogmatically asserted that this was the correct way to interpret the law and then proceeded to render a decision which allowed Mississippi to continue disenfranchising African Americans. The ultimate result was Mr. William's unfortunate execution, despite his

[466] See Erika L. Wood. "Who Gets to Vote?" in *The New York Times,* November 7, 2011

unfair trial. Remarkably, the decision included the banal statement that nothing "substantial" or "tangible" could be concluded by looking at the empirical evidence presented by Mr. Williams' counsel which suggested that he, like many other African Americans, was the victim of a plethora of intersecting discriminatory practices.[467]

As I discussed in the Section above, the *Williams* decision does not reflect the Court's supposed commitment to political neutrality when interpreting the law, regardless of the consequences. Such would be giving too much credit to the decision. The adherence to the "literal" meaning of law advocated for by originalist and now textualist theories of judicial interpretation would be of no moment if they were simply a "science" of law with no moral or political ramifications. It is only when understood as approaches to legal interpretation buttressed by a set of normative beliefs that originalism and textualism become approaches requiring critical examination, and cases such as *Williams* demonstrate the dangers such approaches pose.

By contrast, in Chapter Six, I argued that decisions on democratic rights should be reached through applying a two-step test: the test for dignified authorship. To reiterate, the first step was whether the legal decision amplifies the dignity of those involved, recalling that in my model dignity relates to one's capacity to participate in the authorship of the legal and political institutions that govern us. The second step was to determine whether the legal decision ascribes equal value to the democratic right of citizens. As we shall see in a subsequent Section, in some circumstances the two steps do not cohere, in which case amplifying dignity should trump the ascription of equal value to democratic rights. But in the case of *Williams* the Court did not follow anything approximating the two steps.

[467] *Williams v. Mississippi*, 170 U.S. 213 (1898)

The fundamental originalist position followed in *Williams* is that judges should interpret only the text of the law and not go beyond it. To do otherwise would be to confer upon courts undemocratic power which they are not entitled to as unelected bodies. This literalism, buttressed by under-theorized democratic commitments led the Court to conclude that, since Mississippi's law did not on the face of it discriminate against African Americans Mr. Williams' Fourteenth Amendment rights were not denied.

The Court's unwillingness to look beyond the formal text of the law led to a great injustice which cannot be vindicated by appeal to democratic values. As I have highlighted throughout, democracy is not simply about crude majoritarianism, especially in circumstances like those in Mississippi during the 1890s. Laws were deliberately changed to deny African Americans the opportunity to participate in the processes of government. Democracy is about ensuring that all individuals are able to participate in these processes, and one of the primary responsibilities of courts is to ensure this by upholding the rights of minorities in a robust and aggressive manner. This will often require Judges to look beyond whether the mere text of a law is discriminatory. It involves their examining whether the actual and practical effect of the impugned statute is discriminatory, especially when lawmakers intended and expected it to be so, and attempting as best as possible to reach a judgement sensitive to the actual socio-historical boundaries faced by individuals. The narrow literal-mindedness required by textualism renders this impossible, since adherents remain beholden to the basic myth that law must blindly arbitrate according to the letter of the law even when doing so inhibits judges from fulfilling their most important duty: upholding the rights of citizens in a substantive manner.

Given this, we can see how the decision reached in *Williams* would fail to pass the dignified authorship test as it was formulated in Chapter Six. It does not amplify the dignity of

individuals in any meaningful way. Indeed, by enabling state governments to pass various "Black codes" intended to discriminate against an already marginalized community, *Williams* established a precedent which was to bear dark fruit for generations. Many African Americans still confront the possibility of disenfranchisement for morally arbitrary reasons such as not presenting proper identification on voting day. These policies deeply constrain the capacity of the most vulnerable to participate in the authorship of the state they live within. At such a broad level this not only imputes the dignity of the disenfranchised, but disfigures national politics as a whole.

It is also clear that the *Williams* decision could not pass the second part of my test. Indeed, the entire purpose of the impugned statute was to devalue to democratic rights of a given community. This is not to say that some restrictions on voting rights are not required to protect the equal value of democratic rights for all. Indeed, as I pointed out in my discussion of *Opitz* in Chapter Six, reasonable voting procedures and safeguards are necessary to preserve the integrity of the electoral process. In this respect they are necessary to uphold the normative goal of ascribing equal value to the democratic rights of all. But the restrictions imposed in *Williams* are qualitatively different from those in *Opitz*. In the latter case, democratic procedures were violated and individuals allegedly voted in a riding they were not registered in. This misrepresents the actual will of voters by skewing representation. In the former case, the procedures enacted were not designed to preserve the integrity of the democratic process, and they certainly did not have that effect. The procedures were intended to disenfranchise those deemed unworthy of participating in the democratic process of authorship; particularly those regarded as deficient by virtue of their race. As the Justices of the Supreme Court themselves pointed out, in this the state of Mississippi was all too successful. Such a policy cannot be

justified either in purpose or effect according to the second prong of my test, and should have been rejected.

More than any other case discussed in this dissertation, *Williams v Mississippi* demonstrates how important it is, when interpreting law, to employ a normative approach which puts realizing human dignity front and center. As I explained in the section above, textualism cannot be defended or justified at the theoretical level. And, as we saw in the *Williams* case, in practice, the textualist approach could result in disastrous decisions. Rather than adhering to a false myth about interpreting the law scientifically, or justifying that by appealing to democratic majoritarianism, judges should look to amplify the dignity of legal subjects by applying the two step test set out above in cases dealing with democratic rights.[468]

5) American Law and the Democratic Rights of Convicted Criminals

The United States is currently one of the few advanced industrial countries which still denies criminals the franchise. And indeed, this seemingly draconian situation would appear to be constitutionally permitted. Sec 2 of the Fourteenth Amendment specifically provides that American states can adopt disenfranchisement measures where individuals participate in "rebellion, or other crime." Remarkably, in some circumstances these measures are applied even after prisoners have completed their sentence. There are currently 9 states which have laws in place to prevent ex-prisoners from voting after they have served their sentence. In 14 states, voting rights are restored after incarceration is completed. In 4, rights are restored after former

[468] Here, one might argue that my test is unduly formulaic, or designed to always provide a rote answer. However, there are circumstances where the demands of the two prongs might conflict if applied consistently. In such circumstances, I believe the demand of the first prong should take precedence. Amplifying dignity, as the unifying idea of the entire normative approach, takes priority over ascribing equal value to everyone's democratic rights.

prisoners complete their parole. In 19 states, voting rights are restored after prisoners complete any probation sentence. In these states, some offences such as treason will result in permanent disenfranchisement. Finally, some states require those convicted of serious crimes to petition the Governor or another state body to have their voting rights restored. This may result in permanent disenfranchisement. At the opposite extreme, only Maine and Vermont allow prisoners to vote in state elections while they are incarcerated.[469]

The effects of these draconian policies have a tremendous impact on both the individuals who have been disenfranchised, and the democratic process in the United States. Sadly, it is a problem that is getting worse. In 1976 an estimated 1.2 million citizens had been disenfranchised by voting restrictions. By 2010, thanks to the imposition of more restrictive laws, that number has ballooned to over 5.85 million. This includes 2.6 million citizens who have completed their sentences.

Unfortunately, even these depressing numbers do not indicate the full breadth and depth of the problem.[470] In line with the tragic history perpetuated since the *Williams* decision over a century ago, disenfranchisement laws have disproportionately affected African Americans. One in thirteen African American men are unable to vote because of criminal convictions, relative to 1.8 per cent of the remaining population.[471] In some of the most restrictive states, almost 1 in 5 African American men cannot vote. Ominously, the problem is most apparent in the battleground state of Florida where roughly 1.5 million mostly African American citizens had

[469] Jean Chung, "Felony Disenfranchisement: A Primer." *The Sentencing Project,* May 10, 2016
[470] Chung, "Felony Disenfranchisement"
[471] See Ed Pilkington. "Felon Voting Laws to Disenfranchise a Historic Number of Americans in 2012." In *The Guardian,* Friday, July 13th, 2012

been disenfranchised by 2012. This is quite striking when one considers that in 2000 George Bush Jr won this key state, and thus the Presidency, by a margin of a few hundred votes.

These numbers indicate the breadth and depth of the problem, even if they cannot capture its full historical tragedy. As we saw in the *Williams* decision, the United States has a long history of disenfranchising those considered unworthy of participating in the democratic process. Whether stated overtly or not, this has almost always included far more African Americans than whites, a sad heritage which continues to this day through imposing voting restrictions by requiring certain forms of identification.[472] Unfortunately, I cannot empirically assess whether this has had the effect of compounding the impact of racially discriminatory practices more generally. I leave it to the reader's imagination to determine whether they think that preventing large numbers of African Americans from participating in the democratic process might encourage politicians and civil servants to ignore their unique needs as a historically marginalized community. Given all this controversy, it should come as no surprise that there have been several prominent cases concerning whether criminals should have the right to vote. The most important of these are *Richardson v Ramirez* in 1973, and its more historically sensitive sequel *Hunter v Underwood* in 1985.

Richardson was initiated by several plaintiffs who had committed felonies in California but had completed their sentences. They brought a class action suit against the Secretary of State and election officials, arguing that constitutional provisions and statutes which permanently disenfranchised them were unjustifiable. The plaintiffs argued that California did not have a "compelling state interest" in permanently disenfranchising them, which had been the precedent

[472] "Report to Congressional Requesters: Issues Related to State Voter Identification Laws." *United States Government Accountability Office*, September, 2014

established earlier in *Dunn v Blumstein*. Unfortunately, while they won at the state level, the Supreme Court backed away from narrowly interpreting "compelling state interest" and demanding California enfranchise convicts. The Justices drew on originalist frameworks to develop a formalist interpretation of the Fourteenth Amendment, which stressed that Sec 2 indicated that voters can be disenfranchised for participation in "rebellion, or other crimes." Here, the orientation of the Court comes across as deeply originalist, and highly proto-textualist,[473] as they stressed that the legislative history suggests Congress intended Sec 2 to "mean what it says."

> The problem of interpreting the "intention" of a constitutional provision is, as countless cases of this Court recognize, a difficult one. Not only are there deliberations of congressional committees and floor debates in the House and Senate, but an amendment must thereafter be ratified by the necessary number of States. The legislative history bearing on the meaning of the relevant language of § 2 is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.[474]

They then go on to elaborate upon this conservative interpretation, by stressing that, while Sec 2 might have originally been conceived to disenfranchise those who engaged in crimes against the state, its unambiguous presence and the text of the section tied the Justices' hands in this case. Here the Justices come very close to anticipating Justice Scalia by arguing that, while there remains controversy over whether Sec 2 was intended exclusively to disenfranchise traitors, this history is less important than what the Section "says" and "means."[475]

> As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the

[473] They do not distinguish as sharply between intended meaning and the objective historical meaning of words, as Justice Scalia did.
[474] *Richardson v. Ramirez*, 418 U.S. 24 (1974)
[475] There is an interesting Derridean slip here, wherein the Justices directly seem to conflate meaning with phonocentrism while also denying that the intention of a speaker has bearing on the meaning of Section 2.

> other restrictions on the franchise which were invalidated in the cases on which respondents rely. We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. We do not think that the Court's refusal to accept Mr. Justice Harlan's position in his dissents in *Reynolds v. Sims*, 377 U. S. 533, 377 U. S. 589 (1964), and *Carrington v. Rash*, 380 U. S. 89, 380 U. S. 97 (1965), that § 2 is the only part of the Amendment dealing with voting rights, dictates an opposite result. We need not go nearly so far as Mr. Justice Harlan would to reach our conclusion, for we may rest on the demonstrably sound proposition that § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement. Nor can we accept respondents' argument that, because § 2 was made part of the Amendment'" largely through the accident of political exigency, rather than through the relation which it bore to the other sections of the Amendment,'" we must not look to it for guidance in interpreting § 1. It is as much a part of the Amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means.[476]

Justice Marshall delivered a powerful dissent in this case which took the potential ramifications of prisoner disenfranchisement more seriously, and situated it more systematically within the history of American voting laws. Not content to simply look at the (controversial) text of the Fourteenth Amendment, he directly invoked an evolutionary approach to jurisprudence by analyzing the contemporary arguments offered by California to justify its strict laws on disenfranchisement. Justice Marshall found that, beyond its symbolic value, the state could offer little evidence that it had a "compelling" interest in preventing prisoners from voting. Indeed, it only made the extremely spurious claim that allowing former convicts to vote would generate disrespect for law and order because prisoners would be inclined to repeal criminal laws. Justice Marshall dismissed this highly punitive and autocratic reasoning, arguing that parties in a democracy are entitled to disagree with what behavior should be criminalized. Indeed, he pointed out that according to the state's logic, anyone who disagrees with the

[476]*Richardson v. Ramirez*, 418 U.S. 24 (1974)

majority's opinion on criminal law should be disenfranchised. In a stirring paragraph, Justice Marshall opines that voting is the coin of democracy, and is fundamentally debased by making the right to vote contingent upon supporting the established order.

> Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form; they are constantly in the process of revision in response to the needs of a changing society. The public interest, as conceived by a majority of the voting public, is constantly undergoing reexamination. This Court's holding in *Davis, supra,* and *Murphy, supra,* that a State may disenfranchise a class of voters to "withdraw all political influence from those who are practically hostile" to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views. Voters who opposed the repeal of prohibition could have disenfranchised those who advocated repeal "to prevent persons from being enabled by their votes to defeat the criminal laws of the country." *Davis, supra,* at 133 U. S. 348. Today, presumably those who support the legalization of marihuana could be barred from the ballot box for much the same reason. The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition. Rather than resurrect *Davis* and *Murphy*, I would expressly disavow any continued adherence to the dangerous notions therein expressed.[477]

What we can see here is a classic divide in American law between those judges who employ an process of interpretation of a legal text that stresses its "original" meaning, and those who wish to substantively assess the arguments for and against a contemporary law. In my Section on Justice Scalia, I have already expressed qualified support for the latter approach. In *Richardson*, the majority took an originalist approach to the Fourteenth Amendment which stressed that its apparent meaning allowed states the right to disenfranchise those convicted of a "crime." Controversies over issues of cooperative Federalism aside, the majoritarian conception of democracy operative in this Amendment cannot be made consistent with the demands of my

[477] *Richardson v. Ramirez*, 418 U.S. 24 (1974)

two step test. The *Richardson* decision neither amplifies the dignity of those in question, nor does it ascribe equal value to the democratic rights of the plaintiffs. It can therefore only be justified by taking an originalist approach to the law which is not normatively desirable. As Justice Marshall opined, it devalues the "coin" of democracy by dignifying its crudest features rather than the individuals who make it up.[478]

Indeed, I believe that the very intention behind the state law, which was to disenfranchise those who were unlikely to support the state's criminal laws, was directly at odds with the most important feature of democracy. It constrains the ability of the plaintiffs to participate in the authorship of the laws which govern them, and so redefine the socio-historical boundaries within which they exist. Indeed, the state's law is designed to calcify the criminal law as it stands by excluding those who might recognize its false necessity. As Justice Marshall pointed out, according to this logic any citizens who disagree with the carceral inclinations of the majority might as well be disenfranchised.

Hunter v Underwood has a far happier ending. Unfortunately, it also demonstrates the complete absurdity of many disenfranchisement laws, as well as their disproportionate impact on African Americans. Mr. Carmen Edwards and Mr. Victor Underwood were African American men residing in the state of Alabama. Both had been convicted previously for submitting worthless cheques. How this relatively minor crime led to a Supreme Court decision is astonishing in and of itself. Mr. Edwards and Mr. Underwood were disenfranchised by the Boards of Registrars for Montgomery and Jefferson counties, which relied upon Article VIII, Sec 182 of the *Alabama Constitution* of 1901 which disenfranchised individuals convicted of crimes

[478] *Richardson v. Ramirez*, 418 U.S. 24 (1974)

including those of "moral turpitude."[479] The District Court, examining the history, found that the major purpose of these draconian provisions were to disenfranchise blacks. As John B. Knox, President of the Alabama Constitutional Convention of 1901 put it:

> And what is it that we want to do? Why it is, within the limits imposed by the Federal Constitution, to establish white supremacy in this State.[480]

Unfortunately, the District Court determined that while the Convention as a whole may have been motivated by racism, Mr. Underwood and Mr. Edwards could not show that Sec 182 was expressly intended to disenfranchise African Americans. It therefore decided against them. This decision was overturned upon appeal. The Court of Appeals recognized that the purpose of Sec 182 was to disenfranchise African Americans, and could only be saved if the state defendants could show that the outcome would have been the same if the appellants were not African American. The Court determined that because of the law, African Americans in Montgomery and Jefferson counties were almost twice as likely to be disenfranchised as whites. The Court of Appeals therefore struck the section down and the case made its way to the Supreme Court.

The Supreme Court acknowledged that the law, on the face of it, was racially neutral. It simply disenfranchised anyone convicted of certain crimes, including whites. The Court acknowledged that a law which had a racially disproportionate impact could be saved if one could show that it was not motivated by racism. However, that clearly was not the case here. The Supreme Court examined the historical record and recognized that the efforts of white Alabamans were consistent with the "movement that swept the post-reconstruction South to

[479] *Hunter v. Underwood*, 471 U.S. 222 (1985)
[480] Ibid

disenfranchise blacks."[481] Faced with this, the state attempted to preserve the law by noting that some of the more blatantly discriminatory crimes which prompted disenfranchisement had been removed. But the Supreme Court ultimately ruled that this was not sufficient to save Sec 182 since in its original purpose and continuing effect it had a racially discriminatory impact and therefore violated the Fourteenth Amendment.[482]

> At oral argument in this Court, appellants' counsel suggested that, regardless of the original purpose of § 182, events occurring in the succeeding 80 years had legitimated the provision. Some of the more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation, have been struck down by the courts, and appellants contend that the remaining crimes -- felonies and moral turpitude misdemeanors -- are acceptable bases for denying the franchise. Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race, and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights.*[483]

This decision marks a long needed repudiation of the logic first developed in *Williams* and perpetuated in *Richardson*. Here, the Court demonstrated a willingness to look beyond the literal text of the law by deploying what I have called a normative approach to jurisprudence which rectified a long-standing injustice. In this case, the Court clearly amplified the dignity of both Mr. Edwards and Mr. Hunter by enabling them to vote in elections without discrimination based on commission of a petty crime. Perhaps more importantly, at the social level the *Hunter* decision showcased the Court repudiating its shameful legacy of supporting Black Codes and recognizing the empirical reality of persistent discrimination against African Americans. The Court recognized that amplifying the dignity of individuals who belong to historically

[481] *Hunter v. Underwood*, 471 U.S. 222 (1985)
[482] Curiously, the Court did not invoke Sec 2 of the Fourteenth Amendment except to dismiss its relevance in this case.
[483]Ibid

marginalized communities requires deploying a normative approach to jurisprudence which looks beyond the text of the law and analyzes its substantive intentions and effects.

The Court also ascribed equal value to the democratic rights of Mr. Edwards and Mr. Hunter by striking down laws which prevented them from participating in political processes available to most individuals within the state. Unfortunately, it did not go as far as saying that all such restrictions are unconstitutional, therefore preserving the unfortunate precedent established in *Richardson*. As I have indicated before, I do not believe that restricting the voting rights of criminals or prisoners can be justified in any circumstances. For all its value, the *Hunter* decision is therefore of qualified significance.

6) The Tension Between Dignity and Formal Equality in *Citizens United*.

In *Citizens United*, the Court made a drastic decision that pushes the United States ever closer to becoming a liberal polyarchy nominally legitimated by quasi-democratic procedures. More notably, it marks yet another step in the transition from what Michael Sandel terms a society with a market towards becoming a market society in which narrowly defined economic interests colonize all dimensions of the public sphere.[484] Indeed, the entire basis of the decision is the bizarre conflation of money with expression; a metaphysical reorientation so bizarre and yet so telling that *Citizens United* might well be understood by later generations as a founding sermon of a new onto-theology. The decision also reflects, very profoundly, the practical

[484] Michael Sandel. "From Market Economy to Market Society: IQ2 Talks." Youtube Video, 10:57, June 22, 2012, https://www.youtube.com/watch?v=kvPNS4577MA

limitations of the liberty oriented approach to agency even where it distorts its most basic features.

The saga of *Citizens United* began in 2002, with the passage of the *Bipartisan Campaign Reform Act,* conceived and pushed by Senator John McCain of the Republican Party and Senator Russ Feingold of the Democrats. The *Reform Act* prevented corporations and unions from spending money to engage in electioneering within 30 days of a primary and 60 days of an election. Several years later, inspired by liberal filmmaker Michael Moore's unprecedented financial success with the documentary *Fahrenheit 9/11,* the conservative non-profit organization Citizens United produced *Hilary: The Movie.* This film was highly critical of then Senator Hilary Clinton, who at that time was running against future President Barak Obama. They sought to air advertisements for their film during the electoral cycle, but were prevented from doing so. Citizens United pursued litigation, and by 2009 the matter was before the Supreme Court. While Citizens United only sought permission to air its advertisements, in a stunningly broad decision the Court decided to simply do away with all limits on the money organizations could spend on electioneering communication.

The majority opinion was written by Chief Justice Kennedy, who perhaps irrevocably damaged his reputation as a centrist committed exclusively to upholding the rule of law without promoting a partisan agenda. Justice Kennedy argued that the limitations imposed on campaign expenditures violated the First Amendment's protection of free speech. From there, he quickly went on to conflate such limitations with censorship, which entails the state actively preventing individuals from publishing material. This might have been the case with regard to the specific issue at hand. There is no doubt that prohibiting Citizens United from airing ads from their film constituted a form of censorship that could be challenged. But it remains deeply unclear to me

how one goes from conflating such direct instances of censorship with limitations on expenditure. In a remarkably hyperbolic paragraph, Justice Kennedy maintained that

> …The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." McConnell, supra, at 257–258 (opinion of SCALIA, J.). And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." CIO, 335 U. S., at 144 (Rutledge, J., concurring in result). By suppressing the speech of manifold corporations, both for-profit and non-profit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." The Federalist No. 10, p. 130 (B. Wright ed. 1961) (J. Madison). Factions should be checked by permitting them all to speak, see ibid., and by entrusting the people to judge what is true and what is false.[485]

Unusually, Justice Kennedy went on to claim that such censorship constitutes a dangerous precedent which risks being extended more generally. He argued that, if government can "censor" the speech of corporate associations now, then it may well attempt to regulate the media next. This would indeed have a catastrophic impact on the expression of speech, were freedom of the press not expressly guaranteed in the text of the First Amendment. Justice Kennedy then goes on to draw a further unusual parallel. He opines that wealthy individuals and corporations are already engaged in corporate lobbying, and that a rich person has the opportunity to spend as much as they wish in electioneering. While some might see these plutocratic tendencies as cause for concern, Justice Kennedy apparently reasons that it is unfair for wealthy individuals to possess the right to spend "unlimited" amounts on elections, but not corporations.

> Even if §441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. See, e.g., WRTL, 551 U. S., at 503–504 (opinion of SCALIA,

[485]*Citizens United v Federal Election Commission*, No. 08-205, 558 U.S. 310 (2010) at pg 38

> J.) ("In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to [26 U. S. C. §527 organizations]"). Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech. When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[486]

This last comment brings to mind Kierkegaard's quote about demanding freedom of speech as compensation for exercising freedom of thought. As Justice Stevens points out in dissent, "while American democracy is imperfect, few outside the majority of this Court would have thought its faults included a dearth of corporate money in politics."[487] Kennedy's arguments privilege an absolutism of principle over any empirical sensitivity. The dismissal of any concern about the undue influence of money by transforming Kant's demand that have the freedom to "think for themselves" into an empty platitude reflects the worst dimensions of the liberty oriented approach to agency.[488] Granted, Justice Kennedy does go on to acknowledge that these worries are a concern. He is particularly emphatic about ensuring politicians do not succumb to the corrupting influence of money. But then, remarkably, Justice Kennedy goes on to trivialize this worry by claiming that limits on expenditures constitute "categorical bans" on speech.

> If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption.[489]

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[486] *Citizens United v Federal Election Commission*, No. 08-205, 558 U.S. 310 (2010), at pg 40
[487] Ibid at pg 90
[488] Kant was not this naïve. A great deal of his work is taken up with the problem of why individuals subordinate their transcendental freedom to the demands of "heteronomy."
[489] Ibid at pg 45

Justice Kennedy entirely dismisses the longstanding realization that powerful interests, whether political or corporate, often have the capacity to sway public opinion in a manner conducive to their interests. This is not simply speculation, but well confirmed by empirical research.[490] Worse, Justice Kennedy justifies his decision to do away with all restrictions on corporate expenditures by appealing to fears of censorship, which had only an indirect bearing on the issue at hand. The case brought by *Citizens United* concerned their right to air advertisements for their film during an election year. Preventing that does indeed constitute a form of censorship which might fall prey to the First Amendment. But the decision to simply undo all restrictions on corporate expenditures is only tangentially related to preventing censorship. No one was preventing corporations from speaking; the restrictions imposed concerned their right to expend as much money as they wished. One might claim that the right to expend money in promoting a message is a form of speech, but constraints on that are not censorship or "abridgement" in the words of the Amendment, but a justifiable restriction.

In an elegant dissent, Justice Stevens dissected the reasoning of the majority with careful precision. He suggested that the majority's reasoning is based on an unusual reversal of precedents. Justice Stevens notes that courts had long recognized that corporations are not natural persons, and that their interests are often "furthest" from those protected by the First Amendment.

> As we have unanimously observed, legislatures are entitled to decide "that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context. NRWC, 459 U. S., at 209–210.50 Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression,

[490] For a classic study on this phenomenon see Jürgen Habermas. *The Theory of Communicative Action Volume One: Reason and the Rationalization of Society,* trans. Thomas McCarthy. (Boston, MA: Beacon Press, 1985) and Jürgen Habermas. *The Theory of Communicative Action Volume Two: Lifeworld and System-A Critique of Functionalist Reason*, trans. Thomas McCarthy. (Boston, MA: Beacon Press, 1985)

> since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information," Beaumont, 539 U. S., at 161, n. 8 (citation omitted). Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the "speakers" are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from non-corporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism.[491]

He then noted that, even were it the case that corporations were "natural citizens" with political interests, that does not lead to the conclusion the majority seemed intent upon reaching.

> The majority emphasizes Buckley's statement that Cite as: 558 U. S. ____ (2010) 51 Opinion of STEVENS, J. "'[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'" Ante, at 33 (quoting 424 U. S., at 48–49); ante, at 8 (opinion of ROBERTS, C. J.). But this elegant phrase cannot bear the weight that our colleagues have placed on it. For one thing, the Constitution does, in fact, permit numerous "restrictions on the speech of some in order to prevent a few from drowning out the many": for example, restrictions on ballot access and on legislators' floor time. Nixon v. Shrink Missouri Government PAC, 528 U. S. 377, 402 (2000) (BREYER, J., concurring).[492]

Justice Stevens then analyzes how corporate influence has and continues to have a corrupting influence on American politics. He chastises the majority both for its precedent busting application of a controversial First Amendment theory to a case that did not warrant it, and then warns that this decision may well have far reaching impact in the future. Indeed, Justice Stevens suggests that the majority simply does not live in the "real" world. He also points out that allowing non-resident corporations the opportunity to voice an opinion in a local election will allow them to further disrupt the representative processes that were to be at the heart of American democracy.

> The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim "to enhance the profitability of the company, no matter how persuasive

[491] *Citizens United v Federal Election Commission*, No. 08-205, 558 U.S. 310 (2010) at pg 32
[492] Ibid at pg 51

> the arguments for a broader or conflicting set of priorities," Brief for American Independent Business Alliance as Amicus Curiae 11; see also ALI, Principles of Corporate Governance: Analysis and Recommendations §2.01(a), p. 55 (1992) ("[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). In a state election such as the one at issue in Austin, the interests of non-resident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good, 494 U. S., at 660. The opinions of real people may be marginalized.[493]

I have some contentions with Justice Steven's reasoning. For instance, while I applaud the concern with combatting the corrupting effects of money as articulated in *Austin,* I do believe there are reasons to want to "equalize" what I have called the expressive capabilities of democratic actors. Justice Stevens explicitly rejects this aim as a legitimate reason to restrict the influence of money during elections, instead focusing entirely on corruption. Not least, I share Justice Steven's concern that the influence of money will further dilute American democracy. This is hardly an idle concern. As put by Martin Gilens, following a study of responses to thousands of questions from national surveys conducted between 1964 and 2006:

> If you judge how much say people have—their influence over policy—by the match between their policy preferences and subsequent policy outcomes, then American citizens are vastly unequal in their influence over policymaking, and that inequality is growing. In most circumstances, affluent Americans exert substantial influence over the policies adopted by the federal government, and less well-off Americans exert virtually none. Even when Democrats control Congress and the White House, the less well-off are no more influential.[494]

Determining whether these empirical concerns are borne out will require further studies. But in the remainder of this Section, I will set out why I believe *Citizens United* to be a bad decision in principle as well as in its potential ramifications.

[493] *Citizens United v Federal Election Commission,* No. 08-205, 558 U.S. 310 (2010), 80
[494] See Martin Gilens. "Under the Influence." *Boston Review,* Sunday, July 1, 2012.

I believe the majority erred in conflating the right to expression with the right to expend money when presenting a message. While the two are certainly related, the latter cannot be collapsed directly into the former. One of the defects of the American *Bill of Rights* is the absolutist character of the rights guaranteed within. Unlike modern bills of rights enshrined in a constitution, such as the *Charter* in Canada, there are no provisions in the American *Bill of Rights* which enable courts to qualify the rights guaranteed within by either subjecting them to reasonable limitations or deferring to the legislature.[495] This has resulted in problematic and often confusing common law decisions surrounding rights, where judges are often forced to engage in complex legal gymnastics to qualify rights which no one would wish to see extended indefinitely. The originalist/textualist approach to jurisprudence has further exacerbated this problem by encouraging judges to interpret rights in the most literal manner possible. This is true even in cases where the rights involved, such as to "expression," are highly ambiguous and clearly need not and should not be extended indefinitely. No one, for example, would accept the claim of corporations that they have a right to lie to consumers about the nature of their products because that is a protected form of "expression."

This absolutist approach to rights means that cases such as *Citizens United* are often confronted in a dichotomizing fashion. Either the ability to expend money to present a message is a form of protected expression, or it is not. To my mind, this is deeply misleading. As I explored in earlier chapters, expression flows from the expressive capabilities individuals possess to define themselves by redefining the socio-historical contexts within which they exist. This lies on a continuum correlated with the dignity possessed by individuals. As such, a right to

[495] For a discussion of these anachronistic characteristics see Kent Roach. *The Supreme Court on Trial: Judicial Activism of Democratic Dialogue.* (Toronto, ON: Irwin Law, 2001), 15-34.

expression is not exhausted by simply avoiding constraints on speech. It might be realized by allowing individuals to expend their private resources to amplify their capability to express a certain message in public. In this respect, individuals are indeed entitled to expend money to express themselves. But the corollary to this is that the expression of some might infringe upon the expressive capabilities of others. This would in turn infringe upon their right to expression. The right to expend money to express an opinion is therefore a secondary one, which should be respected so long as it does not unduly conflict with the capacity of others to express their opinion and be heard. This is especially true in political circumstances, as I shall explain shortly.

I believe the majority erred in assuming that corporations should possess the full legal personhood required for them to have as extensive a right to freedom of expression as a natural person. This is because a corporation is not a person with agency, in the sense that they can deploy a set of expressive capabilities to redefine the socio-historical contexts within which it exists. A corporation is a legal abstraction, constituted by language. It possesses agency only to the extent the individuals who make it up are enabled through law to act on behalf of the legal abstraction to pursue certain interests. Because it lacks any immediate agency, any rights a corporation possesses flow secondarily from those possessed by the dignified individuals who act on its behalf. These rights exist to amplify their dignity by enabling them to employ their expressive capabilities effectively.

We are therefore confronted with a situation where an abstract entity can claim rights only on a second-hand basis. Moreover, the particular right being claimed, to expend money to engage in electioneering, is related only in a qualified sense to freedom of expression. Restricting one's capacity to expend money certainly does not, as the majority argues, constitute

a form of censorship. Indeed, restricting an individual's right to expend money may well be necessary to ensure that others enjoy freedom of expression to the same extent.

This does not mean that the state should attempt to equalize the expressive capabilities of individuals in all cases. Inequities in expressive capabilities that flow from morally significant choices should be respected. This is the essence of the second twinned right I argued for in Chapter Two. But we do not live in a society organized along the lines required by the second right, and so there may be pressing need to rectify present inequities. This is especially true given that corporations are legal abstractions, and so enjoy rights only by extension. Moreover, when the rights in question are related to political issues, the priority given to corporate interests should be very minimal indeed. This is because the right to democratic authorship takes precedence over the right to equality of capabilities. Thus, even were we to live in a society organized by the right to equality of capabilities, it is unclear whether granting corporations the right to expend money to electioneer could be justifiable.

When expression is related to politics, one can apply the two step test I argued for earlier. The first step to the test is asking how to amplify the dignity of the individuals in question. The second step is to ask how to equalize the value of the democratic rights of those involved. Thus far in this dissertation, the two steps have always concurred. But here we reach a bit of an impasse. I have thus far given the second step a formalistic slant. This is because the egalitarian dimensions of my twinned model of rights was meant to be captured by the second of the rights. It might be argued, in line with the majority decision in *Citizens United*, that infringing a corporation's right to expend money during elections devalues it relative to natural individuals who can spend as much as they like. In some respects this would be true. But corporations, as legal abstractions, cannot possess dignity. They lack the potential agency required to engage in

self-authorship. As such, the first step does not apply to them. Given that, the need to protect the dignity of natural individuals by upholding their second right to equality of human capabilities should be upheld. It is of greater priority for individuals to be authors of the political-legal institutions that govern them, and to have an equal capacity to do so, than for corporations to spend money to influence public behavior during elections. Politics is unique in this respect because political forums are the medium through which this participatory process takes place. It should not be corrupted by allowing such inequities to blossom.

Conclusion to Chapter Seven

In this Chapter, I discussed the relationship between democracy and law in the American context. I began by offering an extended critique of the originalist approach to jurisprudence. I suggested that while we should admire its democratic sympathies, it is ultimately both untenable and undesirable as an approach to law. I then discussed how the originalist approach to law has resulted in American courts having a mixed record in protecting the democratic rights of citizens, particularly their voting rights.

This was most blatantly demonstrated in the *Williams* decision, where the Court permitted states to de facto disenfranchise hundreds of thousands of African Americans because it refused to look beyond the letter of an intentionally discriminatory law. I then examined two decisions relating to the voting rights of criminals. In *Richardson*, the Court against refused to look beyond the letter of the law with the result that thousands of citizens remained disenfranchised. Fortunately, the Court later backtracked in *Hunter* by demonstrating a willingness to look at the historical context, intentions, and effect of a discriminatory law that

disenfranchised two African American men for submitting bad cheques. Finally, I analyzed the decision in *Citizens United*. This is one instance where the Court seemed willing to go above and beyond a narrow approach to the law. The conservative majority decided to ignore the issues of the case, and conflate the capacity of corporations to spend money during elections with censorship infringing freedom of expression. I do not believe this to be a just decision since corporations lack the capacity to employ expressive capabilities to redefine the contexts within which they exist. This dangerous decision may yet have extraordinary effects on the political culture of American democracy.

Chapter Eight:

Realizing Human Dignity in Contemporary Jurisprudence on the Right to Vote Continued (European Jurisprudence)

Introduction

This Chapter rounds off my argument for a normative approach to jurisprudence by illustrating how international, and specifically European law, can be used as a tool to amplify human dignity by fostering democratization. I begin by acknowledging that international law brings with it specific conceptual challenges, which I attempt to resolve by appealing to the Kantian argument that states have a responsibility for establishing and maintaining the "rightful condition" for human flourishing.[496] To the extent that they cease to do so, the authority of the state to govern generally and the legitimacy of particular laws can be called into question. In these situations, international law can be an aid for individuals who cannot seek redress using the tools of domestic law.

I then go on to examine two prominent cases concerning voting rights in the European context. The first is the *Aziz* decision, which concerned voting rights in Cyprus. I argue that the European Court made the right decision in denying that sovereign authority permitted states to disenfranchise individuals, especially at a systematic level. Later, I examine the *Hirst* decision, which like *Sauvé* concerned whether prisoners should have the right to vote in UK elections. In this situation, the UK offered powerful arguments that prisoners reneged on their rights to political participation by violating the social contract. I proceed to illustrate why the Court was

[496] This echoes the point I made earlier, invoking Daniel Weinstock, that the nation state is not a natural entity with the right to do whatever it wishes. See Daniel Weinstock. "Motivating the Global Demos." *Metaphilosophy,* 40 (2009)

right to reject this reasoning. Finally, I conclude by looking at some of the ways international law might help establish the rightful condition for amplifying human dignity, particularly through realizing economic rights.

1) Normative Jurisprudence at the International and European Level

The special status of international law relative to its domestic counterpart has long been an issue that has perplexed legal scholars. There have been claims at both extremes; from those, such as the mature Hegel, who have claimed that international law is not law at all, to those like Kant who maintained that the very right to legislate domestic law should gradually become dependent on state's acquiescence to cosmopolitan norms.[497] [498] This rich and complex intellectual history, as well as the problems raised throughout, obviously impose a burden on any scholar willing to defend a normative approach to international jurisprudence. They must not only show how such a conception would be defensible with respect to domestic law, but also how it can be applied rigorously and adaptively to the unique conceptual and practical problems posed by international law.

The two most basic criticisms of international law have come from the traditions of descriptive and normative legal positivism. The first, exemplified by Kelsen and Hart, sees the task of legal philosophy to be describing the law accurately without rendering moral judgements

[497] Martti Koskenniemi has brilliantly unpacked this hagiographic vision of international law as "the gentle civilizer of nations" throughout his work.
[498] See Georg Willhelm Hegel. *The Philosophy of Right*, trans. S.W Dyde. (New York, NY: Dover Press, 2005) and Immanuel Kant. *On History*, trans. Lewis White Beck, Robert E. Anchor, and Emil. L Fackenheim. (Indianapolis, IN: The Library of Liberal Arts, 1957)

on its form or content.[499] The second, extending from Hobbes to modern conservatives such as Oakshott, maintain that one should engage in legal philosophy to clearly demarcate the realm of law from that of freedom.[500] [501] Normative legal positivists regard this as an important task since a system of law, whatever its content, is morally valuable and should not be abandoned even in situations where it competes with other moral values. Underpinning this conception is a fear of anarchy.

Descriptive legal positivists hesitate to dignify international law with full ontological status because it does not appear to have many of the features which characterize a domestic legal system. Most notably, the international legal system does not have a source of sovereign authority, either a sovereign legislative body in the Austinian sense, or a constitution stipulating rules of recognition *à la* Hart. This descriptive problem relates to a deeper difficulty for the descriptive positivist and, for that matter, the international realist; that the international legal system lacks sources of power with which to enforce its norms. For these reasons, many descriptive legal positivists have been hesitant to call international law "law" for all intents and purposes.[502] This prejudice has persisted to the present day, when in his otherwise fine book *Legality* Scott Shapiro doesn't even address the question of international law when defending his neo-Hartian positivism.[503]

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[499] See Hans Kelsen. *The Pure Theory of Law*, trans. Max Knight. (Clark, NJ: Lawbook Exchange Limited, 2008) and H.L.A Hart. *The Concept of Law: Second Edition.* (Oxford, UK: Oxford University Press, 1997)
[500] See Thomas Hobbes. *Leviathan*. (London, UK: Penguin Books, 1982) and Michael Oakshott. *Rationalism in Politics and Other Essays*. (Indianapolis, IN: Liberty Fund, 1991)
[501] Interestingly, Costas Douzinas has recently been developing a left-wing equivalent to this same argument. Having not read his chief works on this point, I am unable to comment on them extensively. But like all else he does, it is sure to be an interesting and enlightening contribution.
[502] Hart at least entertained the idea that if the empirical situation changed then so could the status of international law.
[503] See Scott Shapiro. *Legality.* (Cambridge, MA: Belknap Press, 2011)

Normative positivists also maintain the points articulated by descriptive legal positivists, but go deeper. They argue that not only does international law not possess the status of legality in practice, but that it should not on principle. These arguments were a dime a dozen during the heyday of the Bush administration. The essential argument flows from the Herderian idea of national determination, which itself rests upon deeper Hobbesian points about the nature of statehood as expressing the interests of the governed.[504] It is felt that each naturalistic "community" should have the right to assert its unique moral conception without interference from the outside world.[505] Though this might appear precipitously close to cultural relativism of the most romantic sort, the normative positivist argument can be saved by giving it a further twist by criticizing international law for being undemocratic and unrepresentative. This makes it unlike liberal-democratic states, which at least have built in mechanisms for assessing the actual interests of the people.

I do not think that either of these arguments is ultimately defensible. In the first case, the argument of the descriptive legal positivist rests upon the false idea that law is a positive object in the world. I have already criticized this in the last Chapter, and will not rehash my claims here.

The argument of the normative legal positivist is more powerful. The argument that international law, if fully realized, would be a fundamentally undemocratic force in the world, imposing universalizing norms on unwilling cultures, is a powerful one. Indeed, it has not only

[504] See J.G Herder. *Another Philosophy of History and Selected Political Writings,* trans Joannis D. Evrigenis and Daniel Pellerin. (Indianapolis, IN: Hackett Publishing Inc, 2004) and Hobbes, *Leviathan.*
[505] Herder, *Another Philosophy of History*

been the locus of conservative critiques, but of many post-colonial[506] and radical Left[507] critics (who would otherwise reject all forms of positivism) as well. It is not enough, in these instances, to defend how international law operates in practice, since the theoretical question rests on its moral legitimacy under ideal conditions. If a full international legal system were fleshed out, complete with the sources of power needed to make it effective, would it be an undemocratic force in the world? A normative jurisprudence of international law must answer this pressing question if it is to be effective.[508]

Here, the approach pioneered by Dworkin, upon whom I drew heavily in arguing for taking a normative approach to jurisprudence, becomes of qualified value. Throughout his long career, Dworkin, despite having many things to say about justice in general, had very little if anything to say about international law. I suspect this relates back to the problematic classically liberal approach to statehood that still underpins his conception of legality. This comes most to the fore when he discusses the nature of the community in *Laws Empire*, and why individuals concerned with justice should embrace an understanding of law as integrity as the best approach to narrating their unique constitutional story.

> [Internally compromised statutes] cannot be seen as flowing from any single coherent system of principle; on the contrary, they serve the incompatible aim of a rulebook community, which is to compromise convictions along lines of power. They contradict

[506] See Antony Anghie. "Francisco de Vittoria and the Colonial Origins of International Law" *Social Legal Studies* 5 (1996)

[507] See Costas Douzinas. *The End of Human Rights: Critical Thought at the Turn of the Century.* (Oxford, UK: Hart Publishing, 2000)

[508] My sensitivity to this question has grown over the years; especially since, despite the claims of realist critics, there is one branch of international law which wields substantial real power - international economic law. Sadly, in many instances this power is wielded against the interests of oppressed peoples, thereby giving weight to the arguments of post-colonial critics. Europeans have recently had this brought home to them. As I write this, the European Union is currently engaging in a systematic process to undermine the Greek state through the application of austerity measures which even neo-liberal economists have maintained will not help the economy in any notable fashion. These measures will, however, have the devastating effect of punishing the Greek people for the incompetence of their leaders, the corruption of the rich, and most importantly, the systematic failings of global capital.

> rather than confirm the commitment necessary to make a large and diverse political society a genuine rather than a bare community: the promise that law will be chosen, changed, developed, and interpreted in an overall principled way. A community of principle, faithful to that promise, can claim the authority of a genuine associative community and can therefore claim moral legitimacy - that its collective decisions are matters of obligation and not bare power - in the name of fraternity.[509]

This extraordinarily rich paragraph contains not just a defence of law as integrity, but indicates the limitations of Dworkin's theoretical analysis. He claims that a "community of principle, faithful to that promise" can morally determine the content of law. In other words, he is here defending the right of a sovereign state to do as it will so long as it actions are contiguous with the basic liberal principles of law as integrity. Here Dworkin comes very close to undertaking a Kantian inversion and claiming that states which fail to abide by the liberal principles which underpin law as integrity do not possess the moral legitimacy necessary to determine the law and that, therefore, individuals within these states would be under no moral obligation to obey their purported masters even if they must for practical reasons.[510] But he does not explain whether another form of law can be developed as a source of appeal for those subject to such wicked regimes. This strikes me as an unusual gap in his approach.

This productive limit in Dworkin's thought is a jumping off point for discussing how to approach international law from a normative perspective. His argument that a state can only claim the legitimate right to impose laws on others to the extent it is based on principle can be generalized to the global realm. I believe that doing so would entail adopting a Kantian position that sovereignty itself should be conditional on maintaining the "rightful condition" for human flourishing.[511] The requirements for maintaining this "rightful condition" are jurisgenerative in

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[509] See Ronald Dworkin. *Law's Empire.* (Cambridge, MA: Harvard University Press, 1986), 214

[510] This is implied in his most systematic work of moral theory. See Ronald Dworkin. *Justice for Hedgehogs.* (Boston, MA: Belknap Press, 2012)

[511] See Immanuel Kant. *The Metaphysics of Morals,* trans. Mary Gregor. (Cambridge, UK: Cambridge University Press, 1996)

the sense that they can be codified as an international system of rights which all states must become party to and embody in their own domestic legal systems.[512] Ideally, over the course of time the link between domestic and international law would gradually become blurred as states internalize the democratic and economic requirements for sovereignty and regard them as integral principles underpinning their own legal systems. International law would then overlap with domestic law in a self-reinforcing manner as states increasingly affirm international law as a matter of principle rather than simply as a legal requirement. This would, in turn, establish a mutually legitimizing chain through which both domestic and international legal systems validate their positions relative to one another.

This position raises two questions. The first is: what principles should be adopted in international law to establish a "rightful condition" that all states must maintain to be considered sovereign? And the second is: how rigidly must these principles be imposed.[513] The two are deeply interconnected since the first establishes a moral ideal for international law, while the second qualifies this ideal by clarifying how rigidly this ideal should be enforced.[514]

In the first case, as one might expect, I believe we can say that international law should codify the twinned rights to democratic authorship and equality of human capabilities. Here, one might think that the normative-positivist/post-colonial argument has bearing since I am arguing

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[512] See Seyla Benhabib. *The Rights of Other: Aliens, Residents, and Citizens.* (Cambridge, UK: Cambridge University Press, 2004)

[513] I leave aside the all-important question of enforcement here. This has stirred a great deal of debate in recent years, particularly in the post-9/11 era when the rhetoric of liberal interventionism was used to justify the invasions of Afghanistan and Iraq. The latter, especially, is now widely seen even by many Americans as a significant moral blunder. The problem with this is the unilateralism of American policy in these instances. This could be mitigated by leaving enforcement in the hands of, say, the United Nations General Assembly, who might at least ensure that interventions were democratically legitimated. However, there is also a strong possibility that powerful states will continue to use their clout to manipulate the opinions of weaker states to ensure they adopt the position of the hegemon. These are important issues that must be addressed more systematically in the future.

[514] This issue was at the heart of Rawls' book on international justice. See John Rawls. *The Law of Peoples: With the "Idea of Public Reason Revisited."* (Cambridge, MA: Harvard University Press, 2001)

that international law can enforce change on domestic laws. But I do not think this is undemocratic *per se* since there cannot be such a thing as a democracy of states. The state, as an abstract entity, does not have a democratic right to uphold a non-democratic system unless that is what its own people have consented too.[515]

Fortunately, international human rights law has already taken tremendous steps towards codifying the basic requirements to realize the twinned rights. Operating in conjunction, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights*, both of which are considered binding on their signatories, provide much of the legal architecture one needs to check domestic law against global standards. Unfortunately, the ICECS especially remains woefully under-valued and under enforced in the current neo-liberal atmosphere. It is not at all strange to hear many countries, even those which are signatories to the Covenant, to stress the aspirational rhetoric of Article 2(1) to justify doing little to nothing to ease the plight of the economically marginalized.

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In other words, neo-liberals have weaponized the provision around "progressive" realization to ensure that economic justice will never be realized. I do not believe this should be acceptable. The central importance of realizing the right to equality of human capabilities in

[515] As with my critique of contractarianism, I believe that a state can be legitimated only by real democratic consent, and not by an appeal to metaphysical or transcendental arguments. This goes doubly so when such ideological appeals to culture are meant to mask the very real, and deeply hierarchical, power structures which often favour the ruling elites.

order to amplify human dignity implies that relegating issues of economic entitlement to the periphery of debates on international justice is a serious moral failing. Moreover, the democratic right of justice, and its implication that an authentic democracy would pay equal respect to all its citizens, also undermines the position of those who dismiss economic, social, and cultural rights as being inconsistent or at least not as important as civil and political rights. Indeed, it stresses that the latter cannot be realized fully without the former because the two are mutually reinforcing twinned rights flowing from the unifying ideal of amplifying human dignity. Given all this, the question of what principles to adopt is less a legal issue, since many of the corollary rights required by the twinned rights are already codified, and more an issue of international practice. This brings us to the second question raised by my normative account of international law.

International law is distinct from domestic law in lacking anything like an enforcement mechanism, a situation that stems from a state's monopoly on the use of force. This has not proven an exceptional hurdle for international trade law, which often has the backing of powerful interests in advanced capitalist states. But it has proven crippling both to the effectiveness and legitimacy of international human rights law. As mentioned, very few concrete efforts have been made by states to mobilize on behalf of economic, social, and cultural rights except when such can be framed as an act of charity.[516] States have proven somewhat more willing to intervene where serious civil and political rights appear to be at risk, but even then, the law has only been intermittently enforced. At its worst, the rhetoric of international interventionism has been appropriated by powerful states, such as Russia and the United States, to justify unilateral

[516] See Christopher D. Wraight. *The Ethics of Trade and Aid: development, charity or waste?* (London, UK: Continuum Press, 2011)

intervention into smaller states. Such interventions have often been conducted for reasons that have little to do with humanitarianism once one strips away the grandiose genuflections to human rights provisions.

But what if, in ideal circumstances, it became possible to enforce international human rights law? How strident should we be? Surrounding this question are a host of practical issues related to individual circumstances which I shall not discuss here. Instead I shall argue for a general principle which should be adopted which I feel is in line with the twinned rights. Sovereignty, I believe, following Kant, should be conditional on states maintaining the rightful condition for human flourishing as determined by these two rights.[517] However, it would be unrealistic and likely unjust to demand that states realize these principles to the fullest or else face intervention in their domestic affairs.[518] For these reasons, I feel that intervention should only be permitted where states deliberately infringe the first right, or where they deliberately or in effect choose not to realize the second for a substantial part or a majority of the population.[519]

This, in brief, constitutes what I take to be the essential features of a normative approach to international jurisprudence that would be in line with the twinned dimensions of justice, while still being realistically applicable. This claim, of course, cannot be taken for granted. I will

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[517] See Kant, *The Metaphysics of Morals*

[518] In *Anarchy, State, and Utopia* Nozick made a similar argument about the possibility of not engaging in actions that flowed from correct principles if the result would be a moral catastrophe. He was never content with this argument since it inserted a dimension of consequentialism into his deontological account of political morality. To some extent my argument is shielded from this dilemma since my account of democratic justice leaves space for the individuals who make up states to interpret the two dimensions, and the human rights codes which embody them, in various different ways. But it remains an imperfect, albeit realistic, solution. See Robert Nozick. *Anarchy, State, and Utopia.* (New York, NY: Basic Books, 1974)

[519] This point also has particular salience with regard to economic interventionism. In the event of an economic disaster, states should attempt to interfere as little as possible with domestic affairs while helping to resolve the crisis. The approach I am developing would hardly justify, for instance, the wholesale structural re-adjustment of a country's economic policies to what seem like more "rational" ones. Indeed, this would so contravene the first dimension of justice it might even be characterized as a patently unjust act.

therefore attempt to ground my position over the next few sections by analyzing several important cases in recent European law which are related to the right to vote. Hopefully, by the time this Chapter concludes, it will be clearer how my approach might be applied.

2) Amplifying Human Dignity and International Law

In the last two Chapters, I argued that the various rights to be found in Canadian and American law should be understood as emanating from human dignity as a unifying ideal. From a legal standpoint, this might appear somewhat controversial given the varied references to human dignity found throughout modern Canadian and American jurisprudence. By contrast, it is tremendously easy to find salient and even decisive references to human dignity throughout international, especially international human rights law. Indeed, it is far easier to argue that realizing human dignity is a "mother right" in the international legal context than in most domestic legal systems.[520] The conceptual link between realizing dignity and the aims of international law are very explicit in the text of many international legal codes. The Universal Declaration of Human Rights (UDHR) itself, a non-binding but wildly influential articulation of global principles, opens with the following Preamble:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...
>
> whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom...

[520]See Aharon Barak. *Human Dignity: Its Constitutional Value and the Constitutional Right.* (Cambridge, UK: Cambridge University Press, 2015)

References to human dignity appear twice in the Preamble. Firstly, human dignity is acknowledged as one of the sources of "freedom, justice, and peace in the world." Secondly, faith in inherent dignity is associated with the "worth" of human beings, and is a step on the road towards "social progress" and a better life in which all enjoy "larger freedom."

References to dignity then appear twice more in the UDHR. The first is in Article 1, where dignity is linked to the Enlightenment ideals of "reason and conscience" which imply that all should act towards one another in a spirit of "brotherhood."

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

At this point, dignity is largely articulated in rather abstract and even hagiographic terms as leading to and from all good things, somehow and someway. However, the next references to human dignity, in Article 22 and Article 23 (3), are far more provocative. Here, the UDHR explicitly links human dignity to one's capacity to flourish in a rich social environment.

Article 22 reads:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23 (3) is even more express in drawing an explicit connection between respect for economic, social, and cultural rights and the flourishing of human dignity.

> Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

The last point comes very close to implying, as I did in the Section above, that states have an obligation to maintain a rightful condition which involves protecting economic, social, and cultural rights. This conceptual link becomes even more express in the *Covenant* designed to protect just those rights.

At points, the International Covenant on Civil and Political Rights (ICCPR) comes very close to declaring that amplifying human dignity is the ideal to and from which all "daughter rights," and indeed, the authority of the United Nations itself, flows. References to dignity appear throughout the text of the *Covenant*. The most striking are found in the Preamble, which seems to go out of its way to outdo that of the UNDHR. The reference to dignity appears immediately:

> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Recognizing that these rights derive from the inherent dignity of the human person...

While admirably emphatic, the language of the Preamble toys with the same tension that wracks many normative arguments that draw inspiration from human dignity; namely: if human dignity is "inherent" then what need have people for human rights? Here, one detects echoes of Arendt's famous argument on the right to have rights, and that individuals came to recognize the need for the universal rights of man only when their enforceable civic rights were entirely stripped away.[521] In an appropriate twist, this concern seems to be verified by the text of the ICCPR itself. After emphatically stressing the importance of human dignity as the source for all

[521] See Hannah Arendt. *The Origins of Totalitarianism.* (San Diego, CA: Harcourt Inc, 1976), 275

human rights, references to it appear only once more in the text of Article 10, which outlines the legal rights of individuals.

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The remainder of the Article does not detail what is expressly involved in paying respect to the dignity of individuals who have been arrested. It only suggests that the accused should be treated differently than the convicted, and children differently than adults.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) opens with the same dignity-centric language as the ICCPR. But unlike the latter Covenant, the emphasis on dignity does not disappear once one dives into the heart of the text. Indeed, the ICESCR makes a strikingly programmatic reference to dignity in Article 13, linking its amplification directly to a host of related goods:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Such Sections are likely what the drafters had in mind when they called for the "progressive realization" of the Covenant, as oppose to the ICCPR which has no such qualifications. While nominally about education, the Section links many different goods together. Education is to be available to all not just as a good in and of itself, but because it fosters the "development of the human personality and the sense of its dignity" which in turn

should "strengthen" and further the respect individuals have for human rights and freedom, and contribute to establishing a lasting culture of toleration and peace.

From the perspective of the hardened legal positivist, these spurious claims are the root of international law's problems. They regard the references to human dignity and its related goods as, at best, harmless sanctimony, and at worst, dangerously open-ended principles masquerading under the guise of hard law. But this understanding is misguided since, as I argued, it mistakes legal procedures and the expedient production of specific laws for the normative purpose of law itself. It can never get beyond the tautologous claim that law should be obeyed because it is law without entirely divorcing the question of legitimacy from the question of legality. But this becomes even more tenuous in the international context where the issue of legitimacy is perhaps the foundational legal problem, and it can only be resolved through appeal to normative principles.

If we are to have a normative jurisprudence of international law, then Article 13 of the ICESCR is a good place to start recognizing human dignity as the unifying ideal towards which international law strives. While Article 13 lacks the striking economy of the references found in the Preambles to the ICCPR and the ICESCR, it programmatically delineates the connection between dignity, human rights, and other human capabilities in a comprehensive manner. And most importantly, it is already legally enforceable. States which seek to realize this ideal in their contexts would be said to meet to requirements to maintain legitimate sovereignty. Those which fail to meet it would move down the continuum of legitimacy to the point where the international community might even be justified in intervening to prevent serious infringements of the dignity of their citizens. However, this raises the question: which rights must be realized as a condition for sovereign legitimacy, and what consequences should flow from failing to do so? I will deal

with the second question more comprehensively in the next few Sections. The first I will address briefly.

The decision to divide the two Covenants, while perhaps a necessary strategic move on the part of Western states during the heyday of the Cold War, has proven deeply unfortunate in hindsight. It has led to a system in which the ICCPR is shown every respect, and the ICESCR is virtually ignored with claims that states are engaging in the "progressive realization" of the rights within. This ignores the fact, stressed throughout this thesis, that human rights flow from human dignity, and that human dignity is both a unifying ideal and a continuum. Its amplification depends on realizing the expressive capabilities of individuals to define themselves by redefining the contexts within which they exist. None of the expressive capabilities exist in isolation; as both Sen and Nussbaum stress, they are integrally connected in complex and contextually sensitive ways.[522] While this means that states may have a lot of leeway in how they choose to foster capabilities in their given socio-cultural contexts, it also means that they cannot ignore some expressive capabilities (such as those stressed by the ICESCR) and expect the other capabilities to be realized successfully. While resources are not unlimited, as states cannot be expected to do everything at once, officials must use their best efforts to foster the "full personality" of the human person and their interrelated expressive capabilities. We must also begin to broaden our understanding of the obligations states have to the citizens of other states; especially along economic and social lines. Rich states, on the normative model of jurisprudence developed here, may well prove to have obligations to the citizens of other states which go beyond simply preventing moral catastrophes. They might, for example, have an obligation to

[522] See Amartya Sen. *Development as Freedom.* (New York, NY: Anchor Books, 1999) and Martha Nussbaum. *Creating Capabilities: The Human Development Approach.* (Cambridge, MA: United States, 2011)

ensure that other peoples obtain a certain quality of life before they look to improve the lot of their own peoples. This could be justified according to the twinned dimensional model of rights because it both fosters the dignity of the most marginalized peoples and seeks to constitute a global community which ascribes equal value to the democratic rights of all individuals.

Such an argument is sure to be controversial and I will not take it up here. In the next Section, I will try to ground my analysis further by looking at the role democratic rights play in contemporary international jurisprudence. I hope to tease out how my model can be a useful tool to better understand democratic rights in the European framework, and to resolve the challenges encountered in the implementation of those rights in accordance with justice.

3) Democratic Rights in *Aziz:* A Democracy of Value

The *Aziz v Cyprus* decision is one of the first where the European Court of Human Rights ("the European Court") was asked to decide which could transform the entire political structure of a sovereign member state. The controversy was especially prominent given the politically charged and longstanding conflict between Greek and Turkish Cypriots over who will hold dominion over the island nation. As we shall see, I believe the European Court ruled correctly by invoking democratic human rights to trump the claims of nationalists who wished to transform Turkish Cypriots into second-class citizens by denying them the right to vote. The European Court's reasoning also demonstrates how one can use the already existing tools of international jurisprudence to link democratizing processes and state legitimacy in an analytically rigorous manner.[523]

[523] See *Aziz v Cyprus (No 2)-69949/01 [2004] ECHR*

Mr. Aziz was born on the island of Cyprus in 1938, and by the turn of the millennium was a resident living in the capital city of Nicosia. He was a member of the very small Turkish community that resided in the non-occupied Greek section of the island. In 2001 Mr. Aziz requested that the government register him on the electoral role so he would be eligible to vote in the upcoming Parliamentary election. Unfortunately, Mr. Aziz's request was denied that February. The Ministry of the Interior argued that, under Section 63 of the Republic's Constitution, members of the Turkish-Cypriot community were not eligible to vote for candidates in the Greek-Cypriot elections. Mr. Aziz took the matter to the Supreme Court of Cyprus ("Supreme Court"), which denied his claim immediately before the election. Citing principles of judicial restraint, the Supreme Court offered the following reasoning for its undemocratic decision.[524]

> The right to vote is directly linked to the communal checks and balances which provide for the compilation of separate electoral lists and for separate elections of the representatives of each community. The ideal of democracy – one person, one vote in the person's place of residence – does not provide any grounds for the Court to assume the power to reform the Constitution. Such competence is not vested in us, nor can the judicial authorities claim such power. This would be against the principle of the separation of powers on which the Constitution is based.[525]

Understandably dissatisfied with this ruling, Mr. Aziz took his case to the European Court . Mr. Aziz argued that under the European Convention, Article 3 Protocol No. 1 he was entitled to vote in the Cypriot election. The Article reads:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.[526]

[524] See *Aziz v Cyprus (No 2)-69949/01 [2004] ECHR*
[525] Ibid at para 13
[526] Ibid at para 15

Mr. Aziz pointed out that, while it may have seemed necessary to divide the electorate into Greek and Turkish segments when the Republic achieved independence in the 1960s and the threat of invasion by Turkey was very real, these conditions had long since disappeared. The Turkish Communal Chamber, which had been responsible to the island's minority population, had been dissolved in 1963. The Greek Communal Chamber followed in 1965, to be replaced by a unified parliament in which Turks were unjustly not represented.[527]

For its part, the Cypriot Government argued that, while it did have an obligation to hold elections under Article 3, the EU and the *European Covenant* gave member states a "wide margin of appreciation" to determine how they wished to carry this out.[528] They maintained that their unique Republican system, which allocated 30 per cent of the seats in Parliament to Turks and the remainder to Greeks, and granted each block considerable powers, was politically necessary to manage the "delicate" situation on the island.[529] The Government maintained that the Court, following its precedent in the earlier *Mathieu-Mohin* decision, should demonstrate sensitivity to the political evolution of Cyprus' unique electoral system.[530] Finally, they pointed out that Mr. Aziz had chosen to not participate in the Turkish elections, and that maintaining his Constitutional status outlined in Article 62, and the status of the Turkish minority within Greek Cyprus of which he was a member, was not particularly damaging since only a "very small" number of people were rendered unable to vote.[531]

The European Court disagreed sharply with the Government's argument. While it accepted that the young Republic had endured a difficult birth, especially after the Turkish

[527] See *Aziz v Cyprus (No 2)-69949/01 [2004] ECHR*
[528] Ibid at para 18
[529] Ibid at para 22
[530] Ibid at para 23
[531] Ibid at para 24

invasion and occupation of the Northern part of the island, they felt that this was no justification for denying over 1000 Turkish-Cypriots a fundamental right. This culpability was compounded since the Government was aware that this minority existed and had done little to rectify the situation. While the Court acknowledged that sovereign states possessed a great deal of discretion to determine how to organize democratic procedures, including elections, they argued that this could not extend to the wholesale denial of democratic rights to members of the community deemed unworthy or troublesome[532].

> Although the Court notes that States enjoy considerable latitude to establish rules within their constitutional order governing parliamentary elections and the composition of the parliament, and that the relevant criteria may vary according to the historical and political factors peculiar to each State, these rules should not be such as to exclude some persons or groups of persons from participating in the political life of the country and, in particular, in the choice of the legislature, a right guaranteed by both the Convention and the Constitutions of all Contracting States...Consequently, the applicant, as a member of the Turkish-Cypriot community living in the government-controlled area of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he is a national and where he has always lived...in the light of the above circumstances, the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, was impaired.[533]

Consequently, the European Court ordered the Government to amend the situation so that Mr. Aziz, and members of the Turkish community in Greek Cyprus, could vote in the next election. They also ordered the Cypriot Government to pay Mr. Aziz's legal costs.

I believe that the European Court's decision to deny the Government's claim was the correct one. In so doing, it upheld the broader conception of democracy articulated within the European Convention. While states have and should be granted a great deal of latitude in assessing what socio-cultural "conditions" require in order to have a fair election, Article 10

[532] See *Aziz v Cyprus (No 2)-69949/01 [2004] ECHR*
[533] Ibid at para 28

makes it clear that elections are about more than just voting.[534] Elections are designed to manifest the "free expression of the opinion of the people." What the "opinion of the people" can be a contentious issue; but it is likely beyond controversy to now claim that it is not simply the opinion of the majority, let alone the opinion of the most prominent cultural group within a state. [535]

In this situation, the Government of Cyprus chose to willfully deny a substantial number of people the opportunity to employ their expressive capabilities by participating in an election which would have a direct effect on them. It maintained that this was justifiable given the contentious history of the state, and the fact that very few people were impacted by the policy. But this reasoning is spurious, since it puts expediency and politics above principle. But a democratic form of governance, if it truly expresses the "opinion" of the people, must ensure, as Mill claimed, that each individual has the opportunity to have their voice heard.[536] Or, in my language, democracy is about amplifying the human dignity of individuals and ascribing equal value to all their democratic rights. This is especially pertinent where individuals face a strong likelihood of being disadvantaged due to given socio-historical boundaries; as was the case for the Turkish speaking minority residing in Greek Cyprus.

This also speaks to the justifiable conditions placed on sovereignty by well-developed international legal instruments. In instances like these, the European Convention can and has served as an instrument to realize the Kantian ideal. The Government of Cyprus used the Constitution to deny the Turkish speaking minority the opportunity to employ their expressive

[534] See *Aziz v Cyprus (No 2)-69949/01 [2004] ECHR* at para 22
[535] Ibid at para 15
[536] See John Stuart Mill. "Some Considerations on Representative Government" in *On Liberty and Other Essays,* ed. John Gray (Oxford, UK: Oxford University Press, 2008)

capabilities during elections. In a sovereignty, oriented model of law, with its related philosophy of descriptive and/or normative legal positivism, this would be the end of the issue, regardless of the morality or immorality of the law in question. Indeed, the Government of Cyprus appears to have tacitly acknowledged that by focusing its argument not on the principles at hand, but instead on issues of expediency and effect. What the European Human Rights system does is transform this positivist framework into one where the legitimacy of state law is dependent upon their maintaining the "rightful condition" for human flourishing; in this case, by acting in a manner consistent with the principles articulated in the European Convention .[537] This constitutes a great step forward in the realization of the cosmopolitan[538] project.[539]

What makes the European Human Rights system unique, and a (problematic) model for others to follow, is its unique capacity to enforce this dictum with some success compared to most other international human rights systems. This capacity is especially interesting given the European Court can have an impact on the behaviour of strong, as well as weaker states. This gives the European Court system prominence as a model relative to, say, the International Criminal Court, which, for all the good it has done, has a deserved reputation for focusing its prosecutorial efforts almost exclusively on criminals from the global south. As we shall see in the next case, *Hirst v the United Kingdom*, the European Court has been bold enough to try and transform the democratic policies of a great power. Unfortunately, as we shall see, this also

[537] See Kant, *The Metaphysics of Morals.*
[538] See Immanuel Kant. *"Perpetual Peace."* in *On History*, trans. Lewis White Beck, Robert E. Anchor, and Emil. L Fackenheim. (Indianapolis, IN: The Library of Liberal Arts, 1963), 85-136.
[539] My approach here is guided by Habermas. See Jürgen Habermas. *The Crisis of the European Union: A Response*, trans. Ciaran Cronin (Cambridge, MA: Polity, 2012)

speaks to the limitations which still face even the most robust international human rights systems.

4) Establishing the Rightful Condition for All: *Hirst v the United Kingdom*

John Hirst was a UK citizen serving a discretionary life sentence for manslaughter committed in 1980. He was prevented from voting in national elections by Section 3 of the *Representation of the People Act.* Passed in 1983 by the Thatcher government, the Act had disenfranchised prisoners. Hirst brought the issue to the High Court in 2001, but his case was dismissed. He then brought the issue to the European Court later that year. In 2004, the Chamber of the European Court ruled that the *Representation of the People Act* violated Mr. Hirst's Article 3 rights. Not taking the decision lying down, the UK brought the issue to the Grand Chamber, which ruled in 2005. The resulting decision was a long one for the European Court, and drew inspiration from sources far beyond the European Convention including: the ICCPR, South African law, and Canada's *Sauvé* decision discussed in Chapter Six.[540]

Mr. Hirst argued that the UK's insistence that it retain the law, both on principle and because changing it would involve "radical change", was deeply misguided.[541] He pointed out that, at the time, most European countries, as well as South Africa and Canada, no longer denied prisoners the right to vote, and that the number of states which did had been dwindling. Mr. Hirst maintained that this indicated a "presumption in favour of enfranchisement, which was in harmony with the fundamental nature of democracy."[542] While the Government maintained that

[540] See *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005)*
[541] Ibid at para 42
[542] Ibid at para 43

being disenfranchised constituted part of his punishment, Mr. Hirst argued that this rested on a fundamental misunderstanding of voting as a "privilege," which could be given and withdrawn, rather than a right to which all were entitled regardless of circumstance.[543] He maintained that no link could be given between the aims of punishment, such as rehabilitation and deterrence, and removing his right to vote.[544] Finally, Mr. Hirst argued that imposing a blanket ban which prevented prisoners from voting was "disproportionate, arbitrary, and impaired the essence of the right."[545]

The Government of the United Kingdom, echoing similar claims made in *Aziz*, argued that under Article 3 the right to vote is not absolute since the European Convention granted signatory states a "wide margin of appreciation" in determining how to enact the democratic provisions contained in the *Convention*.[546] But the UK deepened the argument made by the Government of Cyprus in *Aziz* by maintaining that, unlike in *Aziz*, the law against prisoners voting was not simply the relic of a bygone era that was no longer contextually defensible. The Government pointed out that Parliament had supported the prohibition for many decades now, most recently by re-emphasizing it while passing the *Representation of the People Act* in 2000.[547] The UK also inverted Mr. Hirst's argument by maintaining that the divergence seen in policy surrounding prisoners voting rights in democratic states, regardless of a general trend towards enfranchisement, indicated that there was still room to argue the point.[548] Given this, it would be inappropriate for the European Court to overturn the considered position of a

[543] *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005*
[544] Ibid at para 44
[545] Ibid at para 45
[546] Ibid at para 47
[547] Ibid
[548] Ibid at para 47

democratic state. This was further justifiable given that domestic British courts, while interpreting the European Convention, had upheld the ban.[549]

Finally, the Government made its most interesting argument. Echoing a position made as far back as Plato's *Crito*, the Government maintained that, by breaking the laws of the states, prisoners had violated the social contract. It was therefore justifiable to restrict them from participating in the affairs of the state, at least for the duration of their sentence. This was justifiable both on principle, and because the Government felt that it would serve a further purpose in deterring future crimes.[550]

> The Government argued that the disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country.[551]

The Government concluded by claiming that disenfranchisement for prisoners was a proportionate limitation since it only affected those who committed a crime serious enough to warrant incarceration; it excluded those who committed less serious offences which subject the perpetrator to fines, community service, suspended sentences, or detention in contempt of court.[552] Finally, it emphasized that the effect of disenfranchisement was only temporary as the ban was removed once prisoners were set free.[553] [554]

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[549] *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005* at para 48
[550] Ibid at para 50
[551] Ibid
[552] Ibid at para 51
[553] Ibid at para 52
[554] They also made stranger arguments I feel barely warrant serious consideration. The Government maintained that the impact of the ban on Mr. Hirst wouldn't change since he was imprisoned for life and was therefore unlikely to benefit from a more targeted ban. Beyond making this argument, unusually particular for a legal case being decided

The European Court began its analysis of the case by admitting that the rights guaranteed by Article 3 differed in kind from those guaranteed elsewhere in the European Convention . This is because, rather than guaranteeing rights to individuals, it placed an onus on states to hold elections to determine the political will of the people.[555] This onus might seem to have an inverse implication; one way of interpreting it might be that states have significant leeway in how to interpret this democratic obligation to the national collective. However, the European Court quickly dismissed this interpretation by emphasizing the individualistic dimension of democratic procedures.

> Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§ 46-51). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference (ibid., § 50).[556]

The European Court went on to emphasize its agreement with Mr. Hirst that voting is "not a privilege" that can be taken away.[557] It opined that in the 21st century, the "presumption in a democratic state must be in favour of inclusion" and, somewhat sardonically, pointed to the United Kingdom's own history of gradually moving from elite to universal enfranchisement.[558]

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at the ECHR, the logic of this position is very unusual. It amounts to saying that, since any policy shift beyond outright enfranchisement for all prisoners would not benefit Mr. Hirst, the European Court should refrain from ruling in his favour. Perhaps this salient point is why the European Court simply decided to push the UK towards enfranchising all prisoners regardless of the duration of their sentence.

[555] See *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005)* at para 56

[556] Ibid

[557] Ibid at para 59

[558] Ibid

While the European Court admitted that there was a margin for how to interpret Article 3, it remains the European Court's job to give the final interpretation in hard cases.[559] States need to satisfy the European Court that their particular way of running elections "do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate."[560] In particular, the European Court emphasized that any measures taken must not "thwart" the free expression of the people in selecting the legislature; electoral measures "must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage."[561]

Regarding the specific question of prisoners voting, the European Court emphasized that even following incarceration inmates retain all of the rights guaranteed in the European Convention , save the right to liberty.[562] It maintained that any restrictions imposed on the other rights guaranteed in the *Convention* would have to be justified for reasons of security, in particular preventing crime and disorder, which is the aim of punishment. It therefore dismissed the claim that one could disenfranchise prisoners for socio-cultural reasons, such as the practice of enfranchisement for convicts offending public opinion. The restriction would have to be for more legitimate reasons for it to be proportionate to the damage caused to the integrity of democracy.[563]

[559] *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005* at para 62
[560] Ibid at para 62
[561] Ibid at para 62
[562] Ibid at para 69
[563] Ibid at para 70

The European Court went on to accept the Government's argument that restricting the voting rights of prisoners constituted a legitimate aim since it would enhance civic responsibility and respect for the rule of law. However, it concluded that the measures taken were disproportionate to what was acceptable in pursuit of this aim. It noted that the ban on voting effected 48,000 prisoners and that there was no evidence that the Government weighed the proportionality of its policy against its impact.[564] Finally, the European Court maintained that, while there still existed some disagreement amongst European states on the issue of prisoner voting, that itself could not be decisive. While states were given a wide margin to determine how to enact the right guaranteed in Article 3, this was not absolute but contingent on the approval of the European Court. Ultimately, the majority ruled that Mr. Hirst's rights under Article 3 of the European Convention had been violated, and ordered the legislature to change the policy and to pay the applicant's legal fees.

Despite his win, the *Hirst* decision was not uncontroversial and prompted a number of Justices to qualify their concurrence or draft dissenting opinions . I will briefly summarize these positions below, before going on to explain why I believe they are mistaken. The most forceful dissent was prepared by Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens. They pointed out, forcefully, that unlike every other right in the *Convention*, Article 3 made no mention of individuals.[565] This is significant since there is no positive association made between the right to vote and holding elections to determine the "free expression of the people". The dissenting Judges found that this indicated that the right guaranteed by Article 3 was concerned with democratic procedures, rather than an individual's right to vote. While they conceded that

[564] *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005)* at para 45
[565] See the Dissent at para 2

denying prisoners the right to vote seemed to run counter to what was required by Article 3, the dissenting Judges weren't convinced that it impugned the "essence" of the right.[566] Because of this, they felt it was inappropriate for the European Court to deny states a wide margin for determining who gets to vote and who does not, so long as they did not do so in an arbitrary manner and did not affect the "free expression of the people" wholesale. Here I will quote them at length.

> Article 3 of Protocol No. 1 cannot be considered to preclude restrictions on the right to vote that are of a general character, provided that they are not arbitrary and do not affect "the free expression of the opinion of the people", examples being conditions concerning age, nationality**,** or residence....Unlike the majority, we do not find that a general restriction on prisoners' right to vote should in principle be judged differently...it is obviously compatible with the guarantee of the right to vote to let the legislature decide such issues in the abstract. {The} majority have concluded that a general restriction on voting for persons serving a prison sentence "must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be...In our opinion, this categorical finding is difficult to reconcile with the declared intention to adhere to the Court's consistent case-law to the effect that Article 3 of Protocol No. 1 leaves a wide margin of appreciation to the Contracting States in determining their electoral system. In any event, the lack of precision in the wording of that Article and the sensitive political assessments involved call for caution. Unless restrictions impair the very essence of the right to vote or are arbitrary, national legislation on voting rights should be declared incompatible with Article 3 only if weighty reasons justify such a finding. We are unable to agree that such reasons have been adduced.[567]

The dissenting Judges concluded by stressing that they were not in a position to determine whether denying prisoners the right to vote was proportionate to the Government's aims, since that was a determination best left to policy makers. They did, however, concede that disenfranchisement might be justifiable in the case of individuals who had committed very serious crimes and had been sentenced to life in prison.

[566] *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005)* at para 4
[567] See the Dissent at para 3

The case concluded with the dissenting opinion of Judge Costa, who added a few remarks to those of his colleagues. He claimed to be in sympathy with the general aim of the majority in this case, and believed state officials should do all they could to re-integrate prisoners into society. However, despite this moral outlook, Judge Costa decided to take a classically positivist stance in this case. He felt it was not the European Court's role to make determinations about how this should be carried out, especially given the weight of jurisprudence which emphasized the latitude traditionally given to states in interpreting Article 3. Judge Costa felt that this should be respected, even if he was inclined to favour enfranchising prisoners.[568]

> ...the Court's case-law permits restrictions on the right to vote that are of a general character, such as conditions concerning age, nationality, or residence (provided they are not arbitrary and do not affect the free expression of the opinion of the people). With due respect, I see no convincing arguments in the majority's reasoning that could persuade me that the measure to which the applicant was subject was arbitrary, or even that it affected the free expression of the opinion of the people....The point is that one must avoid confusing *the ideal* to be attained and which I support – which is to make every effort to bring the isolation of convicted prisoners to an end, even when they have been convicted of the most serious crimes, and to prepare for their reintegration into society and citizenship – and the *reality* of *Hirst (no. 2)*, which on the one hand theoretically asserts a wide margin of appreciation for the States as to the conditions in which a subjective right (derived from judicial interpretation!) may be exercised, but goes on to hold that there has been a violation of that right, thereby depriving the State of all margin and all means of appreciation.[569]

These powerful dissents speak to the consistent quality of the European Court's rulings. When looking at *Hirst* as a whole, it becomes clear that the issues go beyond simply whether prisoners should have a right to vote. The case dealt with fundamental issues such as questions of sovereignty, conceptions of democracy, and the relationship between international law, positive law, and morality. I will now briefly summarize why I believe the majority made the

[568] *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005)* at para 9
[569] See the Dissent of Judge Costa in *Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005)* at para 8-9

right decision in this case; with the caveat that I will not discuss all the issues raised by the case comprehensively.

The most interesting argument raised in this case, and the one I will focus my attention on, is the contractarian claim made by the Government of the United Kingdom: that by breaking the law, prisoners had in effect abnegated their entitlement to vote. This contractarian ideal links directly to the Government's claim about a sovereign state's right to determine its own electoral practices without interference by outside bodies. Indeed, it echoes arguments made very early in the tradition; most notably Socrates' claims about one's filial duty to obey even an unjust law in the *Crito*, and Hobbes' monumental argument that citizens have a duty to obey the Sovereign in almost everything since, after the transition from the state of nature to the civil state, one must keep to the initial covenant made.[570] Both of these arguments would tend to support the Government's claims, both that it has a right to disenfranchise prisoners and that a state should be given a wide margin to determine the form of its political practices, not to mention who gets to participate therein.

Put in legal theoretical terms, this might be cast in the descriptive positivist framework of Judge Costa: that while the ideal may be enfranchisement, the drift of the law towards giving sovereign states a wide margin to interpret their democratic obligations is clear. Or, it can be cast more strongly in the terms of normative positivism: that regardless of the particular moral status of any specific law, sovereign states must be given a great deal of leeway on issues as fundamental as political participation, since that is a basic condition for the maintenance of any orderly legal system. This approaches the position of the other dissenting Judges, who were

[570] See Plato, "*Crito"* in *The Republic and Other Works*, trans. Benhamin Jowett. (New York, NY: Anchor Books, 1960)

more willing to entertain the idea that states have a right to determine who gets to participate in elections so long as the reasoning for their determinations is not "arbitrary."

The deepest tension in the dissenting Judges reasoning is over the very question of political legitimacy, which is invoked directly by the Government of the United Kingdom when it references the social contract. The difficulty with this position, as I highlighted in Chapters One and Two, is that it evades the very issue of concrete legitimacy by trying to lift it to a very high level of moral abstraction. While I believe contractarian positions should be avoided in political theory, since it renders the theorist rather than actual participants the final arbiter in determining legitimacy, it has its uses within that rich tradition. When invoked by concrete states however, which have never in fact been the product of reasoners determining the form of political institutions they wish to govern them, the social contract cannot but come across as an ideological weapon. It attempts to evade the question of the state's legitimacy to act the way it does, both in particular instances and generally, by appealing to a transcendent norm, or "constitutive point," which is meant to accomplish the Midas-like task of transforming political decisions into legal ones.

But a state is not legitimated by a transcendent norm, or constitutive point. As I have argued throughout, it is legitimated by establishing and maintaining the "rightful condition" for human flourishing. The first right which must be recognized to establish a "rightful condition," on my model, is a democratic right to participate in the authorship of political and legal structures, and to determine the laws which flow from these structures. The obligation to realize the democratic right isn't exhausted by the establishment of political procedures, even representative democratic political procedures, since the right is inherent, regardless of the actual status of the individuals who make up the state, including prisoners. The point of democratic

procedures is to ensure the equal value of democratic rights to all, something that is bucked when a state chooses to disenfranchise prisoners. This, I take it, is the conceptual point made by the majority about the individualistic consequences of Article 3 of the European Convention.

The dissenting Judges in *Hirst* erred in thinking that the European Court was improperly treading upon national sovereignty by declaring that the United Kingdom must grant prisoners the right to vote. The role of international law is to secure the conditions which legitimate sovereign authority by ensuring states respect the rights of all the citizens who make them up. This includes, repellent as it may seem to some, criminals and even those who commit the vilest crimes, such as Mr. Hirst. While it may seem attractive, on a contractarian model, to deny them the opportunity to vote, this misunderstands the nature of legitimacy and its relationship to rights. Rights should not be understood as a privilege granted by a magnanimous state to the social body it claims to represent. They should be understood as the legal concretization of the more abstract jurisgenerative principles states must act upon if they are to retain sovereign authority. Rights are legal tools which amplify human dignity through the realization of everyone's expressive capabilities. Denying rights to any individuals does nothing to further respect for the law; it only serves to undermine the moral basis for the law by infringing the dignity of citizens. A normative jurisprudence of international law, by contrast, would seek to link my articulation of human dignity with actual law wherever possible, even where such would run counter to trends within the domestic legal system. Therefore, the majority made the right decision in *Hirst*.

But how far should a normative jurisprudence of international law go in applying moral principles in the affairs of domestic states? In this last section, I must take up this controversy one more time while explaining why a robust international human rights system amplifies the dignity of all. I will then go on to the concluding section of this dissertation.

5) Human Dignity, International Human Rights Law, and the Question of Sovereignty

I have tried to argue throughout this dissertation that dignity is not an absolute value that can be realized once and for all. Rather, it grows as the capacity of individuals to engage in self-authorship is amplified. This capacity is also not absolute; it is divisible into a whole host of expressive capabilities which states have a moral duty to respect by realizing the twinned rights. In the *Aziz* and *Hirst* decisions, I primarily focused on applying these moral principles to cases which dealt with the first of the twinned right. I argued that, if practicing a normative jurisprudence consistent with my approach, Judges would expand the franchise to Turkish Cypriots and prisoners. Fortunately, that is what the European Court decided to do in both cases.

At the international level, I also maintained that these issues go beyond simply whether a few more parties can vote. This is because I claimed that retaining a moral right to exercise sovereign authority should be made conditional upon states acting in a certain manner. At its best, international law attempts to codify this position by obligating wayward states to return to the ideal of placing the realization of human dignity for all at the center of their legal system. To the extent that they take steps in this direction, states can be said to maintain the "rightful condition" for human flourishing, and thus retain the legitimate right to exercise sovereign authority.[571] If they fail in this obligation beyond a certain threshold, this right is suspended and other states may well have an obligation to step in to prevent moral disasters from occurring.

[571] See Kant, *The Metaphysics of Morals.*

All of this is well and good. However, there is a notable gap in my analysis. While I have focused primarily on the dimension of democratic rights in this section, I would like to briefly highlight how the right to an equality of human capabilities might play a role in a normative jurisprudence of international law. We have seen that Article 13 of the ICESCR requires states to take steps to ensure all citizens have access to a good education. Education is not connoted in purely instrumental terms here; rather it is explicitly linked to the "full development of the human personality and its sense of dignity." This might very well be taken as a positive instance of human dignity serving as a unifying ideal making its way into the text of international law. This is because the right to development of an important human capability, namely education levels, is expressly linked to an open-ended goal beyond what is articulated in the text itself. In Rawlsian language, it expresses a teleological understanding of the good; in this case for individuals to be able to realize the fullness of their personality and enjoy a sense of dignity.[572]

Following my account, the full development of the human personality means a great deal more than just the capacity to assume a role in a socio-historical context. It involves the capacity to critically analyze and assess these same contexts through the application of practical reason, and more importantly to choose to reject or revise these conditions within which we exist. This is because my approach emphasizes that the concrete choices we are able to make are more indicative of what is morally significant in our personality than any other psychological features which have emerged as the result of existential and socio-historical determinants. A state which would realize the dignity of individuals must actively create opportunities for the amplification

[572] See John Rawls. *A Theory of Justice.* (Cambridge, MA: Harvard University Press, 1971)

of each individual's expressive capabilities to make such concrete choices, with the realization of the right to education being but one, albeit an important one, of many such positive actions.

This might appear like an unrealistic goal, since what state would willingly choose to foster everyone's expressive capabilities to transcend the contexts within which they exist to become authors of the laws which govern them? This is especially true of non-formal capabilities that go beyond the ideological parameters of the liberty oriented conception of freedom. But we have seen some states that are willing to take steps in these directions, and we should employ international human rights law as a tool to get others on board. International law can especially have an impact on rich states which have the resources to commit to this project, but have been unwilling to do so for various ideological reasons.[573] By embodying a commitment to realizing the twinned rights, international human rights law can maintain a moral prerogative to guide states towards the realization of the "rightful condition" for both their citizens and those of other states.[574]

This last point raises an important issue I would like to conclude with. I do believe that international human rights law, by challenging the legitimacy of sovereign authority where the rightful condition is not maintained, also implies a further moral point. That is that states have obligations to individuals beyond their borders. As mentioned before, this is bound to be an exceptionally controversial claim, especially given the expansive obligations I have argued states have domestically. How can any state be expected to manage both?

[573] The most notable has been the United States, which has been uniquely hostile towards both international law and any non-liberty-oriented approach to agency.
[574] See Kant, *The Metaphysics of Morals.*

Here one might appeal to the "isolation paradox" developed by Amartya Sen for justification: certain ends that individuals may be right to eschew in isolation, might be more palatable if others are willing to contribute towards their realization to a degree consistent with each individual's relative available resources.[575] If states do have obligations towards all the individuals in the world, these obligations certainly cannot be allowed to trump each state's obligations towards its own citizens. However, it would be both possible and morally preferable if states operated together to pool their resources, relative to what is available to each, to lift many individuals out of both absolute and especially degrading relative poverty. No individual state would bear the exclusive burden of this obligation, though rich states would bear the brunt of it.[576] The goal would be to establish a global equality of human capabilities over time, with rich states gradually being required to donate less and less until a reasonable parity of conditions was established for states across the world.

This position remains quite speculative now, since no one has been able to argue successfully that rich states have an obligation to give to the poor. But it remains the hope of this author that adopting this position would not only move us a long way towards a more just world, but might be conducive to the establishment of the cosmopolitan fraternity theorized as far back as Kant.[577] The highly artificial socio-historical boundaries within which we live have too often distracted from the general parity of the human condition; they should not be allowed to distract us from our parallel moral obligations to all.

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[575] He has numerous papers on this subject. See, for example, Amartya Sen. "Isolation, Assurance, and the Social Rate of Discount." In the Quarterly Journal of Economics, Vol 81 (1), 1967

[576] There are also good historical reasons to adopt such a principle. Many rich states became so through the gross exploitation of former colonies which are now independent, though poor, states. The current position, that we give back as a matter of generosity, is therefore unfounded since the superior position of rich states was predicated on their morally reprehensible behavior towards those who are now to be their beneficiaries.

[577] Kant, *On History*

Conclusion to Chapter Eight

In this Chapter I attempted to illustrate how international, and specifically European, law can be used as a tool to realize the rightful condition for the amplification of human dignity. In contexts where states fail to live up to their responsibilities, I argued that international law can provide a remedy for those individuals (and, by extension, groups) who have been significantly marginalized. This is particularly true when the voting rights of individuals are constrained. Here, European law has provided a useful remedy by amplifying the dignity of individuals by defending their right to vote.

I then proceeded to ground my claims through an analysis of the *Aziz* and *Hirst* decisions of the European Court, both of which involved states arguing that they had a sovereign right to disenfranchise individuals. I argued that the European Court made the right decision in both cases by ruling that Cyprus and the UK had to enfranchise Turkish Cypriots and prisoners respectively. Finally, I concluded by looking at some other ways international law might help establish the rightful condition for amplifying human dignity economically.

Conclusion

At the beginning of this project, I noted that the normative links between agency, human rights, and democracy have been hotly contested. In the contemporary era both the liberty oriented and post-modern approaches have attempted to systematize these links once and for all. Often they have been very successful, but at a price. The liberty oriented conception of agency has been unable to take adequate account of the concrete limitations imposed by the socio-historical contexts within which we all live. By contrast, the post-modern conception has focused too much on socio-historical determination and not engaged in the constructive work of formulating what the positive realization of agency would look like. Unfortunately, these limited theoretical successes have had important and undesirable consequences in framing our conception of democracy and law.

The argument in this dissertation was intended to evade these limitations. My goal was to develop and defend an integrated approach to agency which pivoted around amplifying human dignity. In the first Chapter, I argued that human dignity flows from individuals' capacity to deploy expressive capabilities to define themselves by redefining the socio-historical contexts within which they exist. It is from this capacity that their agency to engage in self-authorship flows. I then established that my claims about empowering individuals' expressive capabilities can be conceptually linked to the human rights project. I argued that the moral requirement to amplify human dignity was jurisgenerative of two twinned human rights.

Chapter Two unpacked my account of the two rights more thoroughly. The first was a right for all individuals to cooperatively engage in democratic authorship of the legal and political institutions which govern them, and the laws which flow from these. I argued that this right is required since human dignity necessitates that individuals be capable of defining

themselves socially through redefining the socio-historical contexts they reside within. Democracy is the best political system to achieve this objective. The second right was that individuals should possess equal expressive capabilities except where inequities flowed from their morally significant choices. I then spent a considerable amount of time unpacking this egalitarian argument and defending it against other redistributive traditions. Realizing these twinned rights for all would be required to characterize a state as one which respects human dignity, though I maintained that the first of the twinned rights must take priority over the second for a number of important reasons.

Chapter Three provided the philosophical center piece of this dissertation, and was intended to justify and deepen my argument about individuals' capacity for agency. I demonstrated how developments in mathematics and linguistics can help us understand how individuals have a potentially infinite capacity to bring novelty into the world. Individuals are thus not entirely determined by the socio-historical contexts within which they exist. I then concluded the Chapter by linking this more philosophical account of agency to the arguments made previously. I argued that the potentially infinite capacity of an agent to engage in self-authorship can be indefinitely amplified, but that this has a strong empirical dimension. We must look at what individuals are actually capable of doing and seek to amplify their capabilities within their socio-historical context rather than understand agency in a purely abstract way. The more capable individuals are, the more their dignity is enhanced.

Chapters Four and Five took the project in a more critical direction. I contrasted my dignity oriented approach to agency and rights to the liberal and post-modern approaches. I argued that, while both offer a tremendous amount of conceptual guidance, neither is fully adequate. The liberal approach suffers from being too abstract in understanding agency as a

singular power without paying significant attention to the socio-historical contexts which can have a profound impact on individual's lives. On the other hand, the post-modern approach cedes too much determinacy to the socio-historical contexts, and cannot account for how individuals can deploy their agency to transform these contexts. It is therefore both conceptually and politically inadequate to the needs of progressives.

Finally, my project concludes with three extensive Chapters which applied my dignity oriented approach to agency and rights in concrete legal contexts concerning democratic rights. In Chapter Six, I examined how dignity has been understood in Canadian jurisprudence since the introduction of the *Charter of Rights and Freedoms*, and argued that amplifying human dignity should be understood as the unifying ideal of law. I then demonstrated how this moral argument can be applied in the *Sauvé* and *Opitz* decisions through the application of a two-step test. In Chapter Seven, I demonstrated how the same argument can be applied in American law. I juxtaposed this dignity oriented approach to agency and rights with the originalist tradition best exemplified in the work of Justice Antonin Scalia. My two-step test was applied in several prominent American cases, including *Williams* and *Citizens United*, to show how a dignity oriented approach can lead to more just results than those produced by an originalist interpretation of the law. Finally, in Chapter Eight I applied my dignity oriented approach to European law. I followed Kant in maintaining that states have a duty to maintain a "rightful condition" for the flourishing of human dignity to retain their sovereign authority. I then argued that international law can play an important role in ensuring that they abide by this duty. For example, in the European context the European Court has played a vital role in defending and broadening the democratic rights of citizens, often against the wishes of powerful states. This is what happened in the pioneering *Aziz* and *Hirst* decisions.

I will finish this dissertation about one final comment on a limitation to this project. A dignity oriented conception of agency and rights is meant to consider our potentially infinite capacities within. Unfortunately, on the surface it has little to say about the great meta-ethical and metaphysical issues beyond ourselves. These obviously have relevance, since any discussion of justice that does not address them remains incomplete, since it is not clear on what foundation it rests. The most important, and disturbing, of these questions is that concerning absolute value, or what the theologian Paul Tillich calls our "ultimate concern."[578] These are hardly abstract questions either; indeed, they address the most pressing questions that face us. Why is there something instead of nothing at all? Do our values add anything to the world? Do they coincide with any value beyond our subjective horizons?[579]

Perhaps the best we can hope is that, as our dignity becomes amplified, more and more of us can take up such questions systematically in good faith. Some might find this unduly depressing, a Bekettian nightmare.[580] Others may think them simply unnecessary, idle speculations for the useless and the morose. But I do not think such a technical approach to understanding humanity is correct. The technical mindset, which sees the whole world as a collection of objects to be manipulated, would have us believe our dignity lies in little more than our being as a pig satisfied. I hope that this is not true.

[578] See Paul Tillich. *Dynamics of Faith*. (San Francisco, CA: HarperOne, 2009)
[579] Many of the social problems which we confront are more the consequence of the human spirit than any conceptual dilemmas. Intellectual activity may cast some light on what the problems are, and how we might resolve them. But it can offer little emotional guidance on why we find ourselves in such a situation, and how to comport ourselves. This point is emphasized by Fromm. See Erich Fromm. *The Art of Loving: Fiftieth Anniversary Edition.* (New York, NY: HarperCollins, 2006)
[580] See Samuel Beckett. *How It Is.* (New York, NY: Grove Press, 1964)

Bibliography

Academic Works and Literary Sources

Adorno, Theodor and Horkheimer, Max. *Dialectic of Enlightenment: Philosophical Fragments,* trans. Edund Jephcott. (Stanford, CA: Stanford University Press, 2002)

Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life,* trans. Daniel Heller-Roazen. (Stanford, CA: Stanford University Press, 1998)

Anderson, Elizabeth. "What is the Point of Equality?" *Ethics* 109 (1999)

Anghie. Anthony "Francisco de Vittoria and the Colonial Origins of International Law" *Social Legal Studies* 5 (1996)

Arendt, Hannah. *The Origins of Totalitarianism.* (New York, NY: Harcout, 1955)

Aristotle, *The Basic Works of Aristotle,* trans. Richard McKeon. (New York, NY: The Modern Library, 2001)

Augustine. *Confessions of a Sinner,* trans. Edward Pusey (London, UK: Duncan Baird Publisher, 2006)

Augustine. *On Free Choice of the Will,* trans. Thomas Williams. (Indianapolis, IN: Hackett Publishing Company, 1993)

Badiou, Alain. *Logics of Worlds: Being and Event II,* trans. Alberto Toscano. (London, UK: Continuum, 2006)

Ballard, J.G. *The Atrocity Exhibition.* (London, UK: Forth Estate, 2006)

Barak, Aharon. See *Human Dignity: The Constitutional Value and the Constitutional Right.* (Cambridge, UK: Cambridge University Press, 2015)

Barclay, Linda. ""The Importance of Equal Respect: What the Capabilities Approach Can and Should Learn from Human Rights Law." In *Political Studies,* (2014)

Barclay, Linda. "What Kind of Liberal is Martha Nussbaum?" *SATS: The Northern European Journal of Philosophy* 4, (2003)

Barry, Brian. *Culture and Equality: An Egalitarian Critique of Multiculturalism.* (Boston, MA: Polity, 2000)

Baudrillard, Jean. *The Agony of Power,* trans. Sylvere Lotringer. (Los Angeles, CA: Semiotexte(e), 2007)

Baudrillard, Jean. *Screened Out.* (London, UK: Verso Press, 2014)

Baudrillard, Jean. *Simulacra and Simulation,* trans. Sheila Fraser Glaser. (Ann Arbor, MI: University of Michigan Press, 1994)

Baudrillard, Jean. *The Spirit of Terrorism.* (London, UK: Verso Press, 2012)

Baxi, Upendra. *Human Rights in a Posthuman World: Critical Essays.* (Oxford, UK: Oxford University Press, 2007)

Beckett, Samuel. *How It Is.* (New York, NY: Grove Press, 1964)

Benhabib, Seyla. *Dignity in Adversity: Human Rights in Troubled Times.* (Cambridge, UK: Polity, 2011)

Benhabib, Seyla. *The Rights of Other: Aliens, Residents, and Citizens.* (Cambridge, UK: Cambridge University Press, 2004)

Berlin, Isaiah. *The Crooked Timber of Humanity: Chapters in the History of Ideas, ed.* Henry Hardy. (New York, NY: Knopf, 1991)

Berlin, Isaiah. *Four Essays on Liberty.* (Oxford, UK: Oxford University Press, 1969)

Berlin, Isaiah. *The Proper Study of Mankind: An Anthology of Essays,* ed. Henry Hardy and Roger Hausheer. (New York, NY: Farrar, Straus and Giroux, 1997)

Bork, Robert. *Coercing Virtue: The Worldwide Rule of Judges.* (Toronto, ON: Vintage Canada, 2002)

Bork, Robert. "The End of Democracy? Our Judicial Oligarchy." In *First Things,* November 1996

Brandom, Robert. "Intentionality and Language: A Normative, Pragmatist, Inferentialist Approach." In *The Cambridge Handbook of Linguistic Anthropology,* ed. N.J Enfield, Paul Kockelman, Jack Sidnell. (Cambridge, UK: Cambridge University Press, 2014)

Burke, Edmund. *Reflections on the Revolution in France.* (Oxford, UK: Oxford University Press, 2009)

Cantor, Georg. trans. Phillip Jourdain. *Contributions to the Founding of the Theory of Transfinite Numbers.* (New York, NY: Dover Press, 1955)

Chomsky, Noam. *The Architecture of Language.* (New Delhi, India: Oxford India Paperbacks, 2000)

Chomsky, Noam. *Language and Problems of Knowledge: The Manangua Lectures.* (Boston, MA: MIT Press, 1988)

Chomsky, Noam. *Language and Politics*. (Oakland, CA: AK Press, 2004)

Chomsky, Noam. *On Language: Chomsky's Classic Works Language and Responsibility and Reflections on Language.* (New York, NY: The New Press, 2007)

Chomsky, Noam. *The Minimalist Program: 20th Anniversary Edition.* (Cambridge, MA: The MIT Press, 2015)

Chomsky, Noam. "Recent Contributions to the Theory of Innate Ideas." *Synthese* 17 (1967)

Chomsky, Noam. *Selected Readings on Transformational Theory.* (London, UK: Dover Books, 2009)

Chomsky, Noam. *What Kind of Creatures Are We?* (New York, NY: Columbia University Press, 2016)

Cover, Robert. "Nomos and Narrative." *Harvard Law Review* 97 (1982)

Dahl, Robert. *Democracy and Its Critics.* (New Haven, NJ: Yale University Press, 1991)

Deleuze, Gilles and Guattari, Felix. *Anti-Oedipus: Capitalism and Schizophrenia,* trans. Robert Huerley, Mark Seem, Helen B. Lane. (New York, NY: Penguin Books, 1977)

Deleuze, Gilles. *Difference and Repetition,* trans. Paul Patton. (New York, NY: Columbia University Press, 1994)

Deleuze, Gilles and Guattari, Felix. *A Thousand Plateaus: Capitalism and Schizophrenia,* trans. Brian Massumi. (Minneapolis, MN: University of Minnesota Press, 1987)

DeLillo, Don. *Cosmopolis*. (New York, NY: Picador, 2003)

Derrida, Jacques. *On Cosmopolitanism and Forgiveness.* (London, UK: Routledge, 2001)

Derrida, Jacques. *The Gift of Death and Literature in Secret,* trans. David Wills. (Chicago, IL: University of Chicago Press, 2008),

Derrida, Jacques. *Of Grammatology,* trans. Gayatri Spivak. (Baltimore, ML: The John Hopkins University Press, 1976)

Derrida, Jacques. *Learning to Live Finally: The Last Interview,* trans. Pascale-Anne Brault and Michael Naas. (Brooklyn, NY: Melville House Publishing, 2007)

Dick, Phillip K. *UBIK.* (London, UK: Gollancz, 2004)

Douzinas, Costas. *The End of Human Rights: Critical Thought at the Turn of the Century.* (Oxford, UK: Hart Publishing, 2000)

Drach, Margaret. "The Creative Aspect of Chomsky's Use of the Notion of Creativity." *The Philosophical Review* 1 (1981)

Dworkin, Ronald "The Decision that Threatens Democracy." *The New York Review of Books*, May 13, 2010.

Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution* (Boston, MA: Harvard University Press, 1997)

Dworkin, Ronald. "Hard Cases." *Harvard Law Review* 88 (1975)

Dworkin, Ronald. *Justice For Hedgehogs.* (Cambridge, MA: Belknap Press, 2011)

Dworkin, Ronald. *Law's Empire.* (Cambridge, MA: Belknap Press, 1988)

Dworkin, Ronald. *A Matter of Principle.* (Cambridge, MA: Harvard University Press, 1985)

Dworkin, Ronald. "Objectivity and Truth: You'd Better Believe It." In *Philosophy and Public Affairs*, 25, (1996)

Dworkin, Ronald. *Sovereign Virtue: The Theory and Practice of Equality.* (Cambridge, MA: Harvard University Press, 2002)

Dyzenhaus, David. "Hobbes and the Legitimacy of Law." *Law and Philosophy* 20 (2001)

Ely, John. *Democracy and Distrust: A Theory of Judicial Review*. (Cambridge, MA: Harvard University Press, 1981)

Ewick, Patricia and Silbey, Susan. "Conformity, Contestation, and Resistance: An Account of Legal Consciousness." *New England Law Review*, 26, (1992)

Faulkner, William. *The Sound and the Fury.* (New York, NY: Vintage International, 1990)

Foucault, Michel. *The Archaeology of Knowledge,* trans. A.M Sheridan Smith (London, UK: Routeledge, 2007)

Foucault, Michel. *The Birth of Biopolitics: Lectures at the College De France 1978-1979,* trans. Graham Burchell. (New York, NY: Picador, 2008)

Foucault, Michel. *Discipline and Punish: The Birth of the Prison,* trans. Alan Sheridan (New York, NY: Vintage Books, 1975)

Foucault, Michel. *The Foucault Reader*, ed. Paul Rabinow. (New York, NY: Pantheon Books, 1984)

Foucault, Michel. *The History of Sexuality Volume One: An Introduction,* trans. Robert Hurley. (New York, NY: Vintage Books, 1980)

Foucault, Michel. *The Order of Things. An Archaeology of the Human Sciences.* (London, UK: Routledge Press, 2002)

Frank, Jerome. *Law and the Modern Mind. (New Brunswick, NJ:* Transaction Publishers, 2009)

Friedman, Milton. *Capitalism and Agency: Fortieth Anniversary Edition.* (Chicago, IL: University of Chicago Press, 2002)

Friedman, Milton and Friedman, Rose. *Free To Choose: A Personal Statement.* (Orlando, FL: Harcourt, Inc. 1980)

Fromm, Erich. *The Art of Loving: Fiftieth Anniversary Edition.* (New York, NY: HarperCollins, 2006)

Fromm, Erich. *Escape from Freedom.* (New York, NY: Henry Holt and Company, 1994)

Fuller, Lon. *The Morality of Law: Revised Edition.* (New Haven, CN: Yale University Press, 1969)

Gairola, Rahul. Interview with Gayatri Spivak. *Occupy Education: An Interview with Gayatri Chakravorty Spivak.* September 25th, 2012. https://politicsandculture.org/2012/09/25/occupy-education-an-interview-with-gayatri-chakravorty-spivak/

Guinier, Lani. *The Tyranny of the Majority: Fundamental Freedoms in Representative Democracy*. (New York, NY: The Free Press, 1995)

Guttmann, Amy. "The Challenge of Multiculturalism in Political Ethics," *Philosophy and Public Affairs* 22 (1993)

Guttmann, Amy and Thompson, Dennis, "Deliberative Democracy Beyond Process" *The Journal of Political Philosophy* 10 (2002)

Gutmann, Amy and Thompson, Dennis. *Democracy and Disagreement: Why Moral Conflict Cannot be Avoided in Politics, and What Should Be Done About It.* (Cambridge, MA: The Belknap Press of Harvard University Press, 1996)

Gilens, Martin. "Under the Influence." *Boston Review,* Sunday, July 1, 2012.

Giri, Ananta. "Rethinking Human Well-being: A Dialogue with Amartya Sen." *Journal of International Development 12 (*2000)

Goodman, Maxine. “Human Dignity in Supreme Court Jurisprudence.” *Nebraska Law Review,* 84 (2006)

Habermas, Jürgen. *The Crisis of the European Union: A Response, trans. Ciaran Cronin* (Cambridge, MA: Polity, 2012)

Habermas, Jürgen. *The Theory of Communicative Action Volume One: Reason and the Rationalization of Society,* trans. Thomas McCarthy. (Boston, MA: Beacon Press, 1985)

Habermas, Jürgen. *The Theory of Communicative Action Volume Two: Lifeworld and System-A Critique of Functionalist Reason,* trans. Thomas McCarthy. (Boston, MA: Beacon Press, 1985)

Habermas, Jürgen. *Truth and Justification,* trans. Barbara Fultner. (Boston, MA: MIT Press, 2005)

Hamilton, Alexander and Madison, Jay and Jay, John. *The Federalist Papers,* ed. Charles R. Kesler. (New York, NY: Signet Classics, 2003)

Hart, H.L.A. *The Concept of Law: Second Edition.* (Oxford, UK: Oxford University Press, 1997)

Hart, H.L.A. “Positivism and the Separation of Law and Morals.” *Harvard Law Review* 71 (1958)

Hardt, Michael and Negri, Antonio. *Commonwealth.*(Boston, MA: The Belknap Press of Harvard University Press, 2008)

Hardt, Michael and Negri, Antonio. *Empire*. (Boston, MA: Harvard University Press, 2000)

Hayek, F.A. *The Constitution of Liberty: The Definitive Edition.* (Chicago, IL: University of Chicago Press, 2011)

Hayek, F.A. *Law, Legislation, and Liberty.* (Chicago, IL: University of Chicago Press, 1978)

Hayek, F.A. *The Road to Serfdom: The Definitive Edition.* (Chicago, IL: The University of Chicago Press, 2007)

Hegel, Georg. *Hegel's Logic: Being Part One of the Encyclopedia of the Philosophical Sciences,* trans. William Wallace. (London, UK: Clarendon Press, 1975)

Hegel, Georg. *The Philosophy of Right,* trans. S.W Dyde. (New York, NY: Dover Press, 2005)

Heidegger, Martin. *Being and Time.* trans. Jogn Macquarrie and Edward Robinson. (San Francisco, CA: Harper Collins, 1962)

Heidegger, Martin. *The Question Concerning Technology and Other Essays,* trans. William Lovitt. (New York. NY: Harper Perennial, 1977)

Heidegger, Martin. *What is Called Thinking?*, trans. Gray, J. Glenn. (New York, NY: Harper Torchbooks, 2004)

Herder, J.G. *Another Philosophy of History and Selected Political Writings,* trans Joannis D. Evrigenis and Daniel Pellerin. (Indianapolis, IN: Hackett Publishing Inc, 2004)

Hobbes, Thomas. *Leviathan.* (London, UK: Penguin Books, 1982)

Hogg, Peter and Bushell, Allison. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad Thing After All)." *Osgoode Hall Law Journal* 35 (1997)

Hogg, Peter and Bushell, Allison and Wright, Wade "Charter Dialogue Revisited (Or Much Ado About Metaphors)." *Osgoode Hall Law Journa*l, 45, (2007)

Holmes, Oliver Wendell. *The Common Law.* (Cambridge, MA: The Belknap Press of Harvard University Press, 2009)

Holmes, Oliver Wendell. "The Path of the Law." *Harvard Law Review*, 457

Hume, David. *A Treatise of Human Nature.* (Mineola, NY: Dover, 2003)

Hutchinson, Allan. *Evolution and the Common Law.* (Cambridge, UK: Cambridge University Press, 2005)

Hutchinson, Allan. *Is Eating People Wrong?: Great Legal Cases And How They Shaped The World.* (New York, NY Cambridge University Press, 2011)

Hutchinson, Allan. "A Poetic Champion Composes: Unger (Not) On Ecology and Women.*" The University of Toronto Law Journal* 40 (1990)

Hutchinson, Allan. *Waiting for C.O.R.A.F.* (Toronto, ON: University of Toronto Press, 1995)

Ignacio, Jane. "The Role of the Absolute Infinite in Cantor's Conception of Set." *Erkenntnis* 42 (1995)

Jackson, Vicki. "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse." *Montana Law Review,* 65 (2004)

Jacobs, Lesley. *Pursuing Equal Opportunities: The Theory and Practice of Equality.* (Cambridge, UK: Cambridge University Press, 2004)

Kant, Immanuel. Critique of Judgement. trans. J.C Meredith (Oxford, UK: Oxford University Press, 2007)

Kant, Immanuel. Critique of Practical Reason, trans. Lewis White Beck. (New York, NY: Macmillan Publishing Company, 1985)

Kant, Immanuel. *Critique of Pure Reason, ed.* Vasilis Politis. (London, UK: Everyman Library, 1993)

Kant, Immanuel. *Groundwork to the Metaphysics of Morals*, trans. H.. J Paton. (New York, NY: Harper Torchbooks, 1964)

Kant, Immanuel. *The Metaphysics of Morals*, trans. Mary Gregor. (Cambridge, UK: Cambridge University Press, 1996)

Kant, Immanuel. *On History*, trans. Lewis White Beck. (Indianapolis, IN: The Library of Liberal Arts, 1957)

Kant, Immanuel. *Prolegomena to Any Future Metaphysics, ed.* Lewis White Black. (Indianapolis, IN: Bobbs-Merill, 1950)

Kelsen, Hans. *The Pure Theory of Law*, trans. Max Knight. (Clark, NJ: Lawbook Exchange Limited, 2008)

Kennedy, Duncan. *A Critique of Adjudication (fin de Siècle).* (Boston, MA: Harvard University Press, 1998)

Keyssar, Alexander. *The Right to Vote: The Contested History of Democracy in the United States.* (New York, NY: Basic Books, 2000)

Kierkegaard, Soren. *Concluding Unscientific Postscript to Philosophical Fragments*. trans. Howard Hong. (Princeton, NJ: Princeton University Press, 1992)

Kierkegaard, Soren. *The Sickness Unto Death*, trans. Alastair Hanney (London, UK: Penguin Books, 2008)

Kymlicka, Will. "Communitarianism, Liberalism, and Superliberalism." In the *Critical Review: A Journal of Politics and Society* 8 (1994)

Kymlicka, Will. *Multiculutral Odysseys: Navigating the New International Politics of Diversity.* (Oxford, UK: Oxford University Press, 2006)

Locke, John. *Second Treatise of Government.* (London, UK: Hackett Publishing Co, 1980)

Lyotard, Jean Francois. *The Postmodern Condition: A Report on Knowledge,* trans. Geoff Bennington and Brian Massumi. (Minneapolis, MN: University of Minnesota Press, 1984)

Macintyre, Alasdair. *After Virtue: A Study in Moral Theory.* (Notre-Dame, IN: University of Notre-Dame Press, 1981)

Macintyre, Alasdair "The Virtues, the Unity of a Human Life, and the Concept of a Tradition" in *Liberalism and Its Critics,* ed. Michael Sandel (New York, NY: New York University Press, 1984)

Macintyre, Alasdair. *Whose Justice, Which Rationality?* (Notre-Dame, IN: University of Notre-Dame Press, 1989)

Machan, Tibor. "The Perils of Positive Rights," *Foundation for Economic Education,* April 1st, 2001

Macklin, Ruth. "Dignity is a Useless Concept." *British Medical Journal* 327 (2003)

Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada.* (Toronto, ON: Thomspson Educational Publishing, 1994)

Marcuse, Herbert. *One Dimensional Man.* (Boston, MA: Beacon Press, 1964)

Marcuse, Herbert. *Eros and Civilization: A Philosophical Inquiry into Freud*. (Boston, MA: Beacon Press, 1974)

Martin, Robert Ivan. *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined our Law and our Democracy*. (Montreal, QUE: McGill-Queens University Press, 2003)

Marx, Karl. *Capital Volume One: A Critique of Political Economy,* trans. Ernest Mandel (London, UK: Penguin Books, 1990)

Marx, Karl. *Early Writings,* trans. Rodney Livingstone. (London, UK: Penguin Classics, 1992)

Miller, John. G. "The House of Jaffa." *The National Review,* January 12, 2015

Mill, John Stuart. *On Liberty and Other Essays,* ed. John Gray. (Oxford, UK: Oxford University Press, 2008)

Morton, F.L and Knopff, Rainer *The Charter Revolution and the Court Party.* (Toronto, ON: University of Toronto Press, 2000)

Nagel, Thomas. *Equality and Partiality.* (Oxford, UK: Oxford University Press, 1991)

Nietzsche, Friedrich. *Basic Writings of Nietzsche,* trans. Walter Kaufmann. (New York, NY: The Modern Library, 2000)

Nozick, Robert. *Anarchy, State, and Utopia.* (New York, NY: Basic Books, 1974)

Nussbaum, Martha. *Creating Capabilities: The Human Development Approach*. (Boston, MA: Belknap Press, 2011)

Nussbaum, Martha. *Frontiers of Justice: Disability, Nationality, Species Membership.* (Boston, MA: Belknap Press, 2006)

Nussbaum, Martha. "Political Liberalism and Respect: A Response to Linda Barclay." *SATS: The Northern European Journal of Philosophy* 4 (2003)

Oakshott, Michael. *Rationalism in Politics and Other Essays*. (Indianapolis, IN: Liberty Fund, 1991)

Parfit, Derek. *Reasons and Persons.* (Oxford, UK: Oxford University Press, 1986)

Parfit, Derek. *On What Matters: Volume One*. (Oxford, UK: Oxford University Press, 2011)

Parfit, Derek. *On What Matters: Volume Two*. (Oxford, UK: Oxford University Press, 2011)

Payne, Michael. "Henry Shue on Basic Rights." *Essays in Philosophy* 9 (2008)

Petter, Andrew. *The Politics of the Charter: The Illusive Promise of Constitutional Rights.* (Toronto, ON: The University of Toronto Press, 2010)

Piketty, Thomas. *Capital in the Twenty-First Century*, trans. Arthur Goldhammer. (Cambridge, MA: The Belknap Press of Harvard University Press, 2014)

Pilkington, Ed. "Felon Voting Laws to Disenfranchise a Historic Number of Americans in 2012." In *The Guardian*, Friday, July 13th, 2012

Pinker, Steven. "The Stupidity of Dignity." *The New Republic,* May 28th, 2008

Plato, "Crito" in *The Republic and Other Works*, trans. Benhamin Jowett. (New York, NY: Anchor Books, 1960)

Price, Huw. *Naturalism Without Mirrors.* (New York, NY: Oxford University Press, 2011)

Rawls, John. *The Law of Peoples: With the "Idea of Public Reason Revisited."* (Cambridge, MA: Harvard University Press, 2001)

Rawls, John. *Justice as Fairness: A Restatement.* (Cambridge, MA: The Belknap Press of Harvard University Press, 2001).

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

Rawls, John. *A Theory of Justice.* (Cambridge, MA: Harvard University Press, 1971)

Ripstein, Arthur. *Force and Agency: Kant's Legal and Political Philosophy.* (Cambridge, MA: Harvard University Press, 2009)

Roach, Kent. *The Supreme Court on Trial: Judicial Activism of Democratic Dialogue.* (Toronto, ON: Irwin Law, 2001)

Rorty, Richard. *Philosophy and Social Hope.* (London, UK: Penguin Books, 1999)

Rorty, Richard. "Solidarity and Objectivity" in *Relativism: Interpretation and Confrontation,* ed. Michael Krauscz. (Notre-Dame, IN: University of Notre-Dame Press, 1989)

Rosen, Jeffrey. "What Made Antonin Scalia Great." in *The Atlantic.* February 15, 2016

Rosen, Michael. *Dignity: Its Meaning and History.* (Cambridge, MA: Harvard University Press, 2012)

Rousseau, Jean-Jacques. *The First and Second Discourses*, trans. Roger D. Masters and Judith R. Masters (Boston, MA: Bedford-St. Martins, 1964)

Russell, Bertrand. *Principles of Mathematics.* (Abingdon, UK: Routeledge Press, 2010)

Sandel, Michael. *Justice: What's the Right Thing to Do?* (New York, NY: Farrar, Straus and Giroux, 2009)

Sandel, Michael. *Liberalism and the Limits of Justice: Second Edition.* (Cambridge, UK: Cambridge University Press, 1998)

Scalia, Antonin. *A Matter of Interpretation: Federal Courts and the Law.* (Princeton, NJ: Princeton University Press, 1997)

Schlag, Pierre. "The Empty Circles of Liberal Justification." *Michigan Law Review* 96 (1997)

Schmitt, Carl. *Political Theology,* trans. Tracy. B Strong. (Chicago, IL: The University of Chicago Press, 2006)

Sen, Amartya "Capabilities, Lists, and Public Reason: Continuing the Conversation." *Feminist Economics* 10 (2004)

Sen, Amartya. *Commodities and Capabilities.* (Oxford, UK: Oxford University Press, 1999)

Sen, Amartya. *Development as Freedom.* (New York, NY: Anchor Books, 1999)

Sen, Amartya. *The Idea of Justice.* (Cambridge, MA: Harvard University Press, 2009)

Sen, Amartya. *Inequality Re-Examined.* (Cambridge, MA: Harvard University Press, 1992)

Sen, Amartya. "Isolation, Assurance, and the Social Rate of Discount." In The Quarterly Journal of Economics, Vol 81 (1), 1967

Shapiro, Scott. *Legality.* (Cambridge, MA: Belknap Press, 2011)

Spivak, Gayatri. "Can the Subaltern Speak?" in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg. (Chicago, IL: University of Illinois Press, 1987)

Spivak, Gayatri. *A Critique of Post-Colonial Reason: Toward a History of the Vanishing Present.* (Cambridge, MA: Harvard University Press, 1999)

Taylor, Charles. *The Malaise of Modernity.* (Toronto, ON: CBC Massey Lectures Series, 2003)

Taylor, Charles. *Philosophical Papers: Volume Two, Philosophy and the Human Sciences.* (Cambridge, UK: Cambridge University Press, 1985)

Tiles, Mary. *The Philosophy of Set Theory: An Historical Introduction to Cantor's Paradise.* (Mineola, NY: Dover, 1989)

Tillich, Paul. *Dynamics of Faith.* (New York, NY: HarperOne, 2009)

Toobin, Jeffrey. "Antonin Scalia-Looking Back." the *New Yorker*, February 29th 2016

Tribe, Lawrence. *The Invisible Constitution.* (Oxford, UK: Oxford University Press, 2008)

Tribe, Lawrence. "The Scalia Myth." in *The New York Review of Books,* February 27th, 2016

Tuck, Richard. *Hobbes: A Very Short Introduction.* (Oxford, UK: Oxford University Press, 2002)

Tushnet, Mark. "Postmodernism and Democracy" *American Literary History,* 7 (1995)

Unger, Roberto. *Knowledge and Politics*. (New York, NY: The Free Press, 1973)

Unger, Roberto. "A Mystery Demystified: The Connection Between Mathematics and Physics" http://robertounger.com/english/pdfs/MATHEMATICS_AND_PHYSICS1.pdf

Unger, Roberto. *Passion: An Essay on Personality.* (London, UK: The Free Press, 1986)

Unger, Roberto. *Politics Volume One: False Necessity.* (London, UK: Verso Press, 2004)

Unger, Roberto. *Politics Volume Two: Social Theory (Its Situation and Its Task)* (London, UK: Verso Press, 2004)

Unger, Roberto. *Politics Volume Three: Plasticity Into Power (Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success).* (London, UK: Verso Press, 2004)

Unger, Roberto. *The Self Awakened:* Pragmatism Unbound. (Cambridge, MA: Harvard University Press, 2007

Unger, Roberto and Smolin, Lee. *The Singular Universe and The Reality of Time.* (Cambridge, UK: Cambridge University Press, 2014

Unger, Roberto. *What Should the Left Propose?* (London, UK: Verso Press, 2005)

Waldron, Jeremy. *Dignity, Rank, and Rights.* (Oxford, UK: Oxford University Press, 2015)

Waldron, Jeremy. *Liberal Rights: Collected Papers 1981-1991* (Cambridge, UK: Cambridge University Press, 1993)

Waldron, Jeremy "Torture and Positive Law: Jurisprudence for the Whitehouse" *Colombia Law Review,* 105 (2005)

Wallace, David Foster. *Everything and More: A Compact History of Infinity*. (New York, NY: Norton, 2003)

Walzer, Michael. *Spheres of Justice.: A defence of Pluralism and Equality.* (New York, NY: Basic Books, 1983)

Weinstock, Daniel. "Integrating Intermediate Goods to Theories of Distributive Justice: The Importance of Platforms." *Res Publica.* 21 (2015)

Weinstock, Daniel. "Motivating the Global Demos." *Metaphilosophy,* 40 (2009)

Weinstock, Daniel. "Rooted Cosmopolitanism: Unpacking the Arguments." In Will Kymlicka and Kathryn Walker. *Rooted Cosmopolitanism: Canada and the World.* (Vancouver, BC: UBC Press, 2012)

Wells, Thomas. "Sen's Capability Approach." *Internet Encyclopedia of Philosophy: A Peer Reviewed Academic Source*

Wittgenstein, Ludwig. *On Certainty*, trans. Dennis Paul and G.E.M Anscombe (New York, NY: Harper, Torchbooks, 1969)

Wittgenstein, Ludwig. *Philosophical Investigations*, trans. G.E.M Anscombe, P.M.S Hacker, Joachim Schulte. (Oxford, UK: Blackwell Publishing, 2001)

Wittgenstein, Ludwig. *Tractatus Logico-Philosophicus,* trans. D.F Pears and B.F McGuinness. (London, UK: Routeledge, 2001)

Whitehead, A.N. *Adventures of Ideas.* (New York, NY: Free Press, 1961)

Wood, Erika "Who Gets to Vote?" in *The New York Times,* November 7, 2011
Wraight, Christopher D. *The Ethics of Trade and Aid: development, charity or waste?* (London, UK: Continuum Press, 2011)

Zizek, Slavoj. "*Cogito*, Madness, and Religion: Derrida, Foucault and Then Lacan" in *Theology After Lacan: The Passion for the Real,* edited by Creston Davis, Marcus Pound, and Clayton Crockett. (New York, NY: Wipf and Stock Published, 2014)

Zizek, Slavoj. *Less than Nothing: Hegel and the Shadow of Dialectical Materialism.* (London, UK: Verso Press, 2012)

Zizek, Slavoj. *The Parallax View.* (Boston, MA: MIT Press, 2006)

Zizek, Slavoj, October 28th 2001, "Democracy is the Enemy." *LRB Blog,*
http://www.lrb.co.uk/blog/2011/10/28/slavoj-zizek/democracy-is-the-enemy/

Reports

Chung, Jean "Felony Disenfranchisement: A Primer." *The Sentencing Project,* May 10, 2016

Office of the Chief Electoral Officer of Canada. "A History of the Vote in Canada." Online, Elections Canada,
http://www.elections.ca/content.aspx?section=res&dir=his&document=index&lang=e

"Report to Congressional Requesters: Issues Related to State Voter Identification Laws." *United States Government Accountability Office,* September, 2014

Cases

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Aziz v Cyprus (No 2)-69949/01 [2004] ECHR

Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101

Citizens United v Federal Election Commission, No. 08-205, 558 U.S. 310 (2010)

Edwards v. A.G. of Canada [1930] A.C. 124

Egan v Canada [1995] 2 S.C.R

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC 84

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 CC

Hirst v the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (*6 October 2005)*

Hunter v. Underwood, 471 U.S. 222 (1985)

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

McKinney v. University of Guelph, [1990] 3 S.C.R. 229

Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76

R. v. Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41

R. v. Keegstra, [1990] 3 S.C.R. 697

R. v. Morgentaler, [1988] 1 S.C.R

R. v. Sparrow, [1990] 1 S.C.R. 1075

R. v. Swain, [1991] 1 S.C.R. 933

R. v. Zundel, [1992] 2 S.C.R. 731

Richardson v. Ramirez, 418 U.S. 24 (1974)

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68

Williams v. Mississippi, 170 U.S. 213 (1898)

Films

Jarman, Derek. "Wittgenstein" DFI Production, United Kingdom, 1993

Sandel, Michael. “From Market Economy to Market Society: IQ2 Talks.” Youtube Video, 10:57, June 22, 2012, https://www.youtube.com/watch?v=kvPNS4577MA