Democracy as Fetish: Rhetoric, Ethnography, and the Expansion of Life-

Chapter Three: What Must Be in Place for Someone to Believe in Human Rights?

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In this chapter of his book length-manuscript, Cintron analyzes classic documents from the history of human rights and classic commentaries on rights. He argues that rights talk, both legal and informal versions, is a metaphorical method for describing primal necessities and entitlements. Rights talk tries to settle, but ultimately cannot, the ambiguity between primal necessity/entitlement and "mere" want. Rights, then, are not substantive but a way of speaking and ultimately a way of inciting action.

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rhetorical beginnings

Consider the following two questions: (1) What are human rights? (2) What must be in place for someone to believe in rights, such as human rights? Both questions seem reasonable enough, but I prefer the second one. The first question portends or promises that a "something" will appear at the end of our inquiry, a "something" that will answer the question. This "something," because of the sense of the "to be" verb, would likely point to the very "nature" of rights, a nature that sits outside and beyond any local context of use. The second question, in contrast, deflects the inquiry away from discovering a "something" or "nature" that the word "rights" points to. The second question suggests that a set of conditions, practices, propositions, truth claims, ways of speaking, even a poetics must be in "place"—that is, must precede (and "preceding" here is very important, the *a-priori*)—before I, in my subjectivity, or you, in your subjectivity, can believe in a "something" called rights. Even though I like the first and its aura of a presumed philosophical search, I prefer the second and its aura of a presumed rhetorical search. That is, the generic way of phrasing the second question is: What must be in place for someone to believe in X, whatever the X might be? And I take this generic formulation as having something to do with a more rhetorical approach, and, consequently,

getting a bit closer to the bones of life.

But from another perspective, and forgive me for being a bit baroque here, the two questions are not that different from each other for at least two reasons: (1) It is not possible to treat the second question without assuming an answer to the first. That is, these two questions are not mutually exclusive, for certain presumptions of "what rights are" are the sorts of things that enable one to discover "what must be in place." The activity of the second question is hinged to the activity of the first, or phrasing it a little differently: any attempt to explore the public discourse of rights (a rhetorical approach) is hinged or presumes some sort of ontological inquiry regarding "what rights are."1 In other words, it may well be that the "conditions," "practices," "ways of speaking," "poetics," and so on might just constitute the entirety of rights, meaning that's what rights are, and that is all that they are: a way of speaking.

(2) And now to deepen the baroque even further, let's consider briefly the idea of the question.2 Questions are a type of asking, and so they establish an obligation, the obligation of answering—hence, the two questions under consideration are immersed in the artifice of how we go about doing a certain type of work, the work of the question/answer, which is a thorough-going rhetorical device subsuming any "end" that one hopes to arrive at. It seems to

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1 The most concise and thorough survey that I know regarding "what rights are" is Leif Wenar's entry "Rights" in the Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/rights, 2007 (accessed 3/4/2010). The essay describes the nature of rights by classification, composition, and function. Under classification and composition, Wenar discusses "Hohfeldian incidents" whose elements are privilege, claim, power, and immunity; active versus passive rights; and negative versus positive rights. For the function of rights Wenar discusses will theory and interest theory. There is a brief discussion of the history of the language of rights, and here the term is tracked to early concepts of what is just and fair. Wenar also discusses rights as trump arguments; conflicting rights; the possibility of a right to do wrong; status-based rights (a type of natural right) versus instrumental or consequentialist rights; and various critiques of rights.

2 This discussion owes a debt to Michel Meyer's *Rhetoric, Language, and Reason,* University

me that the question/answer is an energy form that does not predict any specific end—that is, any specific answer—but it compels an answer, creates the expectation of an end as answer. In order to grasp the point we might imagine a question that has no answer or where an answer is not decideable, but because we have framed everything within a question/answer device, we may well force or posit an end/answer when perhaps we should not. So rhetoric from this perspective is pretty thorough-going—it entraps, it enables. At any rate, I wanted to indicate here at the beginning how the second question, my preferred one, which at first glance looks more rhetorical than the first, is in a sense a species of the first; and then, more importantly, I wanted to indicate how the very structure of the question/answer is a device of rhetorical energy that structures so much of the thinking work that we do.

rights as forms of desire

> From a small spark, kindled in America, a flame has arisen, not to be extinguished. Without consuming, like the *Ultima Ratio Regum,3* it winds its progress from nation to nation, and conquers by a silent operation. Man finds himself changed, he scarcely perceives how. He acquires a knowledge of his rights by attending justly to his interest, and discovers in the event that the strength and powers of despotism consist wholly in the fear of resisting it, and that, *'in order to be free, it is sufficient*

Park, Pennsylvania: The Pennsylvania University Press (1994).

3 "The last argument of kings." The phrase on the order of Louis XIV was engraved on French cannon.

that he wills it.'4

--Thomas Paine, *The Rights of Man,*

The Declaration of the Rights of Man at the end of the eighteenth century was a turning point in history. It meant nothing more nor less than that from then on Man, and not God's command or the customs of history, should be the source of Law. Independent of the privileges which history had bestowed upon certain strata of society or certain nations, the declaration indicated man's emancipation from all tutelage and announced that he had now come of age.5

--Hannah Arendt, *The Origins of Totalitarianism,*

Approximately 160 years separate the two quotations above. Both refer to the Declaration of the Rights of Man authored during the French Revolution. The sensibilities of Paine and Arendt could not be more different. Paine as a revolutionary was both naïve and enthusiastic, while Arendt, one of Heidegger's students, was a rigorous philosopher who at the time of the above essay was reflecting on her situation and the larger problem of post World War II refugees who lacked rights and legal standing in countries that mostly did not want refugees. But what is remarkable to me is the persistence of a theme, a sense that the bourgeois revolutions of the eighteenth-century were a pivot point that fundamentally transformed social relations. Paine's "spark" that cannot be extinguished as it moves from nation to nation is,

4 Thomas Paine, *Rights of Man*, New York: Barnes and Noble, 2004, p. 196.

seemingly, Arendt's "emancipation from all tutelage." For both authors status and hierarchy have collapsed and have been replaced by equality and rights—which means in Arendt's phrasing that the commandments of both God and the customs of history have been replaced by the commanding human. Transcendence has collapsed into immanence—and here we have the release of a nearly limitless human *potentia*. Paine's phrasing *"in order to be free, it is sufficient that he wills it"* seems to capture a sort of delirious *potentia,* whose future, at least in the American imaginary, will evolve into all sorts of populist notions regarding the telos of boot-strapping hard work, positive thinking, faith in God, and individualism as commercial.

But let's not get ahead of ourselves, for it seems to me that Paine's notion of will is not precisely our own populist notion and that we ought to articulate that difference. So, let us not forget that for Paine and for like-minded thinkers of his era, freedom was imagined as a natural condition and part of an unfolding divine plan. Paine's phrase, therefore, implies that for human will to be forceful and for freedom to manifest it must be congruent with, so to speak, Nature's "will." Because divinity is the orchestrator of Nature, it makes no sense for human will to run contrary to Nature. Nature's will is the real engine here, and it forms the guarantee that, if an individual will aligns itself to the higher order of Nature's will, the individual will come to self-realization and in the process bring to fruition Nature's divine plan. In this strong sense Nature wants to manifest itself and humanity is its actor. Hence, the realization of freedom on the political plane is indeed a transcendent wholly occupying the immanent. And in different sleights of hand, echoes of this messianic, teleological vision of democracy (as the worldly

5 Hannah Arendt, *The Origins of Totalitarianism*, New York: Harcourt, Inc, 1976, p. 290.

overseer of freedom) persists straight into Hegel's notion of the end of history; straight into Marx's notion at the beginning of the *Communist Manifesto,* "A spectre is haunting Europe—the spectre of Communism" (for how else can we interpret the "spectre" except as an inevitable energy form or *potentia*); and finally just a few months prior to the collapse of the Berlin Wall in November 1989, straight into Francis Fukuyama's return to Hegel's theme regarding the end of history.6 In these voices freedom, rights, emancipation, and the power of human will are coursing not only from nation to nation but across time as if these principles were themselves realizations of Nature's nature—or, as we might call it today, simply a matter of commonsense. (And let's be clear: today's "commonsense" in public discourse simply occupies the transcendent slot that used to be occupied by Nature, God, and so on, so that when someone says "well, it is a matter of commonsense," she or he is reaching for a secularized ultimate.)

I cannot let go of Paine's version of freedom without remarking on Foucault's more contemporary version of freedom and by implication how this chapter understands rights talk. "We should not think of freedom as a universal which is gradually realized over time."7 "Freedom is something which is constantly produced. Liberalism. . .proposes to manufacture it constantly, to arouse it and produce it, with, of course, [the system] of constraints and the problems of cost raised by this production."8 Foucault here strips freedom, and by implication

6 Francis Fukuyama, "The End of History?" in *The National Interest*, Summer, 1989.

7 Michel Foucault, *The Birth of Biopolitics:Lectures at the College de France*, Michael Senellart, Ed., Graham Burchell, Trs., New York: Palgrave, 2008, p. 63.
8 *The Birth of Biopolitics*, p. 65.

democracy too, of any metaphysical telos. Freedom is now something produced, more of an arousal lacking a determinate meaning and, therefore, wielded by all sorts of contrary motives. It is a way of speaking produced by liberalism, and even when it becomes seemingly codified by liberalism's institutions, as in the legislative production of laws and protections that are then tested by a Supreme Court's readings of the constitution, it remains fundamentally elusive and subject to social emergencies and contradictory interpretations of other laws. Freedom is also produced by specific subjectivities that liberalism gives birth to: here, freedom can become the profundity of what one is willing to live and die for, or the triviality of what designers hope to suggest in the aesthetic surfaces of their creations. Freedom, then, is not so much a substantive condition or the telos of nature but more particularly a response to some visceral limitation—and both the limitation and its response to it are to a significant degree sanctioned productions of liberalism.9 Freedom's entire existence, then, is not that of a condition as such, but a response or an arousal to some prior condition of limitation, all of which moves through the distinctive rubrics that mark liberalism. In this sense, freedom is our era's argument machine for limitlessness, a desire machine that motivates. That is, liberalism has produced for our consumption both a vague referent called "freedom" that, nevertheless, determines decisions and a restless longing for something beyond the here and now.

The point of this seeming digression into freedom is to make a similar claim about

9 An interpretation of Foucault's other work on care of the self suggests, ironically, that the tropes of nature and the natural undergird his conceptions of freedom. In sum this interpretation suggests that Foucault may have had a double mind about these matters. At one point he may have thought that freedom was produced by liberalism, but then at another produced by nature. I have no opinion about this interpretation. (David Bleeden, personal conversation.)

liberalism's production of rights discourse. As a kinship term rights talk too has a powerful pedigree, carrying, as it were, messianic undertones. And returning to Arendt's quotation: even though she was far too critical of this same tradition to see herself as its mouthpiece, I think her words do not fully escape the lineage. Neither can contemporary theorists of both the right and left—and this is why I think democracy is mostly fetishized in contemporary political theory. In sum, I want to argue that democratic rhetorics in general and rights discourse in particular sets into motion a subjectivity that can justify the completion of desire. Whereas many other ideologies, such as some religions, set into motion a subjectivity that directly dampens material desires, democracy makes a different sort of move, and looking at rights discourse is one way to examine this.

rights as metaphors of necessity

One of the key issues that bedevils our conception of rights is how to determine whether rights claims are based on primal necessities or primal entitlements, versus whether they are claims based on desire or what I will call here "wants." In sum, when rights claims circulate through public discourse, they often carry with them a deep irresolvable contestation between strong meanings that project a certain timeless universality, innateness, or self-evidence that is wholly independent of personal desires and wants, versus other meanings that project rights as simply a set of "mere" desires or wants of an individual or group. This contestation was already well in place at the inaugural moment of the bourgeois revolutions, and Edmund Burke's 1789 conservative critique of the French Revolution tells us so:

> "These metaphysic rights entering into common life, like rays of light which pierce into a dense medium, are, by the laws of Nature, refracted from their straight line. Indeed, in the gross and complicated mass of human passions and concerns, the primitive rights of men undergo such a variety of refractions and reflections that it becomes absurd to talk of them as if they continued in the simplicity of their original direction."10

Burke's emphasis on refractions and reflections tell us that the rights claimed by the revolutionaries are not direct descendants of "metaphysic rights," that is, those written by the laws of Nature, but have become intermingled with desires and wants that produce the unrestrained life. What Burke wants instead is the responsible life, one that will tame the animality that perplexes humanity. For Burke only the authority of tradition via the institutions of a respectable church and aristocracy and a good king can teach us and lead us to choose correctly between true needs (hence rights) and mere wants and desires. In sum Burke dismissed one of the central claims of the revolutionaries, namely, that their notions of the "rights of man" were direct projections of Natural law. Translating Burke's conclusions into my own language: what some call primal necessities/entitlements will be called by others, such as Burke, "mere" wants, for there is no self-evidence that can help us separate one category from the other. Hence, I argue that this distinction between primal necessities/entitlements versus wants is, ultimately, impossible to make, meaning that rights claims are indeed matters of desire. But even as I adhere to the weaker

10 Edmund Burke, "Reflections on the Revolution in France," in *The Portable Edmund Burke*, Isaac Kramnick (ed.),

meanings of rights claims, I do not deny their importance.

Let me put my cards on the table. I want to argue that rights are a modernist metaphor, a way of talking, a heuristic, a conceptual apparatus, a *topos* or storehouse of social energy. Rights at their minimum are a kind of metaphor for the naming of entitlements and rather often for naming a special type of necessity, necessities linked to some deep wrong that, therefore, can lay an obligation on someone or some entity. But at their maximum rights are something considerably different: they are timeless, universal, self-evident, innate—or, speaking in more contemporary terms, they represent some fundamental "recognition due to each individual."11 Now these maximum meanings of rights cannot be easily stripped off when we hear conversations about rights. That is, these maximum meanings are embedded in how we hear such talk, and the exceptional power of these meanings helps to obscure the metaphoricity. My central point: historically we have had numerous ways of talking about primal necessities and entitlements, and rights claims are a relatively recent set of metaphors for addressing such things. I will also argue that the very fact that we have contestation over what constitutes primal necessities versus wants seems to affirm the notion that rights talk is significantly metaphorical, a kind of naming native to modernity, more heuristical than substantive, more conceptual than definitive. My use of "metaphorical" throughout this text presumes that language typically remains removed from what it names and describes, even though the action of naming intends to bridge that remove. A metaphor and its elaborations, then, posture as a candidate for *the* name in the important action of naming.

New York: Penguin Books, 1999, p. 443.

Let me elaborate further why I think the claim, rights as metaphors, is a credible take on "what rights are." In the grand span of history humans have used many metaphors or terms to name fundamental entitlements and/or necessities and to remind others of their duty or obligation to attend to others. By using the terms "entitlements" and "necessities" I am emphasizing Wolgast's notion that "rights are often spoken of in the language of possessions." In this sense rights function as a kind of "moral property". . .belonging to individuals the way property does." "It focuses attention on the person to whom something is due, just as property law focuses attention on the possessor of property. The individual person with his needs and desires is the central motif." In sum rights talk points to a person who is entitled or "to whom something is due," that is, a desire filled person with necessities that obligates us to answer.12

Clearly, human necessity is a universal condition, but attending to someone else's necessities is not. For instance, people have different capacities for attending to others or obeying others—and some have very little capacity; or at times we must calculate regarding whom we can obey or attend to, and who must be let go before creating even more massive problems. How then do we cultivate a sense of obligation to the necessities and entitlements of others when such obligation is not so self-evident and always submitted to calculation? One way is to embed these conditions and obligations into elaborate and coercive thought systems that provide higher meaning and purpose. Consider how compassion, sympathy, and pity can be deemed virtuous and become moral imperatives according to different religious ideologies: "Blessed are you poor, for yours is the kingdom of God. Blessed are you that hunger now, for

11 Leif Wenar, http://plato.stanford.edu/entries/rights

you shall be satisfied."13 In this rendering the poor have acquired a kind of entitlement, and there is an implied imperative that the rich are obliged to attend to the needs and necessities of the poor. But is "blessedness" part of the ontological condition of the poor and the starving? And is "blessedness" really an entitlement granted only to the poor, a kind of authoritative attribute that we must obey? I doubt it and Marxism agrees. The Marxists of the nineteenth and twentieth centuries deconstructed such claims, revealing their metaphoricity and ideological implications. And yet Marxists retained the obligation to attend to the necessities of the poor: "from each according to his ability, to each according to his needs."14 So compassion, sympathy, and pity in Christianity function as conceptual apparatuses thoroughly heuristic, which resemble the Marxist imperative to distribute one person's abilities to someone else's necessities. That is, these are two sets of metaphors that can be deeply contested and yet function as the groundwork for distinctive ideologies that convince some but not others. Contemporary rights talk, then, does away with the potentially hierarchical and condescending forms of Christian pity and shies away from literal versions of equal distribution. It sides instead with the bourgeoisie. So, we can say that the imperative signified across all

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12 Elizabeth H. Wolgast, *The Grammar of Justice*, Ithaca, NY: Cornell University Press, 1987, p. 29.

13 Luke, 6:20-21, *The Oxford Annotated Bible*, Herbert G. May and Bruce M. Metzger (eds.), New York: Oxford University Press, 1962, p. 1250. And from Buddhism: "and compassionate for the welfare of all creatures and beings, he purifies the mind of the taint of ill-will"—Elizabeth J. Harris, "Detachment and Compassion in Early Buddhism," Buddhist Publication Society, Bodhi Leaves Publication no. 141, 1997, p. 10. Following Harris let me clarify regarding how compassion is understood here. What is being argued is a kind of radical egalitarianism accomplished through the neutralization of self-centeredness. Compassion, then, is not so much a pity for the other but the gradual erosion of self-concern. It is in self-concern that ill will resides. The egalitarianism, then, is not a material condition but a consequence of strenuous observation of one's thoughts, words, and actions. Here too compassion is not innate but the result of disciplined labor that only a few are able to master.

14 V.I. Lenin, *The State and Revolution,* Robert Service (Tr.), London: Penguin Books, 1992, p. 89.

three remains the same, that is, the imperative to address the necessities of others, but there is a new naming in each instance. If the necessities of others and the obligation to care were self-evident or innate, we would not need to name them at all. Nor would we frame these values within elaborate, coercive thought systems, say, a religious ideology emphasizing charity at one historical moment, a political ideology emphasizing material equality at another, and at still another moment a bourgeois ideology emphasizing negative and positive rights that enhance the "rightful" dignity of the individual. In sum the incessant renaming of necessity, the incessant elaboration of moral coercions, the incessant rhetorical *inventio* speak to a certain tragedy, namely, that these concerns are *not* universal, self-evident, innate, or absolute necessities, for if they were, they would preexist us and simply function as part of who we are, and there would be no need to persuade. In sum, we seem to have a primal condition called human necessity that obliges us to act on behalf of others, and this condition has generated a kind of metaphorical expansion over time, a profusion of terms and ideological systems, different ways of talking about the same thing, all because, ironically, necessity and its claim to entitlement and an obligation placed on others are not as self-evident as claimed.15

15 I use the word metaphor as a substitute for Wenar's observations at the end of his philosophical inquiry: "The concept of a right has been reshaped, fitfully, and by strong social forces, for nearly two thousand years. Rights were extant in ancient law, and contested by Christian scholars of the Middle Ages. Rights were later stretched to define the offices of the burgeoning bureaucratic state. Throughout the modern period rights have been grasped by popular movements attempting to protect or empower the excluded, the exploited and the injured. We in the twenty-first century are the inheritors of a concept that has been pulled and cut by many hands, over many years. This is why, when we use the tools of philosophical analysis to detect the deep structure of our concept of rights, we find an irreducible complexity."

"One could hardly count oneself as a theorist if one did not seek a simpler unity—if one did not search for the single logical form, for the single function, that all rights share. The desire for unitary analyses is strong, and for any given concept it cannot be judged a priori whether this desire will be satisfiable. For rights, the desire cannot be satisfied. . . .Theorists who try to tie reasoning about rights to a single pillar will bind their readers with ropes of sand." --Leif Wenar, "The Nature of Rights," in *Philosophy & Public Affairs*, 33, 3:223-252."

If rights, then, are to a significant degree a metaphor, a way of talking, a conceptual apparatus, a heuristic, something not innately substantive until proven so rhetorically, then we can appreciate just how contentious rights claims might be. Let me return again to the distinction between "necessities" and "wants": Both necessities and wants are universal, but even those who might agree that we have an obligation to attend to the necessities of others would not agree that we have a similar obligation to attend to their wants. Necessities pressure a person more powerfully than wants. Obviously the need for food or water as a person dies of starvation or thirst mobilizes my obligation far more powerfully than a person wanting a new car. So is food and clean water a right? Arguably so, according to Article 25 of the Universal Declaration of Human Rights.16 But having a car is not a right. Hence, necessities versus wants seem to be separated by a bright line. But a closer look suggests that there is considerable slippage between "necessities" and "wants," as if the latter is always haunting the former. Indeed, it is not always easy to identify a genuine "necessity." For those who have had the privilege to attend the death of loved ones, as I have, it is oftentimes notable that the dying a few days prior to death voluntarily shut down their "necessity" for food and water. As the body chemical prepares for death, it becomes a very different sort of entity, suggesting that "primal necessities" are at least partly definable by chemical fluctuation.

declarations as genre

16 "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in

It seems to me that the genre of the declaration helps to answer this problem of slippage between necessities and wants. The slippage ultimately is not removable, but the public character of the declaration as genre helps to establish the objectivity of necessities versus the subjectivity of wants, that is, rightful rights versus mere wants.

There are three declarations in particular that form the backdrop of my analysis. These three historical declarations are: the 1689 "English Bill of Rights" ("An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown")17; the 1789 "Declaration of the Rights of Man"18; and the United Nations 1948 "The Universal Declaration of Human Rights."19 (Off in the periphery of my analysis is a fourth document that is not a declaration but is certainly important in the evolution of rights talk: the Bill of Rights, the first ten amendments to the American Constitution.) Clearly the three documents claim to be declarations, but what does it mean to declare, and why do declarations have continuing appeal over time? I want to suggest that these declarations represent a genre and, possibly, a very different sort of speech act.20 Genres seem to represent loose thought systems that precede any specific content and, indeed, may control the content—or if not quite that, then lend particular qualities to the content. Consider another genre: the manifesto. A flamboyant,

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the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." (Article 25, UDHR)

17 "An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown" (English Bill of Rights), Avalon Project: Documents in Law, History, and Diplomacy, http://avalon.law.yale.edu/17th_century/england.asp (accessed 3/9/2010).

18 "Declaration of the Rights of Man, 1789 (La Déclaration des Droits de l'Homme et du Citoyen), Avalon Project: Documents in Law, History, and Diplomacy, http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed 3/9/2010).

19 "The Universal Declaration of Human Rights," http://www.un.org/en/documents/udhr/ (accessed 3/9/2010.

20 Excepting the English Bill of Rights, these documents also "proclaim," and so we might bundle declarations and proclamations together as representing a single genre and, possibly, a speech act.

radical argument must precipitate from that decision, and if it doesn't, it must be called something else, something with much less bite and purpose. The point is that declarations and manifestos organize significant turns in modernity, and we might consider how modernity reveals its evolution through them.

So, I presume that the writers of these documents did not think much about the genre of declarations because they were too busy thinking through and arguing for the rights claims made in these documents. I am reversing that emphasis. My point is that these declarations, as emblematic of a specific genre, create a kind of gravity or gravitas without which rights claims cannot be whatever they are. That is, these claims acquire some of their substance due to the genre that ushers them, for rights claims need weight, so to speak, the weight of Being some sort of natural condition, the condition, say, of being somehow "timeless," "self-evident," "universal," "innate"—or at the very least "necessary." Because of this sort of weight, rights claims can aspire to a special kind of reality and not be labeled inventions of convenience. The genre of declaration helps to create some of this weight. And here's why: It is the job of the "declaration" to obscure the metaphoricity of rights claims by pointing them toward the weightiness of what they aspire to be—and some of this work gets done by distinguishing between "necessities," conditions which are real entitlements and obligations, and "wants," which seem to be lesser conditions.

So, how do declarations do that? The declarations under discussion are the result of deliberating assemblies. In 1689 it is the "Lords Spiritual, Temporal and Commons" who assemble at Westminster, "lawfully, fully, and freely representing all the estates of the people

of this realm." In 1789 it is "the representatives of the French people, organized as a National Assembly. . .that recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the. . .rights of man and of the citizen." In 1948 it is a commission representing only eighteen of the world's nations that draft the declaration, which was then passed by the United Nations General Assembly. Declarations are a type of binding agreement, but they are weaker than treaties, which also bind. Declarations depend on representability for their forcefulness, and it is always force that such documents attempt to muster. One might imagine as comparison the binding force of the Ten Commandments that attempts to represent the voice of God. Declarations, in contrast, are secular documents, but they attempt a similar force through the representation of some collective (the English realm in 1689; the French people in 1789; the world population in 1948). This is what I meant when I said earlier that declarations aspire to a particular kind of reality: that is, the declaration has as its telos the sort of forceful binding that at one time was achieved through supernatural subjects speaking. Habermas says something similar when he says that "communicatively acting individuals are thus subject to the 'must' of a weak transcendental necessity."21 By "communicatively acting individuals" he means people rationally discussing and debating their points of view until they arrive at some end. His point is an important one, for it says that the transcendental force, even without any actual existing transcendent, occurs in modernity during the act of deliberation. Hence, declarations as the products of deliberating delegates representing some larger whole acquire binding force that achieves a kind of weak transcendence. Declarations, then, are examples of

21 Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of*

"universal speak," and they continue in modern terms the intentionality of far more ancient types of "universal speak."

Of course, there are a number of ironies in the claims that I have just made regarding the genre and speech act of the declaration, and it is the 1789 declaration that best reveals some of those ironies. Consider that in 1789 and for considerably later the delegates were profoundly split. Some thought that the Declaration sanctioned "indeterminate liberty" that needed to be countered with a statement of obligations and duties,[22] and later when it came time to materialize equality and universal rights, the delegates from the French Antilles who had argued for their own liberation from trade regulations denied the liberation of slaves; moreover, all rural day laborers, women, hired hands, domestic servants, and many journeymen artisans were disenfranchised from voting and holding office according to rules that required the payment of different amounts of taxes.[23] Or consider the fact that the 1789 declaration cannot resolve the tension between universalism and nationalism, meaning that it reveals itself finally as a spatial conception of rights limited to France compared to the 1948 UN declaration whose spatialization is in the name of the whole planet. These profound disputes, anomalies, and the inherently impossible idealizations behind any attempt at representability return us to the central observation, namely, that the transcendent force of these formal declarations of rights is itself the measure of the extraordinary amount of energy that must be spent because necessities are never self-evident—even though by definition they should be.

Law and Democracy, William Rehg (Tr.), Cambridge, MA: MIT Press, 1998, p. 4.
22 Simon Schama, *Citizens: A Chronicle of the French Revolution*, New York: Alfred Knopf, 1989, p. 443.
23 Schama, 498.

That is, as long as necessities remain metaphors—because they might at any moment be called wants—the sort of binding of the collective that the declaration hopes to achieve remains incomplete, and so the energy spent is meant to address the problem of metaphoricity. In order to dispel the deficiencies and problematics of rights claims, then, a considerable amount of energy is required, energy spent on insuring representability, on deliberation, on the high sounding tones of integrity and moral purpose, and this finally is what I am calling the energy needed to rise above context in order to achieve weak transcendence, which is the telos of the declaration.

A final point: Perhaps the purpose or telos of a declaration of rights is only to incite a possible future. The goal, then, would be to start a long process of embedding certain principles into a material reality that is not presently prepared for such a reality. The disjunct between a present reality and an imagined future is itself an interesting problematic. At any rate, the three declarations interpreted as linked documents suggest a pattern of incitement regarding possible futures. For instance, the 1689 declaration further codifies the rights of subjects versus monarchs, even as it legitimizes monarchy by settling the problem of succession by which William and Mary ascended to power after the abdication of James II. So the 1689 declaration secures the authority of monarchy, but the more important action for us is that the document incites the consolidation of a new kind of subject protected from the pure, arbitrary will of the sovereign. The 1789 declaration upends monarchy itself as it incites subjects to become citizens, but in so doing it "spatializes" rights according to the nation-state, even as it sounds the high tones of universal rights that transcend the nation-state. The consequence

here is that because the category "citizen" is determined by the space of the nation-state, we do not have a way to realize the protections of universal rights for non-citizens such as today's undocumented workers or people fleeing their respective nation-states. That is, rights cannot be truly universal until they can be observed across all spaces. The 1948 declaration answers some of this. It says that there are brutalities sanctioned within and by nation states that contradict a more universal conception of rights. The declaration, therefore, incites a sense of rights whose court of appeal is the "human," not the nation. The irony is that a future that protects universal rights beyond the prerogatives of individual states depends on the creation of a powerful governing entity capable of eradicating abuses protected by claims of national sovereignty or, even more profoundly, claims that protect inequities caused by a globalizing free market. In this sense the 1948 declaration can only be thought of as an incitement, but then that was the condition of the 1689 and 1789 declarations as well.

And so we come to the condition of incitement. According to some legal theorists parts of the Universal Declaration of Human Rights have become part of international customary law.[24] Customary law is ambiguous because it is less than rules that have been established by, say, international conventions, and yet it functions as evidence of a general practice accepted as law.[25] In this sense international customary law is more than good practice or moral terms. There is in addition here a sense of legal obligation: 'Custom in its legal sense means something

24 Peter Bailey, "The Creation of the Universal Declaration of Human Rights," http://www.universalrights.net/main/creation.htm (accessed 3/14/2010).
25 Silke Sahl, "Researching Customary International Law, State Practice and the Pronouncements of States Regarding International Law," GlobaLex, http://www.nyulawglobal.org/globalex/Customary_International_Law.htm (accessed 4/28/2010).

more than mere habit of usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction probably, or at any rate ought to, fall on the transgressor.'26 Indeed, some theorists suggest "that, unlike treaties, which only bind a country once it has accepted the treaty obligations, all countries in the world are bound [by international customary law], whatever their particular view may be. A country cannot repudiate international customary law, as it can a treaty obligation."27

Consider, then, this transformation of the binding declarations that we have been examining, which on closer examination prove not so binding after all, into customary law; or this transformation of the problem of rights—which, as I have argued, is the problem of metaphor, that is, the naming of fundamental necessities that cannot also be named "mere" wants—into customary law. The issue here is that despite all the problematics thus far discussed these declarations of rights are being transformed into international customary law, which may be unenforceable at any given instance but do have, nevertheless, some binding power. So, this transformation of the nonsubstantive and metaphorical into material being, in the form of international customary law, seems to me rather remarkable. The power of incitement layered with all sorts of "weak transcendence" and "universal speak" has enabled this materialization. Because of incitement what does not exist is urged into material being whose final appearance,

26 J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. Oxford: Oxford University Press, 1963, p. 59 as quoted in Silke Sahl, http://www.nyulawglobal.org/globalex/Customary_International_Law.htm (accessed 4/28/2010.
27 Peter Bailey, "The Creation of the Universal Declaration of Human Rights," http://www.universalrights.net/main/creation.htm (accessed 3/14/2010).

if it occurs, will never be what was originally incited, for all of the reasons and problematics that I have been discussing up till now.28

philosophers speaking

Philosophers are not easily persuaded. So, describing human rights as a heuristic, a way of speaking or incitements shaping international law is not sufficient for many philosophers who want the important concepts that underlie our legal frameworks to be more than "mere" words and energy forms. Shouldn't these concepts be substantial, logically consistent, and reason-filled in order to provide some grounds for decision-making and behavior? If our concepts are only ways of speaking or a set of heuristics, they seem equivalent to our whims, stuff that blows through without any necessary moral, theoretical, or analytical bite. I would like to turn to some philosophers who have provided some bite. For instance, Seyla Benhabib in *The Rights of Others* tracks her own thinking against that of Kant and Arendt.29 But a set of arguments more compatible to my own appears in *The Grammar of Justice* by Elizabeth Wolgast.30 Wolgast, as we will see, approaches the question of rights more discursively because of her immersion in

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28 Consider this quotation from *The Huffington Post:* "But if human rights are indeed universal, can they then be denied under certain conditions? . . .There are those in disproportionate positions of political and military power who believe that universal human rights are circumstantial and subject to review. They are not. Human rights are an essential and non-negotiable component of global progress." Here are the sincerely messianic and fetishized overtones of democratic rhetorics fully absorbed by an editorial writer. Couched in weak transcendence this moral incitement in the name of "global progress" aims to make the abstractions of rights embodied, institutionalized, and instrumentalized across all spaces irregardless of calculations by elites. Derek Flood, "Human Rights and Globalization—Synergy or Competition?" *The Huffington Post*, May 10, 2010. http://www.huffingtonpost.com/derek-flood/human-rights-and-globaliz_b_571030.html (accessed on May 11, 2010.

29 Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*, Cambridge: Cambridge University Press, 2004.

Wittgenstein and, as a result, more socially or rhetorically, meaning that the foundational or settled rationality and meaning of such well-worn terms as rights and the social contract are always inflected by their history of use. "We are inclined to begin a subject by asking how crucial terms can be explained or defined, and that approach in turn leads to a separation of understanding and doing, between comprehension and motivation. What we need is a better way to begin," one that brings "'into prominence the fact that the speaking of language is part of an activity, or a form of life.'"31 A key word in Wolgast's description is "motivation," which should remind us of Burke's emphasis on motive and rhetoric's interest in the passions as a part of our sense-making abilities. Broadly speaking the tensions among these thinkers might be boiled down to those who subscribe more to the presumptions and tropes of transparency, and, therefore, move closer to idealism, versus those who subscribe to the presumptions and tropes of opacity and, therefore, move closer to "forms-of-life" theories that are contingent, rhetorical, discursively based. Though I find myself leaning more toward the latter and with Wolgast—and the other three leaning in the other direction—these "leanings," particularly in the case of Arendt, are not more than approximate. Indeed, it may be more appropriate to think of transparency and opacity in ratio with each other at any given instant.

I will start with Benhabib's analysis of Hannah Arendt's notion of a "right to rights" that appears in *The Origins of Totalitarianism.* The concept interests Benhabib considerably as does Kant's notions of cosmopolitan right because both reveal a deep paradox—or what I prefer to call the antinomic conditions (the divided mind, and, by the way, an opacity) at the heart of

30 Elizabeth H. Wolgast, *The Grammar of Justice*, Ithaca, NY: Cornell University Press, 1987.

human rights. This powerful conundrum, to which I have already briefly alluded and that Burke seemed to get but not Paine, is the "conflict between universal human rights and sovereignty claims. . .at the heart of the territorially bounded state-centric international order."32 For Benhabib Kant was intent on locating a fundamental dignity and worth in every person that would be the basis of reciprocal obligations. Reciprocity of this sort functioned as a moral obligation to not "violate the right of humanity in every person." Thus the "freedom of one" would be compatible with the freedom of another, meaning that everyone would have their measure of freedom in so far as they willingly constrained it through civil legislation. Here, then, was the moral imperative at the foundation of "the social contract of civil government under which we all become legal consociates."33 The upshot is that cosmopolitan right for Kant meant that there was a moral "obligation to grant refuge to each human being in need," but, according to Benhabib, he countered that resolution with a contrary, namely, that the granting of "permanent residency" was a privilege of the sovereign community, meaning that naturalization and "denationalization" were in the hands of state authority.34 Here, then, Kant's cosmopolitan rights founders, for the universality of rights are not so universal when shaped by the territorialization of nation-states. Hence, opacity dressed in paradoxes, conundrums, and antinomies raises its difficult head.

Benhabib's reading of Kant's "cosmopolitan right" is as insightful as her reading of Arendt's

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31 Walgast, p. 201; Ludwig Wittgenstein, *The Blue and Brown Books*, New York: Harper and Row, 1958, p. 23.
32 Benhabib, p. 69.
33 Benhabib, pp. 58-59. Immanuel Kant, "Introduction to the Theory of Right" and "The Theory of Right, Part II: Public Right" from "The Metaphysics of Morals," in *Kant: Political Writings*, Hans Reiss, ed., Cambridge, UK: Cambridge University Press, [1797] 1994, 131-176.
34 Benhabib, p. 49.

"the right to have rights." The first "right" in Arendt's formula concerns the right of belonging "to some organized human community." This is a right of membership evoking a moral imperative to 'treat all human beings as persons belonging to some human group and entitled to the protection of the same.' This right seems to be the fundament of all rights, for the second "rights" in Arendt's formula seems to refer to 'civil and political rights' or "citizens' rights." So, "one's status as a rights-bearing person is contingent upon the recognition of one's membership" or one's belonging to some organized human group.35 I repeat much of Benhabib's quotation of Arendt because it is a distinctively creative distillation that brings into focus what Arendt is up to:

> We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation. . .The right that corresponds to this loss and that was never even mentioned among the human rights cannot be expressed in the categories of the eighteenth century because they presume that rights spring immediately from the "nature" of man. . .the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible.36

35 Benhabib, p. 56-57.
36 Benhabib, 55. Benhabib masterly distills paragraphs from Arendt that originally stretch across three pages: Arendt, *The Origins of Totalitarianism*, pp. 296-298.

We might want to attend briefly to what Arendt means when she says that the "right to have rights" refers to a "framework where one is judged by one's actions and opinions." Arendt here is establishing a sharp difference between rights granted due to an ethnic belonging as opposed to a civil belonging. To be judged not by one's nationality or ethnicity but by "one's actions and opinions" signals her deep skepticism regarding nationalism and her strong preference for civic structures. Having lived through the Nazi era, Arendt strongly believed that nationalism, whatever the variety, was to be avoided at all costs. Indeed for her Jewish nationalism too, as the basis for the founding of the Jewish state of Israel at the end of World War II, was evolving its own forms of injustice regarding Palestinians.37 In sum, it was, so to speak, the national half of the nation-state form that had the power to abandon universal rights and thereby toss humanity into a deeply unprotected condition. Her solution was not the establishment of world government but of a civic or political community founded on a more profound sense of equality than nationalism, ethnicity, or difference could offer. But is this a possible solution? Can Arendt achieve her version of cosmopolitan, universal rights, "the right to have rights," by stripping off nationalist and ethnic elements in order to establish a more pure civic structure, a political community so attuned to the ideals of equality that it can transcend ethnic difference and its pull of self-interest? Benhabib's reply, essentially, is that a group is a group whether it is a national group, a minority or ethnic group, or a circumscribed polity: "circumscribed polities. . .perpetrate their own regimes of exclusion." So, if Kant cannot grant a "*moral claim* to permanent residency" because such matters remain the prerogative of the sovereign, Arendt,

37 Arendt, p. 290.

similarly, cannot found cosmopolitanism on any notion of "civic particularism" because particularism always closes the universal.38 As Benhabib states it:

> Universal human rights have a context-transcending appeal, whereas popular and democratic sovereignty must constitute a circumscribed *demos* which acts to govern itself. . . .There is thus an irresolvable contradiction. . .between the expansive and inclusionary principles of moral and political universalism, as anchored in universal human rights, and the particularistic and exclusionary conceptions of democratic closure. . . .Yet modern constitutional democracies are based upon the faith that these two commitments can be used to limit one another, that they can be renegotiated, rearticulated, and resignified."39

I would argue that the dream that democracy can overcome its condition of closure is part of its fetishization, but I would be surprised if Benhabib would agree with my description of democracy. For instance, at the end of her analysis of Arendt's "right to have rights," Benhabib suggests that Arendt could not predict the innovations in international law that have evolved since World War II, or what I mentioned earlier as international customary law. And here Benhabib seems to erect her own version of emerging cosmopolitan rights without denying the forcefulness of the essential contradiction already elaborated. For her, apparently, world government as such is not necessary for a variety of international institutions to have important consequences. She points to a number of examples: the establishment of the UN High Commissioner on Refugees, the World Court, the International Criminal Court, and, more

38 Benhabib, p. 66.

generally, developments in international law regarding the decriminalization of migratory movements. In sum, what all this points to is the emergence of personhood as something independent of national citizenship.40

And yet my observations of these very institutions suggests that they are not projections of a world *demos* with the voting power to choose representatives who are, thereby, legitimized to pass laws on behalf of the *demos*. Rather these institutions are mostly projections of an international legal class with the approval of nationally based leaders. This constellation might be called an international regime. I neither approve or disapprove of such a regime even though it clearly repeats the structures of democratic closure by placing decision-making power in the hands of technocrats, even if well intentioned, honest, and competent. This point is not made by Benhabib. However, one could also say that this regime is a product of earlier incitements that may ultimately incite the creation of a global *demos.* But the more pressing question is whether democratic closure can ever be ruptured—or phrasing it more succinctly: Can there ever be an inclusion that is not simultaneously an exclusion? I suspect not and here's why:

The source of the political is unmet human need.41 (The similarity between "unmet human need" and what was labeled earlier as "primal necessities/obligations" should be obvious.) It is one of the imperatives of democratic institutions to represent unmet need in political deliberation. But its sheer power and complexity makes it significantly unmeasurable and,

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39 Benhabib, p. 19.
40 Benhabib, pp. 67-68.
41 My appreciation to Jane Nicholson for our conversations regarding unmet human needs.

finally, unrepresentable. That is, the compelling nature of unmet human need makes it seem objective, but its subjective nature overruns its objectivity; moreover, democratic rhetorics as an ideological system legitimize and even encourage it, for that is how they fulfill their purpose. In this sense the democratic rhetorics perform a three-fold action: they stir up the desire to address an unmet need (and in the process help shape its reality in the world); they legitimize the need as fulfillment of responsible democratic governance; and, ironically, they dampen and censor the need, for under the principles of the democratic social contract the clamor for one's equality and freedom must adjust to the clamor of someone else's. Thus the democratic rhetorics are deeply antinomic: they urge on the completion of desire even as they curb it.

With those arguments as a backdrop we may be ready to answer the specific question, is there an inclusion that is not also an exclusion? Often unmet need remains closeted in privacy, and individuals may transform, ignore, live with, grudgingly bear up, or succumb to personal want and frustration; but of more interest to my argument here is when unmet need becomes understood as a collective or structural condition, and in so doing becomes a subject of politics. Minority political movements—ethnic, racial, gendered, religious, and so on—shape themselves around some unmet need and the demands for redress. Here is the endless rivalry, the push and pull of now well organized "unmet human needs," each one in competition with another and each one mobilizing on its behalf virtue terms such as justice or the furtherance of equality or commonsense or universal human right or civil right or the original intent of the constitution or sound economic principle, and so on. Here is the noise of unmet human need, forceful but undefinable. I am not saying, of course, that unmet needs are not legitimate or

that we cannot make a determination regarding the truly worthy ones from the unworthy. Of course we can make such determinations and we ought to—and I for one favor the unmet needs of the most marginalized populations. But at a deeper level I am trying to capture the proliferation of legitimacy, the sort of hothouse incubation of unmet needs that occurs under the democratic form. There is something bottomless about unmet need in so far as its claims in the public sphere never cease. It can be applied to all sorts of human conditions, for it is infinitely flexible. The rich can take it up and argue that they are not being treated justly by, say, the tax system, and the poor can take it up and argue that they are not being treated justly by, say, the tax system and its distribution of revenues. Abundant because it is ever renewable, the pathos of unmet human need launches its *topoi* throughout the body politic. The pathos powerfully shapes our moral emergencies, which in turn become foundational grounds for contending parties. Eventually someone's unmet need wins and someone else's loses. Victory here is a matter of democratic closure, for closure means the raw victory of one that marginalizes the other. Perhaps the financing of one lobby pushed aside a counter lobby or pushed aside the petitions of outsiders who could not afford a lobbyist—or perhaps the petitioners turned the tables and won. In the final analysis the winner has their unmet needs represented but not the loser. Ultimately the subjectivity that democracy engenders and nurtures is a powerful set of expectations that far exceeds the mechanisms of representability. The very fact and necessity of choice forces a type of closure. So, if the polity or community of belonging, as described by Benhabib, forces a closing of more universal principles, such as human rights, by distinguishing those who belong from those who do not (say, citizen from

noncitizen), something similar appears at a more micro-level, namely: the imperative of choice determines an unmet human need that gets attention versus another that is postponed.

Let us now turn to Wolgast's analyses of rights, for her vision is dramatically different from those of Benhabib, Kant, and Arendt. She is keenly aware that rights talk represents powerfully aggressive motives between contending parties and that its origins in raw political practice must be taken into account as part of its theoretical analysis. Pushing further we might ask: to what extent does rights talk begin in passionate self-interest and to what extent does its surface of universalism function as a cover and diversion? It has no definitive content that can prevent the emergence of ruthless actions taken in its name. Indeed, if represented with sufficient absoluteness it can justify ruthless actions. Any theoretical account of rights, then, any discussion about the tensions, say, between universal rights and spatialized rights (as discussed by Kant and Arendt for instance) would seem to be a gross distortion if rights themselves are practiced and wagered in ways that are not accounted for in their theoretical narratives.

For Wolgast, rights talk is part of a historical transformation of the political that attempted to locate authority on a different ground. Broadly anti-authoritarian this new discourse has helped to shape a subjectivity that is egoistic, deeply individualistic, and atomizing. Society became a social contract between autonomous agents seeking to pursue their own interests without fear. Political authority became defined as rule over oneself and the institutions of authority, and any other form of rule is now suspect. Societies, then, do not hold together because they represent some sort of binding force but because atomized, equal, and rational

individuals are willing to enter a social contract that guarantees their self-interest.42 Quoting Dworkin, Wolgast maintains that "'rights-based theories'" "'place the individual at the center. . .[and] are concerned with the independence. . .of individual action. They presuppose and protect the value of individual thought and choice.'"43 Wolgast eventually questions whether this particularly American vision satisfies our needs for communal life, and whether such needs must eventually override the structures of atomism and expose in the process its mythic nature. Ultimately, I believe, she compellingly argues that rights talk furthers a "grammar of justice" that has fissured from a "grammar of good," and her intention is to point to the misconceptions in policy and everyday discourse that this fissuring has led to.

Be that as it may, Wolgast has many good things to say about this atomistic vision of the human and one of its central metaphors, the social contract. For instance, it reinforces concepts of privacy; encourages the critique of government; limits the power of government in so far as it threatens "the needs of atomistic units"; and provides a valuable organizing heuristic based on notions of "freedom, autonomy, respect, equality, and the sanctity of desires."44

But let's also explore a few of the internal contradictions in these relations of governance. Consider: for the social contract to endure, government must provide sufficient enforcement (police action) and the economic system must have the capacity to distribute, for without enforcement and some semblance of distribution the very idea of the social contract cannot capture the obedience of highly individualized wills. What then the proper size of government

42 Wolgast, p. 16-17.
43 Wolgast, p. 18.
44 Wolgast, p. 25.

to guarantee that the social contract will hold together? Does a government starved by an anti-authoritarian bias lead to an unraveling of the social contract. Let us not forget that the social contract is modeled on the economic contract and that both of these are premised on atomized, self-interested individuals trying to save themselves from each other; hence, as atomized individuals they call these two powerful metaphors into being in order to guarantee a type of fragile coexistence. Indeed, the very idea of the social contract seems to be built on the foundations of fissuring or fracturing. What holds those forces at bay, then, are the powers of law—which explains perhaps the litigiousness of American society but, more importantly, explains, ironically, why government grows. For government grows as it produces laws—including the laws that reduce government—in the process of addressing the imperatives of fairness in order to abate the fissuring and fracturing.

So, it is this sense of assuring fairness and establishing dignity that makes rights so compelling. They seem to crystallize the modernist subject as a person who ought to when necessary assert a claim upon authority and thereby challenge abuse whether psychological or physical. To embody such a subjectivity means that one is an agent operating in a field of choices in which individuals both determine and take responsibility for the directions of their lives. In this sense rights talk establishes a paradigm of belief that rises to a state of existence that is more than mere belief—and here it is called "natural" or what we all "naturally" want. If natural, then rights are a property or characteristic of who we are, an essence that can be violated only by some illegitimate force. And here the social contract comes to our rescue, for according to its rules and laws we can legitimately demand a taking back of what has been

denied or stolen. In this sense rights seem to be a consequence of atomism if we understand the basic units of society as "discrete and autonomous individuals" constantly contending with one another. Rights "will attach to each individual regardless of his or her characteristics. As persons are independent, so their rights will be defined in a framework of independence. And as the indistinguishable atoms are equal, so their rights need to be equal." Individual rights, then, are a "natural adjunct to atomism."45 In sum, rights talk is part of a construct in which the social is envisioned as a vast system of independence consisting of atomized, autonomous individuals with the authority to claim what is their due. Clearly, there is nothing natural about it, but the energy that it produces provides considerable betterment of daily life, even as the excess of what it produces demands management.

But what happens to Wolgast's analysis when we consider the role of the group in the assertions of individual rights? As has already been noted, the earliest declarations that we examined stressed the possession of individual rights, not, say, the rights of a group or a culture. How did we get from the earliest iterations of rights to today's rights of distinctive groups such as indigenous rights, women's rights, children's rights, or for that matter patients' rights? The answer is not as puzzling as it might first seem. As Charles Taylor argues, individual rights are typically argued for in the context of one's positioning as a member of a group.46 To claim the rights of speech one must be positioned as a speaker; to claim the right of property

45 Wolgast, p. 28.

46 Charles Taylor, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition,* Amy Gutmann ed., Princeton, NJ: Princeton University Press, 1994 (25-73).
DOUBLE CHECK THIS

one must be positioned as a property owner or potential property owner. In all cases this is how we configure rights. Perhaps Wolgast's atomization does not have it quite right, then, for what one is claiming on behalf of oneself can only occur to the extent that one is recognizable as part of a larger membership. In this sense, the irony of individual rights is that any claim made on behalf of a discrete, autonomous individual can only be made if the person can be construed as belonging to an already recognized category. Wolgast's critique, then, of atomized individuals defending their rights as if rights were a kind of moral property is actually a critique of atomized categories of people already legally construed as worthy of respect and protection. There is much to contemplate here: (1) Individual rights appear to sacralize the individual even though the "individual" may be better understood as an entailment of a collective; (2) "legal collectives" are not necessarily identical to the "popular collectives" that cycle through the felt imaginaries of a population; (3) for the latter to become the former rhetorical warfare is necessary—we described this process earlier as incitement, that is, the transformation of artifice into something resembling the natural; (4) the transformation of individuals into collectives is also rhetorical warfare, that is, the never finished work of producing a preferred collective in the midst of competing collectives; (5) atomized collectives who feel that they are legally sanctioned to own a moral property now called "our rights" are engaged in a deep search for a moral authority that lacks equivocation, contingency, and negotiation (in sum, lacks metaphoricity as discussed earlier)—this search is (potentially) for an absolutism that operates under a virtue term, like any other absolutism. I summarize these points and leave out others in order to suggest a field of study for further elaboration.

opacities in general

Where do our inquiries drop us off? And do we have an answer yet to the question, what must be in place for someone to believe in human rights? Both questions have taken us to the threshold of understanding how the presumptions and tropes of transparency are in a face-off with the presumptions and tropes of opacity. I will explain shortly what I mean by transparency and opacity, but before getting to that let me recall some discussions in earlier chapters. Perhaps transparency/opacity is another architectonic equivalent to limitlessness/limitation. Perhaps one is a species of the other. Perhaps both are species of a still more fundamental architectonic not yet named but the only ultimate that deserves this title of titles, as Kenneth Burke might phrase it. Perhaps transparency/opacity is one of the general *topoi* as articulated early on by Aristotle, and, if so, the word "architectonic" is a rather dramatic phrasing of Aristotle's term.47 Well, an exact understanding of transparency/opacity is of no great interest to me. I care more about the specific labors initiated by transparencies and opacities, and the forever ratios and relations that keep them joined—at the hip as it were. Like limitlessness/limitation transparency/opacity thoroughly occupies our sensibilities and thereby generates our made worlds.

So, what must be in place for someone to believe in human rights? A quick answer is that the presumptions and tropes of transparency must be firmly in place, and in order to explain such we might examine Article 14 of The Universal Declaration of Human Rights: "Everyone has

47 **GET THE CITATION**

the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." When Benhabib examines Article 14, she rightly notes: "while the right to seek asylum is recognized as a human right, *the obligation to grant asylum* (italics in text) continues to be jealously guarded by states as a sovereign privilege. . . .neither Kant nor Arendt were wholly wrong in singling out the conflict between universal human rights and sovereignty claims as being the root paradox at the heart of the territorially bounded state-centric international order."48

When one points to paradoxes, antinomies, contradictions, and internal inconsistencies, one is acknowledging the forces of opacity. Opacity is not a linguistic condition that can be resolved with more work or more clear thinking. It is a generalized condition that wholly occupies our sensibilities, social relations, institutional structures, and guiding ideals and principles. You can remove it at some specific moment, but it is fated to return—and given its nature, you do not know when. It is the uncomforting surprise, the invisible that never disappears. And the reason why it can never disappear is captured in the notion of "ratios" mentioned a few paragraphs ago. Opacity has no singular existence independent of transparency but exists as a ratio in relation to transparency—and vice versa. The two are mutually dependent, the ratio of one constituting the ratio of the other. Consider again Article 14 and its attempt to shape a just condition that might be available to all. The maximization of mobility, choice, and political orientation would, on the face of it, lead to a more open and just life whereas their

48 Benhabib, p. 69.

minimization would lead to a life cornered by the constant threat of political persecution. Transparency reigns over the first life whereas opacity reigns over the second. Article 14, then, intends for transparency to reign, but it cannot legally do so for sovereign right trumps human rights; spatialized rights trumps universal rights; spatialized justice trumps abstract justice. In each case territorial boundedness is both a legal condition and circumscription or opacity that qualifies the aspiration to create social relations that go beyond circumscription. That is, we may want transparency to reign; we may want each person to be transparently recognized by any other person, and that all be recognized and protected under a single rule of law that is legitimate and fair, but instead we have the legally justified opacity of territorial boundedness. Of course, territorial boundedness need not endure for all time (and, indeed, saying that it might endure is a claim that both evokes and presumes transparency). A defender of the human rights regime, one who relies, perhaps, on the notion of incitement, might well claim that it is only a matter of time, that the ways in which rights—workers' rights, womens' rights, racial and ethnic rights—have evolved within the territorial boundaries of nation-states is the consequence of an irreversible momentum, a telos; hence, at some point territoriality will give way to a true universality, for if it is "right" for one nation, it should be "right" for the world that such rights should be extended to such peoples everywhere. So, just the existence of Article 14, because it posits an innate contradiction between sovereign rights and universal rights, is sufficient to put pressure on the international legal community as well as the leaders and populist forces of nation-states to resolve eventually the contradiction in favor of universal rights since history reveals the steady progress of an expanding sense of justice as it encounters

the incoherencies of injustice—or so goes the argument. What once were abstract, moral claims aimed against hierarchy have become matters of legal protections and even matters of consciousness—even if, admittedly, both, after hundreds of years, are still not yet hegemonic in any nation-state. What? Not yet hegemonic? After all this time? Yes, not yet hegemonic, for the hegemonic (a species of transparency) marshals the thinkable and sidelines the unthinkable (a species of opacity) but can never do either completely. This condition of incompleteness would seem to hold for any truth regime whether humane or not, whether right or left.

So, idealist theories broadly speaking are founded on the tropes of transparency while skepticism works the tropes of opacity. Of course, the latter cannot proceed without some grounding in transparency, for some transparency must be at work if any perspective is to convince or take hold across time and interlocutors. At any rate I want to conclude with a short list, in part a summary, of some of the presumptions and tropes that must be in place for someone to believe in human rights. Each one is a type of transparency—or more specifically a transparency containing a certain ratio of opacity. So, for someone to believe in human rights, there is a need for the transparency ratio to obscure the opacity ratio. In sum there is the belief (1) that unmet human need is representable; (2) that inclusion without exclusion is possible; (3) that democracy does not "close"; (4) that the rights of persons are self-evident and not a form of speaking, or subject to calculation, genre, or state capacity; (5) that a bright line exists between primal necessities/entitlements and "mere" wants; (6) that the social can be best understood through the metaphor and ideology of contract, implying, as it were, self-interested, autonomous individuals always under the threat of fissuring and fracturing and,

therefore, in need of innate conditions called rights that serve as a legal foundation for protection; (7) that rights as mutually protected moral property equalize and do not further atomize; (8) that some rights, such as property rights, do not lead to the acquisition of power and wealth that may lead to lobbying power that circumscribes the rights of others, and, as a consequence, further atomizes the social.

But there is a particularly thorough-going opacity at the heart of the human rights regime. Rights are certainly one of the cornerstones of the expansion of life. The motive behind their articulation in 1689, 1789, 1948, and other conventions since have been precisely about the broadening of life chances in the face of oppressive practices on the part of sovereigns, armed groups, or other sorts of collectives, individuals, or policies. Rights, then, have often functioned as the foundation for speaking against abuse, and the "rightful" speaker has been the atomized individual and/or group. Perhaps the act of abuse structures these forms of atomization as the only realistic reply. That is, abusive power produces our atomization; hence, the only way to speak to and against power is through atomization. However we configure this, the intention behind these replies has been to expand life by wielding the *topos* of the universal (the all)—even if the speakers "really mean" themselves, that is, their atomized selves or atomized groups. It seems then that the expansion of life may occur in the name of all, but in its moment of utterance it refers to something much less than that. Perhaps this is acceptable, for one can still say that the rights regime has, on the whole, incited a better world, and so remain in basic agreement with Amartya Sen's emphasis that the ethicality of human rights is more important than their ontological verifiability. That is, the value of human rights is not whether they exist

but rather the greater ethical character of the world that rights urge upon us.49 So, Sen's point seems generally adequate to me.

But let's press further, for the goal here is to locate a generalized opacity, and one of these opacities was just named. Another, as I said some time ago, starts with the notion that rights talk legitimizes the completion of desire. But I also suggested that it dampens and censors our desire, and thus the social contract is fissured and fractured by competing desires. The law, ultimately, sits over the cacophony and adjudicates.50 But the adjudication does not stop the proliferation of rights—indeed, perhaps the adjudication serves as impetus for a further proliferation of rights, each right attached to some desire or another. Some recent American examples: fetal rights, tissue rights, and, less seriously, "cycles have equal rights."51 I do not know with any precision if the proliferation of rights over a number of centuries indicates centripetal forces working through the body politic, but, given the trajectory of my thinking, it is tempting to claim that the metaphorical expansion of rights is a driving force without any apparent end. If any of this makes sense, the fissured, fractured world, upon which the social contract is premised, is not ameliorated by a rights regime. Indeed, rights talk may address but it also furthers the fissured, fractured world of the social contract. Rights, when enforceable,

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49 Amartya Sen, *The Idea of Justice*, Cambridge, MA: The Belknap Press of Harvard University Press, 2009.
50 This thought seemingly is shared by retired Supreme Court Justice David Souter: "The Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one. The court has to decide which of our approved desires has the better claim, right here, right now, and a court has to do more than read fairly when it makes this kind of choice. And choices. . .make up much of what we call law." Supreme Court Justice David H. Souter, Commencement Remarks, Harvard University, May 27, 2010, "Text of Justice David Souter's Speech," in *Harvard Gazette*, June 4, 2010. http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ (accessed 6/4/2010).
51 Bumper sticker, Lac de Flambeau,Wisconsin, 6/5/2010.

may extend some relief to the most oppressed, but they do so divisively and not through mutual identification. It is not rights claimants who settle their disagreements by balancing the merits of their competing positions but rather neutral, or so we hope, judges. Rights claimants are more interested in pursuing the perfection of their arguments than in balancing and restraining them. Hence, a question can be asked: Rights claims certainly seem ethical, even deeply so, but what is the nature of this ethicality in light of my last description?

My point is that the ethicality here is a type of fundamental opacity, which at its worst merges into a lethality that is sometimes literal. Consider the recent expansion of drone warfare as one of the signs of the perfectibility of the expansion of life, which has been such a compelling force throughout much of modernity. A question to ask: Is the protection and expansion of life, no matter how ethical, also a type of suicide and homicide? Drone warfare is an example of the desire to perfect warfare, for the expansion of life in military terms requires increases in lethality. If at one point militaries willingly absorbed massive numbers of dead soldiers, today's advanced militaries do just the opposite. The body of the soldier has become more expensive, his or her right to life more demanding, so that the modern soldier is a huge investment in advanced technologies of armoring and weaponry, leading to asymmetrical warfare between the expensive soldier defending "democracy" and the inexpensive soldier, perhaps a suicide bomber, defending his or her belief or territory. For both parties collateral damage is not collateral—it is integral. For the expensive soldier it is a consequence of the increase in lethality, of the perfectionism that is at the heart of protecting life, in this case the soldier's life; for the inexpensive soldier lacking a high-tech airforce, the body becomes the tool

of stealth, so in this case the perfectionism is that absolute belief can justify the absolute actions of the martyr who ecstatically seeks out the killing of combatants and noncombatants. The expansion of life here is in the mystic-like belief that heavenly life is more "life filled" than worldly life. These indeed are swirling perfectionisms in which one party's sense of self preservation collides with the same imperative held by another party.

Of course, there are many who would disagree with the above implications, for, on the face of it, the rights regime has not participated in the increase of lethality. In fact it has done just the opposite. Consider the curbs that are typically placed on a state's use of force. One example appears in Article 2 of the European Convention on Human Rights and Its Five Protocols: "everyone's right to life shall be protected by law." The state can only legally kill under certain conditions, say, "for the purpose of quelling a riot or insurrection" only if it does not exceed the necessary amount of force.52 And in just war theory a state cannot use excessive force against its enemies. So, there is long standing precedent of human rights protections against excessive lethality; hence, both the Israeli military and Gaza rocket launches have been consistently criticized for human rights violations for causing excessive collateral and intentional damage. But this, perhaps, is the point: on the face of it, human rights' protections further a grand, more transparent world where abuse and power are checked and greater equality is the goal. Below the face of it, however, where human rights are not in the hands of

52Article 2, European Convention on Human Rights and Its Five Protocols. http://www.hri.org/docs/ECHR50.html (accessed 6/5/2010. The European Convention on Human Rights along with its two related institutions, the European Commission of Human Rights and the European Court of Human Rights, would seem to be one of the more thorough-going developments of the rights regime. Even a cursory glance at the decisions of the court, though limited to Europe, suggests a level of specificity and deliberation never achieved by the documents that have been analyzed in this paper.

courts whose very purpose is to settle competing claims of desire, rights talk circulates through multiple causes, and because of its aura of absoluteness, it can create strong foundations for taking action. In this domain rights talk is highly malleable and ready to be appropriated by anyone: the right to one's religious beliefs (Article 18, UDHR); personal security rights (Article 3, UDHR); social, cultural, and community rights understood as "indispensable" for one's "dignity" and the development of one's "personality" (Article 22 and Article 29, UDHR); and overlaying all of these specific human rights, the more general right of the citizen, who demands that the sovereign state create his or her security so that the other rights can be realized. And from this "right" a state can justify an international security regime that sees great benefit to drone warfare. The expansion of MY life and way of life, that is, the right of the citizen to demand that the state provide massive security, is the expansion of life in ratio to an expansion of lethality, or, phrasing it differently, the rights regime as guarantor of transparency in ratio to a generalized opacity.