

Consent or contestation?

Duncan Ivison, University of Sydney

I

That consent could wholly explain – either descriptively or normatively – the legitimacy of the structure of political community and its most important and influential institutions and practices is deeply implausible. There are two general sorts of considerations adduced against such a proposition. First, history simply refutes it: force is an essential feature of the founding of any political society, and arguably, for its continued existence, and power relations, in all their complexity, are imperfectly tracked by consent. Moreover, there are deep questions about what people are actually consenting to, given the plurality and changing nature of political collectivities over time. Second, in modern societies (perhaps in just any complex human society) our conduct is shaped and governed in so many ways so as to influence not only the options we have, but also the interests, desires and capabilities constitutive of our ability to act in relation to them in the first place. This undermines any easy connection between the presence of consent and my being free. A familiar conundrum for consent as a standard of legitimacy is that if it means literally that individual consent is required for non-arbitrariness in public decision-making, then public decision-making – indeed almost any form of collective action – becomes almost impossible. If only tacit or implicit consent is required, then we can find it everywhere, and thus nowhere, and the standard is empty.

And yet, to borrow a phrase from Jeremy Webber's chapter, the 'mirage (or 'trope') of consent' remains an important background value for modern political theory in all sorts of ways, and especially for liberal political theory.¹ What explains its persistence? One strategy has been to discount actual consent and move instead to the more rarified air of hypothetical consent, and thus translate the standard into a heuristic device for testing what agents would have agreed to in suitably designed choosing conditions. I won't discuss the details of that move here.² But this strategy trades on making consent essentially redundant, and focusing instead on impartiality or reciprocity. However, another reason why consent still seems to matter is because of those conceptions or values that lie behind it and which continue to resonate with us: namely, the conception of self it presupposes - the rights-bearing subject - and along with it, a powerful conception of legitimacy. It is to these issues I want to turn in this chapter. And I want to do so by asking what we can learn by considering them in the context of indigenous peoples' claims against liberal democratic states, and in their attempt to turn back the language of consent - and indeed rights - against the forces acting on them.

How should we understand this process? Does it represent the kind of 'concretization' of the universal that discourse-theorists speak about?³ Does it represent the construction of a kind of Rawlsian overlapping consensus?⁴ Or is it instead an example of the

¹ Jeremy Webber, 'Challenges of Consent', this volume, pp. 00-00.

² John Rawls, A Theory of Justice: Revised Edition (Cambridge Mass., Harvard University Press, 1999). T.M. Scanlon, What We Owe to Each Other (Cambridge Mass., Harvard University Press, 1998).

³ Jurgen Habermas, Between Facts and Norms (Cambridge Mass., MIT Press, 1997); Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (Cambridge, CUP, 1992).

⁴ John Rawls, Political Liberalism (New York, Columbia UP, 1993).

‘practices of liberty’ – what James Tully has called forms of ‘infra-political resistance’⁵ – discussed in various writings by Michel Foucault?⁶ I believe it probably closer to the last of these, for reasons that will hopefully become clearer as we proceed. But I am not concerned here with specifying more precisely what Foucault meant by practices of liberty (or what Tully means by infra-political resistances). Instead, I want to link what I take to be one of the central insights of this work, along with that of democratic theorists like Ian Shapiro⁷, Iris Young⁸ and Philip Pettit⁹, to our grappling with the nature of consent. This is, that what is required for thinking about the legitimacy or non-arbitrariness in the exercise of various powers, or in public decision-making more generally, is not actual or implied consent, but as Pettit has put it, ‘the permanent possibility of effectively contesting’ those rules and norms to which we are subject.¹⁰ The standard is thus contestability, not consent. What matters is not whether or not people have consented to various arrangements that act on them, but whether or not they have the possibility to challenge (and shape) those arrangements which unavoidably act on them.

But then the obvious question is: what are the conditions required for meaningful and effective contestation? How do we distinguish between arrangements that serve to

⁵ James Tully, ‘The Struggle of Indigenous Peoples for and of Freedom’, in D. Ivison, P. Patton, W. Sanders eds. Political Theory and the Rights of Indigenous Peoples (Cambridge, CUP, 1997) pp. 36-59; ‘To Think and Act Differently’ in S. Ashenden, D. Owen eds. Foucault Contra Habermas: recasting the dialogue between genealogy and critical theory (London, SAGE, 1999) pp. 90-142.

⁶ Michel Foucault, Essential Works: Ethics, ed. Paul Rabinow (London, Penguin, 2000); Essential Works: Power, ed. James D. Faubion (London, Penguin, 2000).

⁷ Ian Shapiro, Democratic Justice (New Haven, Yale University Press, 1999).

⁸ Iris Young Inclusion and Democracy (Oxford, OUP, 2000).

⁹ Philip Pettit, Republicanism: A Theory of Freedom and Government (Oxford, OUP, 1997).

¹⁰ In Pettit, Republicanism, p. 184.

entrench relations of power into relations of domination, and those that break free of them? I won't be able to offer a full response to these questions here, but I shall try to sketch the beginnings of one. The use and counter-use of the language of rights in the context of indigenous peoples' claims presents an interesting opportunity for considering these questions.

II

To begin with, some basic distinctions: There is a difference between being subject to relations of power in general and being dominated. To be dominated entails, very generally, to have almost no room of maneuver with regard to the relations of power acting on you; to have no means of contesting those relations of power. More specifically, it entails not only a lack of resources –of income, opportunities and rights – but also to lack the institutional and normative conditions required for the development and exercise of those very capacities, as well as the opportunity to participate in the elaboration and interpretation of their meaning.¹¹ It means lacking the capabilities, in Sen's phrase, to develop and exercise them effectively.¹² To be dominated entails that the various decision-making procedures, public institutions and practices, up to and including such things as the extant division of labour or the structure of the public culture, systematically prevent or seriously constrain the capacities of individuals and

¹¹ See Young, Justice and the Politics of Difference (Princeton, PUP, 1990) p. 37; Waldron, 'The right to have rights' in Law and Disagreement (New York, OUP, 1999) pp. 232-54; also Foucault, 'The Subject and Power' in Essential Works: Power, pp. 326-48.

¹² See for example Martha Nussbaum, Women and Human Development: The Capabilities Approach (Cambridge, CUP, 2000); Amartya Sen, Development as Freedom (New York, OUP, 1999).

groups to contest and shape those relations of power acting on them. Pettit has recently summarized one aspect of this kind of constraint as the extent to which someone exists under the ‘alienating control’ of someone else¹³: that A can obstruct, coerce, deceive or manipulate B’s choices in ways that B can’t meaningfully check in some way, or which aren’t ‘reasoned’ in the appropriate sense.¹⁴ Non-domination is thus the condition in which alienating control is either absent or constrained in some way.

With this basic conception of domination in mind, let us turn to a particular account of the relation between agency, consent and freedom. When liberals say that ‘P has a right to x’ they generally mean that P has a legitimate claim against others; that others have a duty not to prevent P from doing X, or to enable P to do X, and that these duties are related to certain of P’s important interests - including her interest in freedom, but not only that.¹⁵ Rights have a complex historical lineage, but politically, at least within the liberal tradition, they have signaled important limits on what may and may not be done to individuals by the state or other significant political actors. They have been used to mark particular threats that individuals and groups face in the kinds of societies that have developed since the early modern period. The close relation between the language of *ius* and *dominium* – right and property – linked this general picture of agency to a spatial

¹³ Pettit, ‘A Republican Law of Peoples’ (2007) unpublished paper prepared for the Republicanism and Global Politics Conference, Cambridge University, May 2007. I leave aside the complication of whether or not alienating control can be exercised by non-human agents or ‘processes’ or systems (like markets) that can only be indirectly related to the intentions of individuals.

¹⁴ Pettit, ‘A republican law of peoples’; see also ‘Republican freedom and contestatory democratization’ in Ian Shapiro, Casiano Hacker Cordon eds. Democracy’s Value (New York, CUP, 1999) pp. 163-1990.

¹⁵ I leave aside, for now, the extended analysis of the different kinds of jural relations rights describe, as provided by Wesley Hohfeld, as well as the various debates between ‘interest’ and ‘choice’ theories of rights. I subscribe, very generally, to the ‘interest’ theory. For more extended discussion see Ivison, Rights (Stocksfield, Acumen, 2008).

metaphor of an inviolable sphere or boundary of non-interference (from the state or other powerful social and political actors) behind which the individual's basic freedom was protected. The idea, roughly speaking, is to accord a particular weight and importance to the individual's own point of view about their most important interests, and to see the language and practice of subjective rights as particularly well-suited to doing so.¹⁶ Of course, there are then complex issues about the nature and scope of the duties that follow from a claim being justified along these lines – debates that also go well before the emergence of liberalism.¹⁷ Rights signal the urgency of importance of certain basic interests, but that doesn't mean they express absolute moral constraints, and thus absolute limits on interference, since judgments about interests will unavoidably conflict in many different contexts, as well as be incomplete and subject to disagreement. Rights will inevitably conflict. Some stipulate that for rights to be rights there should be no possibility of conflict, at least in principle.¹⁸ But this is far too strict a standard, especially for a political theory of rights.

Still, on this liberal account, rights are tied to a view of human beings as possessing equal moral worth and a picture of the individual – no matter how embedded or encumbered by community or tradition – as leading a life that is distinctly hers, as seen from the inside.¹⁹ It's not just that P has a need or interest that needs attending to, but that it is she who is claiming the protection or promotion of those needs and interests, and

¹⁶ Jeremy Waldron, Liberal Rights: Collected Papers 1981-1991 (Cambridge, CUP, 1993).

¹⁷ Richard Tuck, Natural Rights Theories: Their Origin and Development (Cambridge, CUP, 1979).

¹⁸ See for example Hilliel Steiner, An Essay on Rights (Oxford, OUP, 1994).

¹⁹ Waldron, 'Rights', in Robert Goodin, Philip Pettit (eds) A Companion to Contemporary Political Philosophy, p. 583; 'When justice replaces affection: the need for rights', in Liberal Rights, pp. 370-391.

thus even when her rights are being violated, the claim brings to bear on that situation her dignity and moral worth as an agent. This is one way of making sense of the Kantian precept that we are to treat humanity in each person as an end in itself, and never as a means. A similar idea lies at the heart of the discourse theory of Habermas and others inspired by him. They ask, ‘which norms and normative institutional arrangements could be considered valid by all those who would be affected if they were participants in special moral argumentation called discourses?’.²⁰ The appeal is thus to individual moral worth; to the idea that I must respect your capacity for communicative freedom by offering you reasons – by offering you a justification that you could accept for the norms and institutions that will regulate your actions and mine. This standard is used as a way of critically engaging with the more specific rights-regimes of particular polities; to resituate the universal in the concrete and to work through the inevitable conflicts that emerge between them.

Along with an emphasis on the equal moral worth of individuals, liberal rights, at least according to the strand I am exploring here, are fundamentally relational.²¹ That is to say, although they often start from a claim about the moral worth of individuals exercising their agency in accordance with their practical reason, the rights that people have are tied to more general principles of justice, or (as we have seen) to inter-subjectively constituted

²⁰ Habermas, Between Facts and Norms; see also Benhabib, The Rights of Others: Aliens, residents and citizens (Cambridge, CUP, 2004).

²¹ This point has been made before by Martha Minnow, Jennifer Nedelsky and Jeremy Waldron. I am indebted to their many writings on this issue; see especially Jennifer Nedelsky, ‘Reconceiving Rights as Relationship’, Review of Constitutional Studies 1(1993) 1-26.

norms of communicative freedom.²² In other words, any account of rights needs to provide an account of how they operate as a system, or as a structure of entitlements and responsibilities. Rights and duties are reciprocal and correlative, and as such they establish patterns of relationships that impose benefits and burdens on people to varying degrees, depending on the contexts in which they are claimed. This is especially the case if we accept, as I think we must, that rights will conflict, given the difficult judgments that have to be made about the interests we think deserve protection or promotion and the distributive issues these judgments raise. The allocation of rights depends on deeper and more systematic arguments about the nature of ‘basic’ or ‘urgent’ interests and the kind of society in which they are best realized or ‘housed’. In short: rights presuppose a wider account of the social and political order in which they are to be situated. They presuppose community (actually: communities) as much as they complicate it. So the choice is not between a theory of rights that is relational and one that is not. It is between different kinds of relations, and the role that our conceptions of rights play in structuring them.

So a liberal system of rights rests, in part, on a particular conception of normative agency; namely the moral agent exercising her practical reason in attempting to live a life that is distinctly hers, as opposed to being at the mercy of powerful political actors or anonymous systems and structures. And this picture of agency is often associated with an emphasis on consent, here understood in the sense that she is owed reasons – a justification – for exercise of coercive power over her that are accessible to her and that

²² In Rawls’s case, for example, the determination of specific forms of rights occurs within the framework of a four-stage sequence Rawls uses to structure the application of justice as fairness to society, once the principles have been settled upon (see PL 396-8, 402-3, 406-7, 415-19). As he puts it, the four-stage sequence is meant to ‘guide our judgments of justice, depending on their subject and context’ (397). But compare A Theory of Justice, n. 30 pp. 442-3.

she could accept or not reasonably reject. And this picture of agency is further associated with an agent who possesses rights: that is, as possessing not only enforceable claims (broadly understood) that others are under an obligation to honor and/or help promote, but often also claims to basic resources that enable her to actually be able to live a life that is distinctively hers. I am referring here, of course, to social and economic rights, which many egalitarian liberals are keen to defend.²³ A liberal system of rights is meant to set in place a pattern of relationships in which the equal moral worth of individuals, endowed with both autonomy and needs (who is both ‘capable and needy’, in Nussbaum’s useful phrase), is recognized, protected and promoted.

III

Now what is wrong with this picture? [I shall set aside here objections to rights in general, of the kind offered by various radical critics of liberalism, significant as they are. Needless to say, insofar as I argue that rights can play a role in contributing to human flourishing, I am rejecting one of the central claims of that critique.] How could such a conception of agency and of rights be considered problematic, especially from the perspective of minority groups, such as indigenous peoples? Liberal rights understood along these lines aren’t meant to be an accurate descriptive account of how individuals actually are treated in society. They are normative claims; they are a way of conceptualizing what it might mean to treat individuals equally - with all due respect- in a complex legal and political system. A standard complaint is that the emphasis on rational agency underplays the embodied particularity of human agency; the fact that

²³ See Cecile Fabre, Social Rights Under the Constitution (Oxford, OUP, 2000) Waldron, ‘Liberal Rights: Two sides of the coin’ in Liberal Rights, pp. 1-34.

human beings are fundamentally embodied beings and live under convention – under culture - and importantly, as Bernard Williams has put it, conventions that have a history.²⁴ If our conception of rational agency is too narrow as a ground for ascribing rights, we run into trouble ascribing them to those who sit on the margins of rational agency, a category that at various times in our history included ‘uncivilized’ peoples, women, the non-propertied, children and the disabled, amongst others. Conceptions of rationality, and especially of reasonableness, when applied to models of political deliberation are never purely formal, and embody various cultural presuppositions and modes of historical framing. Moreover, so this argument goes, if we downplay the embodied and encultured nature of our agency, we get a distorted view of what makes for a valuable human life, and thus of the kinds of rights we need to help protect and promote such a life.²⁵

So if we shift our conception of agency lying behind the rights-bearing subject from one focused mainly on rational agency to one of contextualized agency, how does this affect our understanding of the nature of rights? And what consequences does it have for conceiving of the legitimacy of a political community? One thing that happens, I believe, is that the emphasis on consent fades, at least to a certain extent. We begin, instead, from the premise that we are embedded in all manner of relationships and forms of interdependency to which we did not (and could not) consent to. And so our focus shifts from an emphasis on the presence or absence of consent, to the nature of those relations and interdependencies.

²⁴ Bernard Williams, *Making Sense of Humanity and other Philosophical Papers 1982-1993* (Cambridge, CUP, 1995).

²⁵ See Jennifer Nedelsky, ‘Reconceiving Autonomy’, *The Yale Journal of Law and Feminism*, 1 (1989), pp. 7-36.

How then should we conceive of the legitimacy question? Instead of looking for evidence of primal or continuing consent, we should be looking for evidence of contestability – for the capacity of people to effectively contest those norms or actions acting on them, and to alter or shape their course in different ways. More importantly, these capacities can't be assumed to exist independent of the very forces they are to be deployed against. Thus, how can they be developed and maintained? What are the conditions required for their realization? And so, how can rights be reconceived in such a way so as to serve the promotion of this ideal of critical contestability?

The situation of indigenous peoples in liberal democracies provides a striking example of the challenges this kind of view faces. Jeremy Bentham once said of natural rights that they were 'a species of cold heat, a sort of dry moisture, a kind of resplendent darkness'.²⁶ Some have thought this applies to another improbable conjunction: 'aboriginal rights'. Taiiaki Alfred has argued that these rights are, in fact, 'the benefits accrued by indigenous peoples who have agreed to abandon their autonomy in order to enter the legal and political framework of the state...indigenous rights get defined not with respect to what exists in the minds and cultures of Native people, but in relation to the demands, interests and opinions of the millions of other peoples'.²⁷ Here liberal rights seem not so much protection against the arbitrary exercise of power, or as serving to promote of the capacities of individuals and groups to realize their equal worth, but rather a manifestation of the very coercive powers they were supposed to protect indigenous peoples against.

²⁶ In Jeremy Waldron (ed) Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man (London, Routledge, 2002) p. 73.

²⁷ Taiiaki Alfred, Peace, power, righteousness (Don Mills, OUP, 1999) p. 140.

And yet, just as modern rights theorists have felt the sting of Bentham's charge and gone on to try and defend them nonetheless, some indigenous scholars have sought to reconstruct the potential of rights-talk for their people. John Borrows, for example, in the course of a discussion of the impact of the Canadian Charter of Rights and Freedoms on Aboriginal self-government, argues that the underlying principles of the Charter could potentially help indigenous peoples. More specifically, Borrows argues that the Charter can help create a 'conversation' between the forms of equality embodied in the European languages of rights and those within Indigenous traditions and political theories.²⁸ What is striking in Borrows' argument is the alignment of three distinct modalities of politics that are often kept apart: conversation, rights and tradition. Borrows suggests that by exploiting the conjunction of the wide acceptance of rights language in the broader Canadian community, along with the conceptual and justificatory indeterminacy of rights claims themselves, they can be put to work in contributing to the emancipation as opposed to the domination of indigenous peoples.²⁹ It is no an easy task, to be sure.³⁰ However, 'retranslated and transposed by [indigenous peoples]', Borrows argues, the language of rights can be used to 'convey our meanings'.³¹ His specific example is the debate over sexual equality, but the general point is this: the language of rights, just like

²⁸ John Borrows, 'Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics', University of New Brunswick Law Journal 43 (1994) pp. 19-48.

²⁹ For a related but different approach to putting rights to work for indigenous peoples, see Larissa Behrendt, Achieving Social Justice: Indigenous Rights and Australia's Future (Sydney, Federation Press, 2003).

³⁰ See Borrows, 'Domesticating Doctrines: Aboriginal Peoples after the Royal Commission', McGill LJ 46, 3 (2000) 615-661.

³¹ 'Contemporary Traditional Equality'.

other normative languages³², can be translated and re-described through a (genuine) conversation between different traditions, and a living tradition can be re-invigorated, and some of its more vulnerable elements even gain strength from, a suitably transformed discourse of rights and citizenship. He calls his general approach a form of ‘critical pragmatism’.³³

Debates over the history and use of the ‘doctrine of aboriginal rights’ exemplify the kind of genealogical conceptual analysis practiced by Foucault and others, where the purposes which governed the emergence of a concept (or institution or social practice) may be quite different from those it currently serves. These rights came into existence in the context of colonial rule and the imposition of imperial constitutional law between the 17th and 18th centuries in Canada, Australia and elsewhere.³⁴ So it’s clear that the doctrine was formed within the context of deeply unequal relations of power between colonizers and colonized, and helped entrench unjust relations between indigenous and settler populations. And yet today, in different contexts – including, among other things, different beliefs about race, anti-discrimination and amidst a resurgence of indigenous activism - this very doctrine has offered one avenue through which indigenous peoples

³² See Borrows, ‘Landed Citizenship: Narratives of Aboriginal Political Participation’ in Will Kymlicka, Wayne Norman eds. Citizenship in Diverse Societies (Oxford, OUP, 2000) especially at pp. 329-30. The idea, roughly speaking, is that Aboriginal self-government also means bringing to bear Aboriginal political philosophies and values on the wider community and its decision-making processes. Without the recognition of both separateness and interdependency, Aboriginal people lack the means to effectively contest those norms and institutions acting on their most important interests.

³³ Borrows, ‘Contemporary Traditional Equality’.

³⁴ See Brian Slattery, ‘Understanding Aboriginal Rights’, Canadian Bar Review 66, 2, (1987) pp. 727-89; ‘Aboriginal Sovereignty and Imperial Claims’ Osgoode Hall Law Journal 29 (1991) 681-703; Cole Harris, Making Native Space: Colonialism, Resistance, and Reserves in British Columbia (Vancouver, UBC Press, 2002); Paul Kael, European Conquest and the Rights of Indigenous Peoples (Cambridge, CUP, 2002).

have been able to contest the actions the state and other powerful actors acting on them, as imperfect as the legal and political process has been. Although pursuing contestation through the language of rights has been required precisely because of the persistence of the legal and political doctrines and institutions that were imposed on them, Borrows (and others) still claim they can play a role in aboriginal struggles for and of freedom. How can this be?

One straightforward argument, as we've seen, is that the sheer ubiquity of the language of rights in our public discourse offers a tool for indigenous peoples to exploit.³⁵ Insofar as the ascription of rights entails the ascription of some form of equal worth and agency to individuals (and sometimes groups), this can be used by the more vulnerable in society to promote their claims for equal consideration and entitlement. In Australia, for example, Larissa Behrendt has argued that, for all its faults, the language of rights enables the principle of non-discrimination to become publicly manifest in a potentially effective way – connecting the harms suffered by indigenous people to a moral (and legal) register accessible to the vast majority of citizens.³⁶ Rights articulate harms and command the attention of others; they signal relatively insistent or preemptory moral considerations.³⁷ Note that this means the appeal to the pragmatism of rights can't be a pure strategic play. There is an explicit appeal to the equal moral worth of individuals (and especially to their agency) underlying these arguments. So it is value-

³⁵ This is emphasized by Borrows and Behrendt; see also Patricia Williams, The Alchemy of race and rights (Cambridge Mass., Harvard UP, 1991).

³⁶ Behrendt, Achieving Social Justice.

³⁷ Wayne Sumner, The Moral Foundation of Rights (Oxford, OUP, 1987) p. 12.

infused pragmatism, and pragmatic or practical in the sense that it focuses on the actions or activities of individuals (or groups) as rights claimants.³⁸

IV

But attractive as this critical pragmatism might be, it is vulnerable to a powerful objection that has its origins in variations of Marx's critique of liberal rights in On the Jewish Question. Marx argued that liberal rights were a product of the relations of power constitutive of bourgeois society, and are thus unable to provide the grounds for an effective critique of the inequality and alienation that society. This critique has been extended in interesting ways. The concept of a right has both intensional and extensional dimensions. The crucial question is the relation between these dimensions – between the claim that 'X is a right' and the claim that 'P has a right to X', where P represents a particular agent at a particular point and place in time. Wendy Brown has argued that the fundamental paradox of rights is 'the paradox between the universal idiom and the local effect of rights'.³⁹ That is, the interplay between the apparent freedom to act in a certain

³⁸ In Australia there has been much debate about the supposed failure of the 'rights agenda' with regard to the health and well-being of Aboriginal peoples. These arguments focus on how an increasing emphasis on rights – including rights of self-determination and social welfare – has grown alongside catastrophic rates of drug and alcohol addiction, domestic violence, systematic unemployment and under-education. The suggestion is that rights discourse, and especially collective rights, has distracted political attention from the need for individuals to take greater personal responsibility for their behaviour. These are complex issues that deserve separate treatment. However, it is simplistic to talk about the failure of the rights agenda if the claimants never had the opportunity to genuinely exercise them in the first place. For an interesting analysis of the problems from the perspective of one Aboriginal community see From a Hand Out to a Hand Up: Cape York Welfare Reform Project (Cape York Institute for Policy and Leadership, May 2007).

³⁹ Wendy Brown, States of Injury: Power and Freedom in Late Modernity (Princeton, PUP, 1995) p. 97; 'Suffering rights as paradoxes', Constellations 7, 2 (2000) p. 233.

way, and the regulatory, discursive and normative context within which that ‘free action’ takes place.⁴⁰ Thus rights can end up doing two different things at the same time. First, rights can work so as to align individual conduct with various kinds of particular social, political, economic and cultural norms. Rights underdetermine action to a certain extent (they can be waived, withheld, alienated or suspended), but also structure a range of possible actions. A right to sue for defamation or invasion of privacy ensures that the law will enforce culturally specific standards of civility.⁴¹ A right to be immunized from certain kinds of interference might embody various assumptions about the proper scope of the law or of government in general. Of course, rights are also used to challenge prevalent social norms as well. But a crucial issue is often not only the absence or presence of a legally enforceable right, but of the social and political conditions surrounding it: To which interests, reasons, norms or capacities do rights refer? How and in what context is the right exercised and by whom? Will it be an individual, a group? Will it be exercised by the agent herself, or by a representative? And how will it be enforced, and by whom? Strictly or informally? By the state or by other means? In other words, what are the social, historical and norm-based ‘surrounds’ of the claim? What conventions and norms govern the uptake of a rights claim? As I have been arguing, rights are by definition a social practice.⁴² They simultaneously presuppose various kinds

⁴⁰ For further discussion of this point in relation to conceptions of freedom see Ivison, The Self at Liberty: Political Argument and the Arts of Government (Cornell, CUP, 1997).

⁴¹ This example was suggested to me by Robert Post.

⁴² See Richard Flathman, The Practice of Rights (Cambridge, CUP, 1976). Cf. Alasdair MacIntyre, After Virtue (London, Duckworth, 1985): ‘A practice is any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of

of social arrangements and patterns of interaction, as well as reinforce and help bring various institutions and ways of acting into being.

To summarize: Rights empower different individuals and groups unevenly, depending on their capacity to exercise the powers, capacities or immunities to which the rights refer. The danger of rights-talk is that in some instances, it can end up entrenching various relations of power if rights are ascribed but the effective means for exercising them are not. And (or) it can end up de-politicizing those relations of power; that is, by abstracting or obscuring those relations of power constitutive of a particular identity or subject relevant to the ascription of rights. The designation ‘women’s rights’, for example, according to Brown, ‘may entail some protection from the most immobilizing features of that designation’ but ‘reinscribes as it protects us, and thus enables our further regulation through that designation’.⁴³ Standard liberal rights protecting bodily integrity or freedom from violence, for example, can fail to protect women from harms perpetrated elsewhere when combined with other claims to do with religious freedom or property

activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended’. (p. 175) Note that for MacIntyre, an important feature of a practice is that the standards of excellence are internal to it, which help us work through disagreements rationally, and achieve the goods of the practice. A tradition is constituted by a set of such practices, and provides standards of reasoning and deliberation required for moral reasoning and action. Individuals are always situated within a context of practices and traditions, and yet also always reflecting on and critically engaging with them: ‘a living tradition... is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition’. (207) He is notorious for accusing liberalism, however, of being an *incoherent* tradition, given that it is a form of life constituted by debates between apparently incommensurable views. Lying in the background of this paper, however, is the thought that MacIntyre is wrong about this, and that liberalism is indeed a complex tradition – or family of traditions - in which the accommodation of deep disagreement is one of the constitutive features of the practices therein.

⁴³ Brown, ‘Suffering rights as paradoxes’, p. 232.

rights. Rights aren't the only means of protecting individuals from harm. But they are a particularly powerful discourse in liberal democratic societies.

Keeping this kind of objection in mind, I want to work back from Borrows' argument for a critical pragmatic approach to rights to consider what consequence it might have for conceiving of rights in general. Is the language and practice of rights suitably commodious to accommodate such re-inscriptions and re-translations, especially as envisaged by advocates of 'aboriginal rights'? If rights are always embedded within various social relations, and thus also power relations, can they also provide a critical standard for politics? In other words, are there conceptual limits on the extent to which the language of rights can be put to work to serve the ends of not only Aboriginal peoples, but also the construction of the form of social and political relations intimated in Borrows' reference to the modality of a 'conversation' between law and tradition? To return to my opening remarks, is there a conception of rights which can contribute to promoting the conditions for effective contestation – including contesting the way conceptions of rights themselves function to entrench or de-politicize discrimination.

V

The first step is to conceive of rights more naturalistically.⁴⁴ In contemporary philosophy, to be a naturalist is generally to believe that philosophical enquiry should be fundamentally continuous with empirical enquiry in the sciences. But what does 'continuous with empirical enquiry in the sciences' really mean? Which sciences

⁴⁴ See especially the discussion in Williams, 'Making Sense of Humanity' in Making Sense of Humanity, pp. 79-89; cf. Brian Leiter, Nietzsche on Morality (London, Routledge, 2002) pp. 3-25. I am grateful to David Macarthur for many helpful discussions about philosophical naturalism.

exactly? Do they include the social and human sciences? And what does ‘in continuity with’ imply? That we should seek to use similar kinds of methodologies as used in the sciences – broadly construed – to explain human behaviour? Or, that our philosophical theories, including our theories of morality or politics, must be justified by the results of science? As I use it here, naturalism refers to a kind of methodological naturalism, but broadly construed, and found in philosophers as diverse as Hume, Spinoza, Nietzsche, Foucault and Bernard Williams, amongst others. What they share is an approach to explaining human behaviour – including human intentions, beliefs, actions and values – by locating their causal determinants either in a distinctive theory of human nature, or indeed outside of any such theory (as in Foucault’s case, to ‘discourse’ or ‘biopower’ or some other complex of socio-empirical phenomena). The aim is to try and understand man as part of nature as opposed to standing fundamentally above or against it, but nor reducible to a narrow scientific conception of nature either. What we are, as human beings, is clearly a function, in part, of our biological or genetic make-up (in the loose sense of providing us with dispositions towards displaying certain properties or phenotypic traits depending on the context). And the fact that we are embodied creatures also has significant moral and political relevance. If central to our conception of who we are includes the ways in which we are all vulnerable to various bodily afflictions and to changing fortunes across our life-cycle (albeit in different ways), this will in turn shape our beliefs about what we owe to each other. But what we are is also, crucially, a function of the way we are shaped and molded by cultural and social factors, and particularly various social and historical norms (which in turn shape the meaning of the ‘fact’ of our embodiedness). More to the point, if it is an ethological fact that human beings live

under culture, then any proper understanding of human behaviour will require making sense of the complex ideas human beings have about their culture(s). An interactive, naturalistic approach to normative questions in moral and political philosophy must account for these features.

And so if human beings are complex assemblages of desire and affect, which shape our rational preferences and beliefs, then we need to track the complex interactions between these different aspects in relation to claims about rights. And thus we need to understand how various ‘provisional fixed points’ in judgments about rights are formed in the first place, and especially the historical, cultural and normative character of those judgments.

Such a naturalistic approach is consistent with a belief that there is a difference between moral and legal rights, or morality and convention more generally. But it takes a more historically dynamic approach to the nature of moral beliefs and thus also about the distinction between moral and legal rights more generally.⁴⁵ To be rights holder is to possess a certain moral status, but that status is not exclusively a function of some transcendental claim about human nature, or about certain properties that all human beings share everywhere. That status will also have social and political conditions required for its realization; people will have to be recognized in the appropriate sense, and institutions will be required to make the moral rights at issue effective.⁴⁶ And the

⁴⁵ For two very interesting discussions along these lines to which I am indebted see Derrick Darby, ‘Unnatural Rights’, Canadian Journal of Philosophy 33 (2003) pp. 49-82; and ‘Blacks and Rights: A Bittersweet Legacy’, Law, Culture and the Humanities 2, (2006) 420-439.

⁴⁶ See Rex Martin, A System of Rights (Oxford, Clarendon Press, 1993). Similarly, rights can’t be reduced in every instance to legal claims, since we tend to want to ask

beliefs that sustain judgments about the moral status itself well alter across time and space according to changing historical and social conditions.

Second, and following from this general approach, we should think of rights, very generally, as entailing not only protections or immunities against the state (or other agents), but also the capacity to act on the actions of others (either negatively and positively), as opposed to being conceived primarily as barriers or trumps. Rights act so as to structure the range of possible actions open to individuals and groups in a particular society. This is consistent with the general point above that rights are fundamentally relational; they set in place a pattern of relationships within which people can act or are acted upon.

Putting these two points together, it follows that when the relations of power that sustain a particular pattern or distribution of rights begins to change, so too the kinds of rights. Certain rights can disappear or change over time and new ones emerge in their place. For example, Ian Shapiro has argued that to say A has a right to X is to say something about (i) who or what is the subject of the entitlement; (ii) what is the substance of the entitlement; (iii) what is the basis of the entitlement; and (iv) what the purpose of the entitlement is.⁴⁷ Thus, on my analysis, change can occur along any one of these four axes. Our beliefs about the subject of rights may change, which in turn may alter our sense of the substance and/or purpose of various entitlements. Change along one axis, but not along others, can render the bundle unstable.

evaluative questions about the purpose or ends in relation to which those rights are implemented or enforced

⁴⁷ See Ian Shapiro, The Evolution of Liberal Rights Theory (New York, CUP, 1986).

Consider two examples. The political empowerment of women changed many of the rights husband used to have over their wives. But if the beliefs that sustain an unequal division of labour within the home and the family remain constant, there can occur a disjunction between changes in the nature of the subject of rights and the various purposes or justifications upon which other rights connected to it depend (for example, to privacy, or to freedom of religion). Similarly, if one thinks of the history of the discourse of rights as applied to Aboriginal peoples, one can see how the different axes can come apart, or how changes along one triggers change along another. Thus, in some periods, Aboriginal peoples were often denied the status of rights holders under natural law, since they were ‘uncivilized’. They were also denied legal rights, because they were not considered to be citizens. Then they were extended liberal rights, but only if they became citizens, the conditions of which, in many cases, involved abandoning their own conceptions of political community and property. And yet the assertion of ‘Aboriginal title’ and self-government, did begin to change our understanding of the subject of those claims previously grasped under another description; which in turn became connected to increasing criticism of notions such as the ‘civilizational standard’ and ‘terra nullius’, as they were deployed in domestic and international law. These developments generated new kinds of legal rights, or at least new interpretations of old ones, which then also were shaped by changes in the economic organization of states, and the changing economic and political architecture of the international political system.

These kinds of disjunctions and tensions – between new rights and the old, and between the emergence of new subjects of rights and the purposes and bases upon which others connected to them depend - can produce paradoxes and asymmetries, but also what

Moira Gatens has called ‘productive paradoxes’:⁴⁸ a clash that can only be resolved by either exposing false premises, or reopening debate on fundamental issues deemed to be settled and which structure the background against which the apparent paradox is set. When ‘new’ rights are asserted in this way, often a broader claim about the relational structure within which they are set is being made. A different system of rights, in other words, is often implicitly (and sometimes explicitly) being appealed to by the claimants of these as-yet-to-be-realized claims. The meaning rights-claims can be altered when claimed by those who weren’t originally deemed eligible to claim them.

This leads finally to the normative character of this naturalistic account of rights, as I am calling it. How can we account for the normative force of rights claims, and therefore the important critical role they play in contemporary politics, whilst at the same time embracing a historical and contextual account of the nature and basis of rights? Does it mean giving up on the project of providing a philosophical foundation for rights altogether? But if we do that, then what is the force of claims to previously unrecognized rights of property, self-government or non-discrimination? If the force of the justification is no more than the fact that we share a culture that endorses the idea of rights, then how can this work in conditions of deep cultural diversity – ie. in the conditions faced by just about every political community in the world today? The bottom line is that in all the examples I have cited, at some basic level, there is an appeal to the equal moral worth of individuals underlying the appeal to rights. But this basic moral claim is also dependent on it being supported not only by a moral justification of the right in question, but that this justification be actually reflectively available to agents

⁴⁸ Moira Gatens, ‘Genealogy, Rights and Sexual Difference’, paper presented to the American Political Science Association Meeting, September 2004.

understood as culturally and socially embedded beings.⁴⁹ The moral justification is tied up in complex ways with socially recognized practices – this is a pragmatist claim – but not necessarily reducible to them. Our commitment to equality guides our moral discussions in these contexts, but in ways that are constantly in dispute, never fully determinate and subject to revision in being applied to particular contexts. There are moral rights, but they are always tied to the considered (and not-so considered) moral convictions of particular societies at particular times. What it means to treat someone equally then will require both the formal attribution of equal worth and yet also attention to the contexts – interpretive and practical - in which people’s capacities for action are developed and made effective.

I shall conclude by acknowledging some of the deep problems this approach to rights faces. There are at least six. First, as I have already mentioned, it blurs the distinction between legal and moral rights, since naturalistic rights are institution-dependent (understood very broadly) – dependent on the existence of not only certain kinds of moral beliefs, but various kinds of institutions and social practices. This might contract the imaginative or aspirational quality of rights-claims, especially in contexts where they are crucial precisely because there aren’t any effective means for enforcing them, and the point of the claim is to draw attention to that gap. Second, it cuts away at the preemptory and stringent character of rights claims that many moral and political philosophers see as essential for marking and promoting the basic equality and freedom of individuals. A naturalistic analysis of rights places them much more squarely in the realm of social practices –into politics – and thus in the middle of disputes over what counts as an

⁴⁹ This emphasis on the moral justification of rights being ‘reflexively available’ to agents is well-emphasized by Martin, A System of Rights.

essential moral interest or capacity, and hence much less able to act as side-constraints or restrictions on political action itself. Fourthly, rights now seem less constant, and certainly not timeless; their content and meaning shifts and flows with changes in relations of power and sociability between people, and with wider social and political changes across time. Fifthly, in being bound more closely with such historical and sociological factors, rights seem to lose the deep, direct connection many associate with a moral constant I have admitted is central to any practice of rights worth defending: the attribution of equal moral worth to every human being. And finally, even given all this attention to relations of power etc., does it really answer Taiaiake Alfred's challenge? Can the language of rights really be put to work to support indigenous peoples' freedom, as opposed to their domination?

These are serious objections and deserve a more extended response than I can give here.⁵⁰ A comprehensive response would, I think, draw on this basic thought: The naturalistic approach sketched above is concerned precisely to make explicit the ways our extant practices of rights often fail to treat individuals equally, and to seek new forms and understanding of rights that better approximate that ideal, itself now re-conceptualized in light of these new understandings. One of the products of such an analysis, it seems to me, is to see the subject of rights in a new light: Not as the agent who possesses rights prior to entry into civil society which then act as conditions on the exercise of power, but rather as an agent who is constituted by both relations of power and freedom, and for whom rights serve as a means of critically reflecting upon, contesting and altering those relations in ways that promote their effective freedom.

⁵⁰ For more discussion see Ivison, Postcolonial Liberalism (Cambridge, CUP, 2002); and Rights.