Do the critics of human rights have a point?
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This paper critically engages with a theoretical tradition that is sceptical of human rights with particular focus on a recent body of Marxist and post-structuralist influenced literature. Human rights sceptics provide a vital caution against a particular moralistic strand of liberal rights politics focused on the achievement of legal entitlements through the state. However, in treating rights as ideological - with reference to official regimes of economically liberal ‘negative’ liberties - their writings appear to foreclose the possibility of more democratic conceptualisations. Since their earliest articulation, rights have also empowered individuals as political agents capable of challenging relations of exclusion and domination through appeal to a flexible ideal of universality. The paper offers a theoretical account of rights as ‘claims’ duly sensitive to this more rebellious tradition, which it illustrates with reference to recent mobilisations by irregular migrants for a human right to freedom of movement.

The triumphant spread of human rights discourse across the globe has provoked something of a backlash in recent years. A significant number of critics now point to the embrace of the language of human rights by governments, businesses, bureaucrats and military leaders as evidence that the idea not only fails to challenge the interests of the powerful in any fundamental sense but provides them with a potent language of legitimisation with which to justify their nefarious activities. A recent wave of critical literature combines insights into the ideological biases that underlie the purported universalism of rights, first articulated by Karl Marx, with an analysis of power relations that draws on Foucault, painting a pessimistic picture of how human rights come to regulate social and
political relations and shape compliant subjects through a variety of discursive mechanisms that go beyond the law. Working within the tradition of ideology critique, authors such as Wendy Brown, Costas Douzinas and Slavoj Žižek seek to analyse the role of rights within contemporary strategies of power and draw attention to their limits as a language of liberation, raising challenging questions about the role the concept plays in fixing dominant categories of identity, strengthening state institutions and legitimating military intervention and the coercive spread of free market globalisation. The concerns these authors express at the depoliticising logic of human rights echo the motivations behind recent attempts by normative political philosophers to articulate an appropriately ‘political’ understanding of the idea sensitive to its role in international power politics. However, the primary focus of these critics is not with the best interpretation of human rights on the basis of abstract reasoning, but with human rights as a living discourse and set of meanings manifest in ideological narratives and modes of legitimation. This critical approach supposes that in order to properly evaluate a political idea, such as human rights, we cannot limit ourselves to abstract contemplation of its moral aspirations, but must pay attention to how it is deployed by political agents in real-world circumstances, giving due attention to how the concept shapes and constrains the terrain of political action in the interests of dominant groups and classes.

Faced with this critical challenge, a defender of human rights might be tempted to reply that the manipulative and hypocritical deployment of the discourse by the powerful to justify self-interested ‘humanitarian’ wars, and other sinister activities, does not count against the idea since it involves a straightforward misapplication of the concept of human rights disallowed under a correct interpretation. This response proves unsatisfactory, however, since it misses how the critique of human rights goes beyond the charge of manipulation and hypocrisy alone to show how the discursive logic of human rights is itself troubling, so that even those who invoke them in a well-motivated way risk reproducing relations of domination and exclusion. A second response, which defenders of human rights might be inclined to make, turns the question back on critics and asks
what alternative political ethics they propose by way of replacement. Yet while it is no doubt true
that critics could be more explicit about the normative standpoints from which their own analyses
proceed, I take it that the project of critically scrutinising our political terms is still valuable even
when not accompanied by a fully-fledged alternative. Specifically, it can show how different
theoretical configurations of human rights will promote certain troubling aspects of the practice and
frustrate potentially more fruitful pathways for reform. Moreover, despite some of their more
polemical pronouncements, these critics do not propose to abandon the philosophical idea of human
rights as such. Indeed, they are more appropriately thought of as human rights sceptics than outright
rejectionists, calling attention to how certain logical features of human rights discourse support
historical processes that run contrary to the emancipatory aspirations of rights as an ideal.\(^3\) Thus,
sceptics note the ‘paradox’ of rights, as both a discourse of emancipation that empowers
subordinate groups to challenge authorities and a discourse of domination that bolsters the power of
those same authorities by legitimising the status quo.\(^4\)

This idea of paradox captures an important dynamic in human rights that merits attention. Although
there may be no ‘resolution’ at the level of theoretical inquiry, the identification of such a paradox
calls for reflection on the role of human rights as a mode of argument and legitimation so as to
better understand and manage the political tensions and obstacles the discourse foreseeably gives
rise to. In this way, the method of critique has a valuable diagnostic role that complements more
constructive modes of theorizing, clarifying the practical obstacles any theory of rights must face
when deployed by political actors and institutions and giving theoretical inquiry a realist orientation
towards considerations of power, conflict and agency. In sections II to V of this paper, I unpack the
various elements that make up the sceptical critique of human rights and formulate them as four
distinct - though interrelated - theoretical objections: individualism; statism; moralism and
conservatism. I argue that sceptics usefully problematise a particular moralistic strand of liberal
rights politics narrowly focused on the achievement of legal entitlements through the state. Their
emphasis on the contestability of rights provides a useful corrective to the often depoliticising logic of legal and philosophical approaches. Perhaps most importantly, I argue, sceptics insist that human rights are not a comprehensive language of social justice and that alternative, more collectivist programmes will be necessary to confront entrenched inequalities of wealth and power and respond to global challenges such as climate change.

Nonetheless, I also modify aspects of the sceptical case and qualify the scope of their arguments. Too often, sceptics make unwarranted generalisations from the narrow, top-down practice of official rights discourse to reach far-reaching conclusions about the concept in general. In treating rights as ideological - with reference to official regimes of economically liberal ‘negative’ liberties - their writings appear to foreclose the possibility of more egalitarian conceptualisations that preserve the utopian horizon of human rights as an ideal. In section V, I set out a theoretical framework for conceptualising human rights sensitive to the sceptical concern with resisting domination based on their role as ‘claims’, a form of speech act which empowers agents to challenge and replace unjust laws, institutions and social practices according to critical moral ideals. I highlight the collective character of human rights as claims on behalf of all similarly-situated human beings and show how they configure individuals as political agents capable of challenging relations of exclusion and domination through appeal to a flexible ideal of universality. I illustrate this account in section VI with reference to contemporary movements of ‘irregular migrants’ - sometimes termed ‘illegal’ or ‘undocumented’ immigrants - who have asserted defensive rights to humane treatment in combination with the more transformative demand for freedom of movement.²

Section 1, The Charge of Individualism
The first aspect of the radical critique concerns the individualism of human rights. Ethically speaking, rights are said to express the moral value or well-being of individuals. However, this is not what critics object to: some form of commitment to individuals is a basic feature of any humanistic outlook, including collectivist ideologies, such as socialism. Rather the individualism critics fault relates to particular ontological suppositions they identify at the heart of rights discourse which casts rights-bearers as independent and self-reliant, pursuing their interests in competition with one another in the manner of pre-socialised agents in a ‘state of nature’. In ‘On the Jewish Question’, Marx had argued that the French Declaration of the Rights of Man’s list of formal civil and political freedoms, protecting a private sphere of autonomy, corresponded to the rights of ‘egoistic’ man separated from the community as an ‘isolated monad’; an anti-social conception in line with the bourgeois view of civil society as an arena for the unbridled pursuit of individual self-interest.

The strong analytical link Marx drew between rights and an individualistic social ontology was influentially elaborated in the 20th century in the work of CB MacPherson who theorized the liberal rights-bearer in terms of the bourgeois ethos of ‘possessive individualism’, which he traces back to 17th century English thinkers, such as Hobbes, Locke, Harrington and the Levellers. In projecting the imperatives of early modern commercial society back into the fictional world of the state of nature, these natural rights theorists naturalised the autonomous, self-reliant man independently pursuing his own interests protected by ‘negative’ rights of interference grounded in the idea of self-ownership. The idea of self-ownership later became a crucial legitimation for bourgeois property relations and associated inequalities, framing the purchase and sale of labour power on the market as an exercise of ‘freedom’ regardless of the degradation of labourers themselves.

Arguably, the radical charge of individualism has greater purchase against the early modern idea of natural rights than it does against modern notions of human rights to be found in the international
legal and political regime that emerged after World War Two. Notably, the modern idea of human rights does not rest its authority on claims about what individuals are entitled to in a state of nature and points towards a more social ontology of the individual. The Universal Declaration of Human Rights, for example, refers to the rights individuals enjoy as part of the human ‘family’ and lists a number of rights that can only conceivably be enjoyed in community with others, such as rights to health, housing and social security. Nonetheless, for today’s critics, the bourgeois ideal of the individual still infuses our modern conceptions of human rights, smoothing the social terrain for global neoliberal capitalism. This is the thrust of Wendy Brown’s critique of Michael Ignatieff’s influential call for a ‘minimalist’ understanding of human rights to civil and political freedoms aimed at the prevention of suffering. For Brown, Ignatieff’s argument ‘is not an ontological account of what human beings need to enjoy life, but rather a political-economic account of what markets need to thrive.’ Brown’s Foucauldian approach adds to MacPherson’s analysis a more comprehensive picture of the institutional and social relations of power within which a right is embedded. According to this picture, human rights are themselves a form of power that ‘produce’ a certain type of subject through a variety of discursive mechanisms that go beyond the law.

These insights have been applied by feminists, post-colonialists and queer theorists, among others, to call attention to how particular regimes of rights regulate subordinate identities by treating them as deviations from a dominant ‘norm’. As Brown puts it, ‘rights are not just defenses against social and political power but are, as an aspect of governmentality, a crucial aspect of power’s aperture. As such, they are not simply rules and defenses against power, but can themselves be tactics and vehicles of governance and domination.’ For Costas Douzinas and Slavoj Žižek, too, human rights are tied up with the imperatives of Western consumer capitalism. This requires that individuals regard themselves as autonomous authors of their own identity and happiness through unobstructed acts of consumption. It follows that the language of ‘choice’ is central to both human rights and to capitalist consumer ideology. The preoccupation with individual choices comes at the
expense of other more collectivist projects with popular energy channeled into private consumption over active citizenship.\textsuperscript{13}

Arguably, this is a compelling critique of those approaches that accord primacy to private property and contract over material well-being, as represented by Ignatieff’s minimalism. However, these authors err insofar as they imply that the analytical link between human rights and a depoliticized capitalist subjectivity is necessary rather than contingent.\textsuperscript{14} Crucially, alongside the possessive ideal of rights-bearers - linked to rights as a form of ‘property’ - there always co-existed within the liberal tradition a more active and participatory ideal. This ideal can be found in the earliest popular articulations of rights within political movements, such as the English Levellers, who developed early theories of natural rights in opposition to authoritarian power within the English civil war. Macpherson sees the Levellers as possessive individualists thanks to their defence of a natural right to self-ownership and to property.\textsuperscript{15} Yet in the hands of the Levellers, the idea of self-ownership is linked not solely with a theory of property accumulation but with a theory of political agency grounded in an individual’s subjective capacity to apprehend injustice through the light of conscience and take defensive action against it. Self-preservation was the most basic natural right, meaning that if a man’s person is violated he has the right to resist. These ideas were used by the Levellers to argue for the extension of voting rights to the poor and to justify rebellion against the encroachments of tyrants.\textsuperscript{16}

The Leveller view of a natural right to ‘self-propriety’ was later used by John Locke to justify rights to property through the ‘mixing’ of one’s labour with raw materials. Yet even within Locke, this view of man as accumulative by disposition is accompanied by an emphasis on his rational capacity to protect himself through his own defensive agency. Locke’s emphasis on the fundamental right to self-preservation – which, unlike other rights, cannot be alienated upon entry into civil society - reflects his view that rights are most effectively controlled and enforced by rights-bearers
themselves. In extreme cases of interference with liberty, Locke famously proposed that the ‘whole body’ of society can justifiably rebel to overthrow the ‘tyrannical power’ of their oppressors through an ‘appeal to heaven’.17 Thus, while it is important not to over-emphasise the democratic credentials of this early natural rights tradition, attention to this popular strand of natural rights thinking corrects the tendency – shared by Marxist critics and economic liberals alike - to present a monolithic version of early natural rights theory as a precursor to modern free market ideology, drawing a strong conceptual link between rights and a depoliticized subjectivity.

Insofar as rights ‘produce’ individuals, it is not merely as consumers, workers, and capitalists, but as political agents entitled to protest and challenge power. The individualism of rights is valuable here precisely because it refers us to the political demands of individuals who are endowed with moral judgment and the entitlement to confront and repel authoritarian concentrations of power. The exercise of rights may be self-regarding, but it need not be selfish. Certain types of property rights, such as those to land, are the most plausible example of selfish right since it is often the question of a zero-sum game. Other rights, however, have a more positive-sum structure according to which my exercise of rights benefits others. Free speech, for example, serves important collective goods in encouraging a democratic political culture in which power is to be held to account.18 As Claude Lefort put it, ‘the right of one individual to speak, to write, to print freely, implies the right of another to hear, to read, to keep and pass on the material printed’.19 Admittedly, this collective character can be obscured through a focus on rights as individual legal entitlements, as I discuss next.

Section 2, The Charge of Statism
The second charge against human rights is that they bolster the power of the state by reinforcing dependence on its institutions as the ultimate interpreter and enforcer of moral claims. It is part of the paradox of rights, for sceptics, that while they are supposed to check and limit state power, their proliferation in law leads to increased decision-making powers for state institutions over ever more domains of social life through police power, surveillance and militarism. In turn, this encourages a stance of passivity and inertia among rights-bearers who alienate their capacities to safeguard their interests to state institutions with a consequential decline in autonomous political organisation. As Brown writes, rights discourse ‘may trade one form of subjection for another’ in the form of ‘an external agent or set of institutions that promises to protect individuals from abusive state power in part by replacing that power’.20 Insofar as legal rights ‘empower’ people, sceptics argue, it is within a set of rules decided by the state and overseen by judges and other officials. Thus, for Douzinas:

Right claims reinforce rather than challenge established arrangements. The claimant accepts the established power and distribution orders and transforms the political claim into a demand for admission to the law. The role of law is to transform social and political tensions into a set of solvable problems regulated by rules and hand them over to rule experts. 21

The indeterminate nature of human rights, as they often appear in law, hands these experts significant discretionary power to adjudicate the claims of different social groups and classes. In practice, these purportedly impartial experts may act self-servingly, reproducing the ideological preferences of elites. This is most obvious in the well-documented judicial preference for rights to private property over rights to collective bargaining and material resources that would involve redistribution of wealth and power.22

A legalistic vocabulary of human rights, it is said, may distort the moral issues at stake by orientating decisions formal towards questions of procedural equality. The case of a ‘human right to
development’ has been cited by sceptics as one example of how collective economic demands can be channeled into a confused and indeterminate legal notions. In strategic terms, moreover, the individualising pressure of judicially-enforced rights may both obscure the public character of political demands and dissolve the collective ‘we’ of the social movement that fought for and achieved that right. A focus on judicial victories can detract from the political battles required to transform the underlying structures that sustain the denial of rights in practice. This caution against statism offers an important reminder that the translation of a claim into law should not be treated as a definite sign of social progress or as indication that the right under contention has been depoliticised in line with a broader social consensus. We should remain conscious of the dynamic whereby more far-reaching demands are diluted into terms that official institutions understand and approve of. Nonetheless, it should be recognised that human rights are not reducible to the rights found in law and overseen by judges and that a commitment to human rights does not translate to any specific strategy for their achievement and enforcement.

Section 3, The charge of moralism

Marx and Engels famously counterposed their own ‘scientific’ form of socialism - centred on a historical analysis of exploitation - with the abstract moralising of their ‘utopian’ socialist contemporaries. Calls by utopian socialists for ‘rights’ and ‘justice, it was said, operated within a set of ideological assumptions that reproduced underlying property relations and the class prejudices of the bourgeoisie. Today’s sceptics share the Marxist worry that the resort to universal moral categories has an ideological function in simplifying complex and controversial issues, removing them from political contestation while masking the powerful interests that invoke them. The charge of moralism does not appear in the form it did in classical Marxism, since few today defend the idea that capitalism can be relied upon to create its own grave-diggers with little need for normative critique. Rather, the language of rights is linked to a depoliticising form of
humanitarianism that casts those who are needy or abused as passive objects of pity. For some sceptics, the human rights movement is unavoidably implicated in a simplistic, neo-colonial narrative that casts the west as ‘saviours’ and the third world masses as needy ‘victims’.  

Crucially, human rights moralism is said to elide the political voice and agency of individuals and justifies coercive interference from external agents. This reinforces a paradigm of politics based on security, policing, coercive borders and military intervention in other states. The concern is especially acute when it comes to the use of human rights to legitimate Western military interventions, such as those in Afghanistan and Iraq. As Zizek notes, it would be too simplistic to say that the Iraqi invasion simply used rights as mask for political and economic interests. Rather, its advocates drew support from a particular liberal-capitalist understanding of development and freedom. The freedom that was being presented to the Iraqis as a universal ideal concealed a particular understanding of freedom that favoured the interests of powerful political and economic elites.  

The human rights movement airbrushes these conflicts and divisions whenever it invokes the idea of an ‘international community’ united by humanitarian values and capable of dispassionate and impartial intervention. It is also accused of offering moral legitimacy to the conduct of these wars, with groups such as Human Rights Watch presuming to evaluate drone strikes and other forms of state violence according to principles of ‘non-discrimination’ and ‘necessary precautions’ without regard for the morality and legitimacy of the conflicts themselves.  

The concern with moralism extends to the way in which groups such as trafficked sex workers, refugees and the poor are treated by those at the ‘softer’ end of human rights practice. The institutional dynamics of this practice typically require that rights-bearers appear in legal and political forums as weak and powerless in order to gain support. As the anthropologist Sally Merry Engle notes of the depiction of refugees of political violence in international forums:
They are represented visually far more than in voice, typically through images that are anonymous and focused on dead, starving or homeless bodies. The predominance of women and children in these depictions emphasizes their helplessness and neediness. They need protection and someone to speak for them, in this rendition, not the opportunity to tell their stories.\textsuperscript{29}

The role of representing those deprived of their human rights in forums and conferences in which international laws and norms are drafted is then assumed by a cadre of NGO’s, lawyers and other human rights professionals from the wealthier nations. However well-intentioned these actors are, there are unavoidable problems of accountability when they decide on matters without being responsive to the relevant constituencies of interests.\textsuperscript{30}

These arguments are powerful and important. Nonetheless, we should be clear about the relevant concern with moralism, which is not with moral ideas as such, but with their deployment in a way that over-rides political agency and relevant contextual considerations that remove from the specificity of the situation and what needs to be done. As I go onto discuss in relation to undocumented migrants, moral notions familiar from the practice of human rights, express important restraints on political power and provide resources for the ongoing critique and reform of unjust laws and social practices. The correct response to moralism, I suggest, is not to reject moral terms to condemn violations of human rights or the analytical apparatus that accompanies it. So long as we live in a world in which states and state-like entities use their powers to oppress and kill people, it will be meaningful and appropriate to talk of human rights ‘victims’. Indeed, where the violation of an individual’s human rights is intimately tied to their political incapacity – as with someone being tortured, for example - the identity of victim is not only descriptively accurate, but may also be more immediately helpful in galvanising much-needed time, energy and resources from
more privileged constituencies. Insisting on viewing the politically incapacitated as empowered subjects, by contrast, might lead to them being blamed for not rectifying their condition in a way that is unrealistic and inappropriate. The problem is not with the language of victims as such - or indeed other comparable terms - but its use as a synecdoche to the exclusion of more political relations of solidarity and responsiveness. The problem with moralism is when the moral ideals that ground human rights - which are the source of their authority and distinctive content - are seen as trumps over politics that can be disinterestedly applied by the relevant officials and experts without regard for the opinions of those whose interests are affected.

**Section 4, The charge of conservatism**

The concern here is that rights entrench, as a matter of legal priority, a particular set of political and economic arrangements that serves the status quo. Any appeal to new rights will be constrained by the discursive logic of dominant understandings and so cannot play any significant role in the reconstruction of institutions and social structures. Again, Marx’s analysis proves relevant here insofar as rights are said to be theoretically implicated in preserving the liberal distinction between the ‘public’ sphere of the state and the ‘private’ sphere of social life by granting a measure of civil and political freedom in the former and implicitly placing off limits harms committed by private actors in the home, the workplace and wider society.31

While the modern regime of human rights has expanded to include a range of social and economic rights, these rights lack the prestige of the classical liberal freedoms and are accorded lesser priority by states and in international treaties. For sceptics, this is no mere accident of politics but a structural feature of human rights with its focus on formal matters of procedure over more
The inequalities of the economy are placed off-limits by the state-focused framework of human rights with those political projects that address these inequalities framed by comparison with human rights as too ‘ideological’ and insufficiently ‘neutral’ and ‘objective’. In practice, the aspiration to impartiality that is part of the legitimating appeal of human rights translates to a misguided ideological ‘purity’ that prevents campaigners from condemning the neoliberal economic logic of privatization, austerity and tax cuts for the rich that leads to so many without secure housing, education and healthcare around the globe.32

What is the scope of the conservatism critique? Most importantly, it contributes a vital reminder that human rights are not a comprehensive language of social justice. Certainly, it is logically possible to conceive of more ambitious and radical human rights, potentially including both ‘positive’ rights (such as a universal basic income) and ‘negative’ rights (such as the right not to have one’s labour commodified). Nonetheless, it is unlikely that a fully just society could be specified in terms of a list of individual rights without the addition of society-wide principles of distribution and regulation. On the strategic level, it seems plausible to think that human rights cannot provide the sort of collective, structural challenge necessary to overturn dominant configurations of property and capitalist power. Human rights to material goods prescribe at most a sufficiency threshold which no human being should fall below. There is nothing in international human rights law, as such, that precludes the vast levels of economic inequality witnessed today and the concentration of oligarchic power in the hands of the ‘1%’. There is an unavoidable tension between the minimalist logic of rights as weighty protections against abuse and deprivation, and their future-facing, utopian aspirations. However, we should be clear about what follows from these observations. The conservatism charge counts against the over-extension of human rights in politics at the cost of other more appropriate principles and ideals. It argues for the selective and judicious deployment of the idea of human rights rather than its replacement.
Moreover, it is possible to over-estimate the conservatism of human rights by focusing on their articulation in legal texts, judicial verdicts and politicians’ speeches at the expense of their redefinition and deployment by groups outside the official human rights system. Agonistic theorists, such as Jacques Rancière, Etienne Balibar and Chantal Mouffe make a compelling case that human rights have a normative vitality that resists the attempt to fix them around a particular and partial vision of human nature. Historically, struggles for rights have defied the compartmentalization of politics Marx criticized, radicalizing liberal commitments through the extension of the proper sphere of application of egalitarian norms beyond the ‘public’ institutions of the state to inegalitarian relations within the ‘private’ domains of the family and workplace. An unjust state that recognizes merely formal legal rights will nonetheless still open a political space for its subjects to lay claim to new rights by acting as if they were indeed equal. This normative vitality compels those who benefit from the hegemonic ideology to provide ‘relevant reasons’ for unequal treatment, as Jane Mansbridge has recently put it. It follows that human rights do not simply ‘mask’ inequality, but affords a basis for continual contestation as political subjects bring to attention the gap between an abstract formal equality and their own lived experience by claiming and acting upon the moral rights they are denied. In the words of Rancière, excluded groups ‘construct a dissensus against the denial of rights they suffer’ and in doing so ‘insert one world into another’. Thus, while human rights may not be universalistic in a fixed and timeless sense, they may be seen as intrinsically universalisable through open-ended practices of contestation. The appropriate response to the charge of conservatism, I take it, is not to reject human rights as inherently implicated in the inequities of the status quo, but instead be mindful that they are not a comprehensive language of justice and that their logic of universalism may contain unnoticed closures and exclusions unless subjected to ongoing political scrutiny and challenge.

Section 5, Thinking politically about human rights
As we have seen, septics raise important concerns with how certain features of human rights discourse support dominating forms of ‘power over’ insofar as they elevate property and competition as hegemonic values, strengthen the coercive arms of the state, legitimise patronalist forms of humanitarianism and divert political energy from more radical, collectivist projects. In this penultimate section I propose a framework for thinking about the undoubted role that human rights also play in supporting contentious forms of emancipatory politics, through attention to the ‘power to’ of rights claimants and the ‘power-in-concert’ of rights-based movements. I make no substantive argument for an additional more ‘radical’ list of human rights, nor do I propose a formal definition of the term to which all correct usage must conform. Instead, I offer an interpretive account of the role human rights have as a tool to challenge power and define new norms with reference to the conceptual structure of human rights, the types of social relations they entail and how these relate to political identities and forms of action.

A useful route into thinking about the political role of human rights can be found in several philosophical writings from the 1970’s that present rights as a form of speech act based on an analysis of their role as ‘claims’. Significantly, there are certain features of rights that are more readily expressed in the language of ‘claims’ and ‘claiming’ since claims are familiar not only as nouns, but as verbs that allow us to do things. The focus on claims orientates us to the performative character of rights and the dynamic processes through which they are created, define and enforced in politics in contrast to a more static focus on rights as a form of ‘property’ that individuals enjoy independently of political activity. As the legal philosopher Joel Feinberg put it, rights are ‘not mere abstract concepts; they are instruments and devices that can be used by their possessors to do things’. And although they may be asserted in all manner of circumstances, rights are paradigmatically called upon in conflictual circumstances when they are being denied by some duty-bearing agent hostile to their recognition. Rather than expressing a request for sympathy, to claim a political right, on this understanding, is to assert, press or demand what is owed to one on
the basis of authoritative morality principles; the principles of an ‘enlightened conscience’.  

Consider agent X’s claim-right to some moral good A (such as freedom of speech, voting rights or healthcare). Agent X’s claim to A presupposes the existence of other agents to whom the claim is addressed. These addressees fall into two general categories. First, there is the obligation-bearer - agent Y - who is charged with securing X in the enjoyment of A through the performance or non-performance of some action. This is typically the administrative branches of the state, though potentially corporations and trans-national institutions against whom human rights might conceivably be held. By claiming a right against Y, agent X lets it be known that they have that right and makes explicit that they expect Y to act upon their moral obligations towards them. Should Y continue to violate the right after it has been claimed, they are framed as not merely careless or morally ignorant, but as actively unjust in refusing to act upon authoritative moral principles. In the terms of social movement scholars, it constitutes an ‘injustice frame’ that involves the ‘attribution of responsibility to a concrete target’ and so ‘successfully bridging the abstract and the concrete’. The individualism of rights thus has an important role in sanctioning protest by individuals in defence of their interests: the violation of the right is not wrong in some abstract moral sense; it is a wrong done to them, because the duty is owed to them and it is morally appropriate that they protest against it.

Individuals who are similarly socially positioned to X and likewise suffer from the denial of the relevant good A will have a compelling social interest in supporting X in the achievement and enforcement of their rights against Y. In this way, a rights claim lends itself to the mobilization of distinct categories of social identity and interest: for one person to claim a human right for themselves is logically to also claim that right on behalf of all human beings who are similarly socially positioned on account of social class, gender, race, religion, disability, or some other identifier; it is to make a demand on behalf of all those in the same ‘vulnerability class’, to borrow a
useful term. The universalist logic of human rights is not merely a source of apolitical abstraction: it confers an important collective character of claim-making that marks rights as distinct from more self-regarding demands in the form of ‘desires’, ‘needs’, ‘interests’, ‘preferences’, and so on.

Where there is a conflict of wills between rights-bearer (agent X) and obligation-bearer (agent Y), a claim also functions as a call for political support by X to third parties - agents Z – who have responsibilities to enforce X’s claim against Y. The category of third parties includes legal addressees in the form of the adjudicative branches of the state and trans-national courts and tribunals who have formal institutional obligations to enforce recognised legal rights. However, it also extends to political addressees in the form of political allies in domestic politics (including fellow citizens, political parties, campaign groups, trade unions, and so on) and in international politics (including the citizens of other states, foreign governments and international institutions). Although these potential allies lack formal institutional obligations regarding X, they may be motivated to support them in their claim out of a sense of political responsibility to promote the recognition of human rights. Alternatively, they may be motivated out of a more indirect social interest in the securing of that right, as for example with X’s right to healthcare, which a fit and healthy Z supports despite the higher taxes on their salary in the knowledge that they might one day fall into the same vulnerability class of ill-health. Understood in this way, human rights are a quintessentially relational concept that implicate their claimants and respondents in relations of justification, solidarity and reciprocity and accompanying processes of identity-formation and contestation.

Notably, third party allies may be called upon to carry out any number of political actions in support of X against the obligation-bearer Y. This includes electoral activity, protests, petitions, strikes, sit-ins, marches, meetings, boycotts, and other actions, and – in the case of foreign governments - possible action in the international arena. A human rights claim to some good that is
not initially recognised, then, will still have achieved partial success if it succeeds in mobilizing a constituency of affected interests and political allies to campaign and secure that right over time. This introduces an important temporal dimension to rights politics. It is often the case that demands for rights initially ridiculed or ignored retrospectively come to be seen as part of the general ‘common sense’ thanks to ongoing practices of critique and activism that persuade others and build alliances over time.

In addition, the focus on claiming helpfully brings into focus a central feature of rights that sits in tension with the alleged paternalism of the discourse. Within the discourse of rights, there is a strong presumption that individuals have authority over the exercise and enforcement of their own rights. This entails that – with the exception of certain ‘mandatory’ legal rights, such as the right to vote in some jurisdictions – we do not compel people to exercise their rights or attempt to claim them on their behalf without their proper authorisation. Richard Flathman usefully articulates the rationale for this anti-paternalist presumption with reference to two senses of the notion of authority: the rights-bearer has authority over the exercise and enforcement of a right because they are an authority over what will best serve their interests. This authority is in keeping with the assumption that individuals are the best judge of their own well-being in line with the familiar liberal presumption about individuals as moral persons most famously set out by Mill. It also expresses a certain kind of strategic assessment that rights-bearers are best placed to defend themselves from the ‘standard threats’ to their rights or else to judge how others might help and support them.

In cases of children and adult incompetents, where the rights-bearer is not the best judge of their interests, it may be required that a third party agent assumes de facto authorization to claim rights on their behalf until the time they have the requisite autonomy to do so themselves. The same may also be required for those cases - such as my earlier example of the tortured prisoner - where the
rights-bearer is incapable of defending themselves against incursions or of alerting others to help. Nonetheless, it would rightly be regarded as an inappropriate form of paternalistic interference were a third party to claim a right on behalf of another individual who is not incompetent or incapacitated in this way. From this perspective, the paternalism sceptics detect in the current human rights regime is not a logical outcome of the discourse itself, but rather in tension with one of its central features.

A political culture of human rights in which individuals are conceived of by themselves and others as ‘makers of claims’ underscores relations of responsiveness and mutual recognition in marked difference to paternalistic relations of ‘saviour’ and ‘victims’ or other hierarchical notions. Crucially, the knowledge that one has rights is linked to certain psychological properties associated with self-esteem and a more confident and assertive attitude. Moral ideas we associate with human rights, such as respect and dignity, are not merely abstract moral foundations, then, but relate to the concrete social standing of those with authority to have some say over their treatment and to demand and enforce that treatment where necessary. There is a certain reactive logic to rights politics which evolves in response to new threats and circumstances. It is often through the concrete experience of losing one’s dignity, of being disrespected and insulted, that new claims for rights emerge embodying substantive moral notions of what dignified and respectful treatment consists in.

Finally, the framework of speech acts permits us to identify a distinctive quality to the language of human rights that helps explain their discursive force. Human rights have a proleptic quality in presenting themselves as descriptive, in describing how things are, but with the real purpose of saying that things are not as they ought to be. When the recognition of a new right is being urged, the action gains part of its force by appearing to adhere to existing conventions and practices regarding the distribution of moral goods while in fact subverting them and changing things. This quality of certain types of political speech is highlighted in a footnote by John Searle discussing
Proudhon’s statement that ‘Property is theft’. If one takes this as an internal remark, within an accepted system of linguistic usage, it would seem contradictory and nonsensical. For Searle, however, it ‘gets its air of paradox and its force by using terms which are internal to the institution in order to attack the institution’.  

There is a similar paradox and productive tension at the heart of human rights discourse. Assertions of new human rights may present themselves as conventional and conservative, upholding some prior order, but this masks the fact that they may be challenging that order. Social arrangements are being challenged under the guise of their correct application and ‘to the extent that our social world is constituted by our concepts, any successful alteration in the use of a concept will at the same time constitute a change in our social world’. In the next section, I turn to examine one contemporary human rights claim of this kind as asserted by recent political movements of irregular migrants.

**Section 6, A Human Right to Freedom of Movement?**

The situation of irregular migrants is paradigmatic of a class of excluded persons and so brings into sharp relief both the tensions and possibilities of human rights. This group has a serious and urgent set of interests to defend in light of their vulnerability to abuse, exploitation and repression, and yet they lack the formal rights of political participation to advance those interests possessed by those with citizenship of the state or the secure public standing to make claims enjoyed by legally resident non-citizens. Nonetheless, a striking feature of recent migrant movements to Europe, the US and other affluent parts of the world has been the level of political activity by irregular migrants themselves who have used hunger-strikes, sabotage, illegal border crossings, evasion and other forms of disobedience and protest to advance their aims. While some simply demand liberty and humane treatment, or the right to have their asylum application heard, others have articulated a
more forward-looking demand for complete freedom of movement as a human right.

In one protest in 2014, around 400 refugees and irregular migrants, along with their supporters, staged a trans-national ‘March for Freedom’ from Strasbourg to Brussels where they held a week-long protest camp outside the EU’s headquarters. The group’s political demands focused on basic human rights to liberty and humane treatment against a brutal regime of policing, detention and deportation by European states. In addition, the group asserted the more utopian human right to ‘Freedom of Movement’ between states which is not to be found in international law. The group’s public, symbolic transgression of state borders in their march to Brussels embodied the radical ethos of direct action in which individuals do not wait upon the state to grant their claims, but act ‘as if’ the world they wish to bring about existed already. In this way, they ‘inserted one world into the other’, offering a vivid demonstration that they as a matter of fact ‘possessed’ the moral right to freedom of movement which they were denied by law. The group’s slogan that ‘No border crossing is illegal!’ framed a radical, transformative challenge to the existing border regime as legitimate on the basis of its upholding a more fundamental and independent moral order in the form of the claimed human right. The March to Freedom aimed to mobilise those in the same vulnerability class as the protesters in the form of the hundreds of thousands of irregular migrants in Europe who have fled Africa and the Middle East due to conflict, poverty, persecution and the effects of climate change. They also hoped to reach sympathetic third party allies among the European citizenry in the form of politicians, political parties and social movements. Notably, the group did not shy away from antagonism in confronting the EU and nation states with the failure to meet their moral obligations with the protest at one point disrupting a meeting of the EU heads of state on migration.

Here, we see how human rights can furnish a flexible language for those marginalised or excluded from formal democratic politics, empowering irregular migrants as political subjects to assert their
place in political decision-making. It seems patronising and inaccurate to think they are ideological dupes, fooled by capitalist strategies of legitimation. Nor do they adopt a purely instrumentalist outlook based on the tactical appropriation of ruling class discourse. Rather, the language of human rights has been reflexively endorsed as a principled basis with which to contest the identity of ‘illegality’ and assert a more political identity grounded in a common humanity. Is the claimed human right to freedom of movement ‘radical’? Certainly, if implemented, the right would represent a radical break with the existing regime of selective immigration controls that underpins the international state system and would likely have significant implications for the global distribution of resources and opportunity. Like other human rights, the demand for freedom of movement has arisen historically in response to new institutional threats and circumstances. Specifically, it has involved a rethinking of what human freedom and association means within the context of an interdependent and yet profoundly unequal global order.\textsuperscript{50} As it stands, of course, the right to freedom of movement right is rejected by liberal states and the overwhelming majority of their citizens who see unrestricted immigration as a threat to prosperity, security and cultural integrity. This position implicitly weights a state’s right to decide its terms of entry - grounded in widespread understandings of sovereignty and self-determination - above the interest migrants have in gaining entry. While these arguments currently prevail in public discourse, the shared framework of human rights nonetheless entails that authorities cannot dismiss the claimed right as \textit{a priori} wrong or unintelligible, but must instead provide relevant reasons for differential treatment.

\textbf{Section 7, Conclusion}

Human rights sceptics helpfully call attention to the tensions and threats of a world in which the language of human rights is ideologically hegemonic. They provide a subtle and sophisticated warning against an overly moralised human rights discourse that can simplify and distort political choices and even marginalise the voices of the already disenfranchised. Moreover, it seems plausible to suggest, as sceptics do, that in certain contexts the language of human rights may
constrain and neutralise the ambitions of political movements, diverting emancipatory energy into costly and ineffectual legal disputes that leave untouched power relations in the economy and other domains designated as ‘private’ by prevailing norms. It is vitally important to remind ourselves that human rights are just one weapon among many in the arsenal of social justice activism. A more comprehensive political programme for open borders, for example, might also highlight the exploitative structures of the global labour market and leverage the strategic position migrant labourers have within these structures to bring about change.

Yet while sceptics are right to caution against the dangers of an unreflective mobilisation of human rights, a preoccupation with delegitimation, which treats rights in exclusively ideological terms, risks losing the flexibility of the discourse and its transformational potential. Human rights are not, by their very nature, static and depoliticising. In politics, they also have a dynamic role to play as claims, a form of speech act which empowers individuals and groups to hold the powerful to account through political mobilization and contestation. In their vigorous campaigns for a human right to freedom of movement, contemporary movements of undocumented migrants exemplify the productive side of the human rights paradox, acting upon the very citizenship rights they seek to acquire. As it stands, even the most basic legal rights for refugees and irregular migrants found in international law are being undermined, underscoring how rights require ongoing mobilisation to defend and secure. A political culture of human rights, faithful to the idea’s fundamental precepts of respect and dignity, will be one in which the excluded, destitute and disenfranchised are viewed not merely as objects of humanitarian concern, but as political subjects and makers of claims with authority over their rights and the judgment and capacity to author new ones in response to new threats and circumstances.


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


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


14 Douzinas, for example, states that rights are ‘manifestations of individual desire’ and that ‘global neoliberal capitalism and human-rights-for-export are part of the same project’, “The Paradoxes of Human Rights,” *Constellations* 20, no. 1 (2013): 62, 65.

15 McPherson, *Possessive Individualism*.


20 Brown, ‘The Most We Can Hope For…’, 455.

21 Douzinas (2013), 60.


24 While I go onto discuss the case of irregular migrant activism, there are many examples of grass-roots movements in Latin America and elsewhere reinterpreting the official discourse of human rights via their own political and cultural traditions, giving it new content and meaning suited to their own local practices, see Mark Goodale and Sally Engle Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press, 2007).


26 Mutua, “Savages, Victims, and Saviors.”


31 K. Marx, ‘On the Jewish Question’.

32 Moyn (2010), Ch. 4.


36 As Christian Reus-Smit puts it, ‘what makes individual/human rights particularly compelling moral principles is their universalizability: the fact that they cannot, coherently, be claimed by one but denied to another.’, “Human Rights in a Global Ecumene,” *International Affairs* 87, no. 5 (2011), 1217.


42 Flathman, (1976), 83.


49 Nigg (2015).