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Why Human Rights Aren't Working

Reestablishing the Relationship Between Practice and Theory

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“And you, of tender years,
Can't know the fears that your elders grew by.”
- “Teach Your Children”, Graham Nash

Introduction

“Rights without a meta-narrative are like a car without seat-belts; on hitting the first moral bump with ontological implications, the passengers’ safety is jeopardized.”¹ The problem is, however, that the world of international human rights *is* a car without seat-belts and we have to keep driving anyway. When we conceive our notions of rights, there are two simultaneous processes happening: first, overarching concepts such as justice, equality, freedom, goodness, etc. are conceptualized in the realm of metaphysics, the ‘meta-narrative’ referred to above, or even ‘theory’, if you will. Second, these concepts are then translated and implemented in the realm of ‘practice’, and manifested as laws, customs, and norms. It seems logical to think (and indeed, this is a pervasive thought in rights discourses) that we must first successfully define our terms and ideals, and once this is achieved we will have a consistent basis for developing practices of rights, enforcement problems notwithstanding. Unfortunately, we are reluctant to admit a simple truth: it is entirely possible, and rather likely, that a decisive, comprehensive metaphysics upon which we can all agree will always be beyond our reach. Although there is merit, both practically and philosophically speaking in continuing to search for the best possible foundations of our normative frameworks, we must (and do) proceed in establishing and implementing those frameworks without definitive theories in place. It is the great challenge of human rights that as we continuously attempt to define those elusive concepts, we must continue to establish laws and treaties as if we have already successfully completed the metaphysical task.

In some ways, this is akin to Thomas Nagel’s theories of the absurd.² Part of what makes life seem absurd is that we are self-conscious enough to recognize the absurdity, but must proceed with our lives taken in all seriousness in order to survive.

¹ Wilson, Richard A. (ed). *Human Rights, Culture & Context: Anthropological Perspectives*. Pluto Press, London 1997. p. 8

² Nagel, Thomas. “The Absurd”. *The Journal of Philosophy*. vol. 68. no. 20. October 1971. pp. 716-727.

We must ascribe meaning where there is almost necessarily none. This is, in fact, an apt allegory for all human rights work: surely, those that participate in this field with any honesty have had one (or several, or daily) moments of the lowest despair, moments in which we realize that we will probably achieve nothing significant in our lifetime to lessen the suffering of those around us, but in any event we must try. Our only choice in the establishment of a rights framework is to carry out simultaneously the tasks of creating both theory and practice, despite the difficulty in achieving consistency in the latter without stability in the former. Thus, in this paper I will attempt to address both theory and practice, as unrelated as they may seem at times.

I propose the following research question, simple or unorthodox as it may seem: why is our international system of human rights not working? In asking this question, I have faced several ripostes, including the query – what do you mean by “*why*”? For the purposes of this paper, I concede that there are myriad semantic deconstructions that can complicate this line of inquiry; however, I wish to approach the question in the intuitive sense, and I intend it to be taken at face value. Of course, one could argue that various aspects of the international system of rights *are* working, and clearly they are. Living conditions, particularly in the affluent states of the global North and West have far surpassed anything we could have dreamed of even two hundred years ago. Our monitoring systems and comprehensive institutions are coherent and complex, from the grassroots level of NGOs and civil society organizations to the behemoth constructions of the United Nations body. Collectively, our understanding of rights has broadened to include everything from LGBTQI rights, to climate change, and cyber rights. The list of successes is almost inexhaustive at this point, and one would be hard pressed to defend the argument that rights are ‘not working’ at all. This is not the point I would wish to make because it is simply not true. Nevertheless, when I have posed my research question in past months to those around me, from friends in casual conversation, to colleagues, academics, and professionals within the human rights field, there tends to be a nearly visceral response that my research question, in an intuitive and fundamental way has merit. Surely, there is no way to deny the obvious discrepancy between the aims with which this international system was conceived, and the glaring failure to fulfill those aims on a mass scale, largely within the global South and East (or, perhaps, one could argue,

smaller nation states still suffering the repercussions of their colonial pasts).³ To put it bluntly, perpetual war, irresponsible environmental policies, constant human rights violations (on both smaller and greater scales), and an increasing crisis of statelessness for asylum seekers, among a cornucopia of other challenges are simply not what our predecessors had in mind when developing the United Nations and its charter in “sav[ing] succeeding generations from the scourge of war.”⁴

Certainly, my research question requires some clarification, because there are many senses in which it can be understood. As I have mentioned, I believe there is an intuitive collective, colloquial understanding when we say that something is not working, but in order to provide a more stable foundation from which to analyze whether something is “working” or fulfilling the function for which it was intended, I pose my question based on the original purposes of our current system of rights, and the aims or objectives that have been expressed in international human rights treaties or declarations, most particularly the United Nations Charter (UNC) and the International Bill of Rights⁵ (though not limited to those documents only). It would be ineffective to list all of those objectives and their much debated interpretations here, but I refer to those pledges of Member States such as: “achiev[ing], in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”⁶ For example,

The General Assembly, Proclaims [the] Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.⁷

³ Statistics on, *inter alia*, poverty and welfare by country are available through the World bank at: www.worldbank.org/en/topic/poverty/lac-equity-lab1/glance

⁴ UN, Charter of the United Nations and Statute of the International Court of Justice, 1 UNTS XVI, 24 October 1945. Preamble.

⁵ The International Bill of Rights is comprised of the UDHR, the ICCPR, and the ICESCR.

⁶ UNGA, *Universal Declaration of Human Rights*, 10 December 1948; adopted by General Assembly Resolution 217 A (III) of 10 December 1948. Preamble.

⁷ *Ibid.*

Similarly, goals can be identified as “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want”, and conditions “whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”⁸ The Preambles to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) also include a recognition that “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized.”⁹

Perhaps the aims of the rights framework are most lucidly articulated in Article 1 of the UNC itself: “to maintain international peace and security [...], to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples [...], to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, [...and...] to be a center for harmonizing the actions of nations in the attainment of these common ends.”¹⁰

Thus, taking into consideration these specific aims as outlined by the organ established for the fulfillment and protection of peoples’ rights, I pose yet another question, related to my original one: can we truly say that we have even come close to reaching any of these objectives? In attempting to answer this question, it seems imperative to approach both metaphysical and practical considerations, to deconstruct both theory and practice. I believe it would be prudent not only to build a normative inquiry as to the efficacy of the implementation of rights (through an analysis of rights bodies as well as manifestations of rights or their violations), but also to investigate the value of the rights themselves, and whether those rights *can*, in fact, be effective or are desirable for individuals at all.

Furthermore, when I contend that human rights are “not working”, I also intend this to be read in conjunction with the assumption that we have now, as a full society,

⁸ UNGA, International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. Preamble.

⁹ UNGA, International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976, 999 UNTS 171, ICCPR). Preamble., and ICESCR, Preamble.

¹⁰ UNC. Arts. 1.1. - 1.4.

passed into a mode of existence for better or worse, that is globalized and internationalized in nature, as the aforementioned treaties establish in their Preambles. The functionality of an international system of rights was created with the intention of international cooperation at its very core, and so I take “not working” to signify not working in the bigger picture. I am not interested in the “imagined communities”¹¹ of nation states, and their ever-evolving borders and boundaries, nor am I interested that some countries may (by public survey or other means) establish they are more content with their governments and rights (or quality of life) than others. I am interested, however, in the quantitative and qualitative analyses that consistently suggest that large percentages of populations the world over are living with very little protection for any of their human rights at all.

Now, hopefully I have sufficiently addressed the “not working” definition for that portion of my research question: the system of rights is *not working* with respect to the fulfillment of its initial aspirations, on an international scale, nor has it come close to achieving those ends in the majority of communities around the globe. In subsequent sections, then, we can pass from this aspect of the research question to the feature that seeks to address “*why*”.

The first part of my paper will focus on the practice of human rights, largely as it is enacted via the United Nations. I will engage in a critical analysis of the institution itself, as well as attempting to earnestly assess the success or failure of rights, as they are expressed in international and regional treaties. The second half of my work will focus on theory, more specifically the varied and unstable metaphysics that we use to determine which rights we value above others, how biopolitics inscribe the power of the sovereign on the individual, and our ability as individuals to dissent or fight for change outside of the legal framework.

¹¹ Anderson, Benedict R. O'G. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Verso, London 1991.

Methodology

Embarking upon this work, I have run into several challenges while attempting to create a stable methodology. In most general terms, I would argue that I have used a rather simple method, whereby I engaged in a close-reading analysis of several philosophical, legal, political, and literary texts and have done my best to incorporate intersecting theories since this is an interdisciplinary program; however, this was far from a simple process and there was considerable difficulty in finding pertinent texts that were sufficiently ‘interdisciplinary’ for my considerations within the faculties of law and human rights. For the most part, I had to research outside these disciplines, or in their very nooks and crannies (but glaringly present and celebrated in other fields as visionary) to find suitable material.

To some extent, I believe this work itself to be a self-reflexive methodological endeavor (or meta-methodological if you prefer), in the way that I propose new methods for understanding and incorporating interdisciplinarity within studies of the law. For the purposes of this paper, I have considered it more effective to explain methodologies in more detail in the sections to which they pertain. In part, of course I have done this purposefully, maybe in the self-interested motivation to be mildly subversive, and also because I question the value of methodology in non-statistical analysis.

A note on the structure: I have also chosen to stray from the University’s strict ‘guidelines’ for chapter headings, division of sections, and other templates at times. I think this is reasonable considering my work is not a legal paper, and I have prioritized my own style preferences to contribute to the flow of my research.

Finally, a note to say that in no way are the arguments proposed meant to undermine the dedication of the countless individuals that participate in the institutions I have criticized, or who devote their lives to the improvement and attainment of human rights as we know them. In Churchill’s words: “Let no one look down on those honourable, well-meaning men whose actions are chronicled in these pages, without searching his own heart, reviewing his own discharge of public duty, and applying the lessons of the past to his future conduct.”¹²

¹² Churchill, Winston. *The Gathering Storm*. Houghton Mifflin: Boston, 1948. Preface, iv.

Part 1: Practice

Chapter 1:

The United Nations Body

As mentioned above, in this section I wish to look at the practical aspect of why our current paradigm of rights is dysfunctional, and I choose as my starting point the United Nations (UN) itself, as the self-appointed organ for monitoring, implementing, and determining human rights, both at the operative and moral/ethical levels. I think this is a useful (though daunting) commencement. Let us take the following example: I have to assemble a bookshelf I have purchased from Ikea. I have appointed myself the ‘assembler’, I have all of the tools I require, and the parts of the bookshelf lay on the floor before me, ready to come together to fulfill their purpose as a place for holding books. Somehow, however, the shelf is not coming together. In existential terms,¹³ I have certain circumstances of facticity surrounding me, i.e., aspects of my situation that I cannot change. I am me, regardless of what I may do in that moment, and there are a finite amount of parts and tools I have at my disposal. So, to examine why the bookshelf is not coming together, I must shift to consider my transcendence, or rather the aspects of the situation that I can control or change in order to achieve the desired effect of ‘assembled bookshelf’. Assuming that all of my tools and parts are as they should be, I am either a) not completing the motions with my body as I should, b) not implementing my tools correctly, c) not understanding how the shelf should look, and therefore building incorrectly, or d) all of the above.

Granted, these options can be deconstructed and possibly formulated another way. That is not the point. The point remains that as an allegory for a system of rights, the UN fills all of the functions in the bookshelf scenario. Insofar as the UN is an entity comprised of individuals and communities that also wish to enjoy rights (or the

¹³ The concepts of facticity and transcendence were first explained in this way by Jean-Paul Sartre, and can be found in Sartre, Jean-Paul. *Being and Nothingness: An Essay on Phenomenological Ontology*. Washington Square Press, New York 1966.

bookshelf), the UN is the assembler. Moreover, the UN also embodies the tools *and* the materials since it simultaneously constructs the rights that build the framework or shelf, and creates the apparatuses that will put that framework together and keep it intact. Most interestingly, the UN is the shelf itself, since the rights we possess were, and continue to be, determined by state representatives, leaders, and policy makers. Glaringly, it seems highly problematic that a system of rights should be so confusingly self-contained, but the lacunae and inherent self-contradictions in the UN's configuration are for the most part beyond the scope of this paper. Instead, I wish to pursue the line of inquiry in the 'bookshelf' scenario that positions the UN as a tool. In other words, are we using a screwdriver to hammer in a nail? And, if so, why?

Chapter 2:

What is the United Nations?

It may seem regressive at this point to determine a working conceptual definition for the UN, but there still remains ample disagreement as to the nature of this entity that could be construed as an impediment to answering my research question. If we are to determine the correctness of the tool for assembling our bookshelf, we must first know which tool we have in hand. In part, I am indebted to my supervisor for illuminating the necessity of this point, partially because he alluded to the position that the United Nations in general, and the Security Council in specific are not governments. On it's face, I do not find this notion implausible, and at times I am tempted to agree, considering that there is (or at least is meant to be) some difference between state governments and the overarching organ we have established for overseeing those various governments. Nevertheless, I wish to clearly assert that a) at the very least, the UN is a form of authority, and b) the UN is a world government with various branches. I believe there is sufficient evidence for the first claim that I will not defend this position here, but the second requires some explanation.

The New Oxford American Dictionary defines *government* as: “the governing body of a nation, state, or community [...]; the system by which a nation, state, or community is governed [...]; the action or manner of controlling or regulating a nation, organization, or people [...]; the group of people in office at a particular time; administration.”¹⁴ Additionally, the same source defines *governing body* as, “a group of people who formulate the policy and direct the affairs of an institution in partnership with the managers, especially on a voluntary or part-time basis.”¹⁵ Using these definitions, we can confidently refer to the UN both as a governing body and as a government, and in recognizing it as such, we can open the door for new types of analyses that contain the same criteria with which we criticize governments on a smaller or domestic scale. As

¹⁴ Stevenson, Angus and Christine A. Lindberg (eds). *New Oxford American Dictionary*. 3rd ed. Oxford UP, Oxford 2010.

¹⁵ *Ibid.*

Noam Chomsky rightly attests, “any form of authority requires justification; it’s not self justified. [...] Any time you find a form of authority illegitimate, you ought to challenge it. It’s something that conflicts with human rights and liberties.”¹⁶

Functioning under this assumption, that the UN is, in fact, a government, we can then conceive of the Security Council as a branch of the world government, and potentially more specifically refer to it as a legislative branch. In any case, we can proceed in the inquiry of why the system of rights is not functioning properly by examining whether or not the “rights government” is successfully fulfilling its authoritative role, in Chomsky’s sense of justifying authority. There are multiple aspects of the UN we could consider for this analysis, but I will investigate whether the structure of the UN reflects that of a healthy democratic government or institution, as well as considering criticisms of its structure and operations.

¹⁶ Chomsky, Noam. *Chronicles of Dissent*. David Barsamian (interviewer). New Star Books, Vancouver 1992. Introduction, xv.

Chapter 3: Criticisms of the United Nations

In scrutinizing the UN as a government, there are several criteria for democracy in relation to which the institution fails. Obvious inconsistencies include policies that appoint most representatives, as opposed to electing them, minority member states monopolizing legislative ability and power, and arguably high levels of politicking and corruption (though these are incredibly difficult to verify given the lack of information and transparency in UN operations). Some of the challenges facing democratic operations within the UN are beyond the scope of this paper; however, it is noteworthy that both internally and externally many have lost faith in the UN's ability to govern itself, let alone the rest of the world. In a recent article entitled "I Love the U.N., but It Is Failing", Anthony Banbury explains:

I have worked for the United Nations for most of the last three decades. I was a human rights officer in Haiti in the 1990s and served in the former Yugoslavia during the Srebrenica genocide. I helped lead the response to the Indian Ocean tsunami and the Haitian earthquake, planned the mission to eliminate Syrian chemical weapons, and most recently led the Ebola mission in West Africa. I care deeply for the principles the United Nations is designed to uphold.
And that's why I have decided to leave.¹⁷

There is a strong case to be made that gradually, the prevailing sentiments regarding the UN have become disillusionment, disappointment, and distrust within and outside of the organization. Perhaps if these feelings were echoed only by the few, or select critics outside of the framework, the implications would not be so alarming; however, the UN appears to be approaching a point where it's failings can no longer be ignored among heads of state and policy makers. When several internal high-level officials no longer support this system of authority, it seems necessary to inquire as to why, and where to pinpoint its underachievements.

¹⁷ Banbury, Anthony. "I Love the U.N., but It Is Failing". *The New York Times*. Online. 18 March, 2016. Available at: www.nytimes.com/2016/03/20/opinion/sunday/i-love-the-un-but-it-is-failing.html?_r=1. Accessed on 21 April 2017.

Banbury identifies administrative gaps and personnel problems as most detrimental:

Six years ago, I became an assistant secretary general, posted to the headquarters in New York. I was no stranger to red tape, but I was unprepared for the blur of Orwellian admonitions and Carrollian logic that govern the place. If you locked a team of evil geniuses in a laboratory, they could not design a bureaucracy so maddeningly complex, requiring black hole into which disappear countless tax dollars and human aspirations, never to be seen again.¹⁸

Former Secretary General Kofi Annan has also expressed dissatisfaction while in office, urging that, “we must move from an era of legislation to an era of implementation,”¹⁹ and “[e]ven more important, we must take concrete steps to reduce selective application, arbitrary enforcement and breach without consequence.”²⁰ As Annan puts quite bluntly, “[v]illagers huddling in fear at the sound of Government bombing raids or the appearance of murderous militias on the horizon find no solace in the unimplemented words of the Geneva Conventions.”²¹ Annan seems to identify here obstacles of implementations and enforcement mechanisms; although these may be true, this perspective still partially places the locus of inaction or blame either on operations or member states that struggle or shirk compliance responsibilities.

Yet others are more directly critical of member states as entities unto themselves, their geopolitical interests, and how internal decision-making processes are stultified by political inefficacy:

The power struggle that has ensued between member states of the North and South in pursuit of [...] differing objectives is (at least, in part) responsible for the current paralysis in ‘political will’, which is so often blamed for the [...] the inability of member states to agree on or implement an appropriate reform agenda²². [Furthermore], the slow, complicated, and cumbersome multilateral decision-making process

¹⁸ *Ibid.*

¹⁹ Annan, Kofi. *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General. 21 March 2005, UN Doc. A/59/2005. para. 132.

²⁰ *Ibid.*, para. 131.

²¹ *Ibid.*, para. 130.

²² Peck, Connie. *Sustainable Peace: The Role of the UN and Regional Organizations in Preventing Conflict*. Rowman & Littlefield, Lanham 1998. p. 9.

persists, wherein member states, with differing interests, are required to agree. This tortuous process is [...] responsible for what has not been done.²³

Although these criticisms of member states and general practices of the UN are apt, and in part serve very well for explaining certain failures in the establishment and implementation of international rights, others within the organization indicate the very structure and interests of the UN as problematic. Perhaps one of the most scathing reviews of human rights operations within the UN comes from Katarina Tomaševski, the first ever Special Rapporteur on the right to education.

Throughout her career, Tomaševski was a resolute critic of the UN, both of structure and practice. An interesting question that I allude to elsewhere, of why we continue to participate in an institution that we fundamentally do not believe in, can possibly be answered by Tomaševski's remark that we care what human rights law has to say, "simply because there is nothing better,"²⁴ and she notes the irony that "[t]he paradox of human rights is the double role of the state, as protector and violator"²⁵. She goes on to provide the following critique:

I do not follow the evasive approach favoured by the United Nations. Bombastic statements such as "all human rights are universal, indivisible, interdependent and interrelated" convey an artificial global consensus where there is none. Although I use international human rights law as the conceptual framework for this book, I treat it as a work in progress. Formally, it constitutes binding obligations for states. Really, governments representing their states can breach or ignore the law with impunity. The paradox is that international human rights law has been created by the states for themselves. Its beneficiaries have had no say in its formation and most have no access to justice when their rights are violated. [...] Human rights law represents the bare minimum to which governments have grudgingly agreed and which they will comply with only if forced to do so.²⁶

²³ *Ibid.*, p. 67.

²⁴ Tomaševski, Katarina. *Human Rights Obligations in Education: The 4-As Scheme*. Wolf Legal Publishers (WLP), Nijmegen 2006. p. 8.

²⁵ *Ibid.* p. 9.

²⁶ *Ibid.* pp. 7-8.

Tomaševski's assessment also seems to point to the fact that in part, reforms are not successful because it is states themselves who would have to garner the political will to put them in effect, and until now, it has clearly not been in their interest to do so.

Chapter 4:

The Security Council

Arguably the most complicated and controversial entity within the UN body of organs is the Security Council (SC), and its relationship to the other organs of the UN (particularly the General Assembly, or UNGA) is often the source of heightened tensions. The internal structure of the UN been created as an impenetrable fortress. This may seem an extreme comparison, but consider the genealogy of the SC's permanent 5 (P5).²⁷ This is a (conceivably) supreme authoritative international body in the legislative sense. The P5, and their stunted decision-making process, has been a source of frustration since the inception of the UN as we know it. From the 1950's to the present day, the SC has been criticized for its abuses of the veto vote, and its brutal disregard for human rights in situations such as Rwanda and Yugoslavia, in which geopolitical interests were considered prioritized over people. Reform suggestions often include proposed radical changes, both to the composition and responsibilities, of the SC and the UNGA. Currently, the former (though a subsidiary body of the latter) wields immense power largely due to the veto process., in which “ a negative vote by any of the permanent members on a resolution that relates to a non-procedural matter would veto the resolution” and has the ability to impose sanctions upon countries non-compliant with international law.²⁸ Charged with the maintenance of international peace and security, the SC is the decisive body that can determine interventions or prevent international action.

To this day, the permanent members of the Council are plagued by the lasting effects of Cold War geopolitical tensions.²⁹ This is an ironic historical configuration wherein international peace at the ideological level has been subsumed at the practical level by an organ preoccupied by war (not unlike Minipax, the Ministry of Peace in

²⁷ Rehman, Javaid, *International Human Rights Law*. 2nd ed., Pearson, Harlow 2010. p. 34. Permanent members include: China, France, the Russian Federation, the United Kingdom, and the United States.

²⁸ *Ibid.*, p. 35.

²⁹ In a 2015 address to the UNGA, Putin openly referred to lasting tensions between Russia and the U.S. since the time of the cold war in reference to criticisms concerning U.S. actions in Syria in 2015. The full address can be found in: “Comments by Russian President Vladimir Putin to the General Assembly” (28 September 2015). Official transcript. *Military Review*, January-February 2016. The Army Press, Fort Leavenworth, 2016. pp. 16-22.

Orwell's *1984*). Similarly, the the UNGA, although less entrenched in the lasting effects of cold war politics than the SC, is nevertheless an organ plagued by the constrictions of state sovereignty, interstate politics, and a lack of enforcement mechanisms. As Garry Jacobs notes more generally, “[t]he UN Charter and the Universal Declaration of Human Rights set forth idealistic principles for peaceful co-existence between sovereign nation states and respect for the rights of individual citizens. In practice, the UN remains an undemocratic institution.”³⁰

And yet, it is only the P5 that has the power to vote to disassemble itself or change one of the permanent members.³¹ Furthermore, in order to be adopted, amendments to the UNC must be accepted by all members of the P-5.³² If this were the structure of any other nation's government, it would be referred to as a dictatorship, tyranny, or perhaps oligarchy at best. Nevertheless, these nations (partially due to their natural resources, assets gained during the highly exploitative colonial eras, and size of population and military powers), continue to rule with an iron fist.

Why are the structure and provisions of the SC an impediment to human rights operating successfully? I propose that the answer lays in the history of the formation of the UN itself, and the fact that opposing interests and ideologies have been amalgamated and are supervised under one organ, when in fact there should have been no synthesis at all. In other words, an institution that oversees the establishment and implementation of international human rights (via the offices of the UN Office of the High Commissioner for Human Rights), and one that oversees international geopolitical affairs and economic interests (largely via the Security Council) cannot be one and the same. These are two ideologies that often conflict with one another, but are currently coexisting within the same nexus of a single body. Consider the historical phenomenon enacted by many states that decreed the separation of church and state. For centuries, state affairs were conducted in cooperation with the interests of the church, and this symbiosis ensured that the interests of one paradigm were always informed and influenced by the other. This

³⁰ Jacobs, Garry. “Integrated Approach to Peace & Human Security in the 21st Century”. *Cadmus*. Vol. 3, iss. 1. *Cadmus, online*, October 2012. pp 48-71. p 53.

³¹ Detailed information can be found on the UN Security Council's homepage. Available at: www.un.org/en/sc/. Accessed on 15 May, 2017.

³² Luck, Edward C. “Reforming the United Nations: Lessons from a History in Progress”. *The United Nations: Confronting the Challenges of a Global Society*. Jean E. Krasno (ed). Lynne Rienner Publishers, Boulder 2004. pp. 359-397. p. 362.

dichotomy also reflects the current structure of the UN. Furthermore, arguably as long as an authority over human rights coexists with an authority with the use of force at its disposal (not to mention veto power, sanction power, etc.), the former will always remain subservient to the interests of the latter. I will further problematize and elucidate more specifically how the SC and UN impede the fulfillment of rights in a subsequent section where I will attempt to establish the UN as a sovereign.

Chapter 5:

Operational Failures

In terms of legislative ability and agenda setting, I do not feel the need to go into great detail concerning the failings of the UN. These are, for the most part, a matter of public record if one looks carefully enough. Nevertheless, for the sake of basing theoretical criticisms on actual practice, I will discuss two examples that I believe demonstrate some glaring shortcomings of UN practices in the ‘real’ realm of rights, as they affect individuals and collectives today.

There are a cornucopia of issues to choose from to prove that human rights are not working in the operational sense, and merely for the sake of quelling arguments before they begin, to calm the staunchly misguided opponents of this view, I will provide some brief examples in this chapter.

First, it seems inherently unfair to us to listen to the directions of others when they do not follow those directions themselves. Think of the typical child’s complaint “Why can you do it, but I can’t”? This perception of injustice often leads us to impulses of rebellion or dissent. We do not understand why our position entitles us to something different than we give to others. In this dichotomy of parent/child, however, the parent is superior in power, an embodiment of the sovereign that creates, enforces, breaks, and punishes rules because their knowledge of the world is superior to that of the child. Governments, however, are not parents, and the individuals and communities that depend upon them for survival and trust their ability to protect rights are not naïve children. Thus, we end up with an inherent mistrust in our governments and sovereigns (including the UN itself) when they claim to know something we do not, about how the world is and how it should be. After all, the agents effecting the work of these powers within institutions are individuals not unlike ourselves.

We can employ a very simple example that elucidates the hypocrisy of the UN, and a very practical one at that, which can be grounded in the international legal framework for those that desire a more tangible connection with philosophy. The UN is an institution that “enshrines” and “illuminates” paragons of diplomatic virtue that nations are meant to uphold, yet this same institution is incapable of following its own

foundational agendas. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979, came into effect in 1981 and has 191 of countries as states parties.³³ Article 4.1, I argue, calls for de facto equality in workplaces and government institutions,³⁴ and this has been reiterated numerous times in subsequent treaties, sessions, and General Comments³⁵. This directly concerns the *jus cogens* principle of non-discrimination as a non-derogable right. In spite of these facts, of 43 Special Rapporteurs positions available at the UN only 10 are filled by women.³⁶ Even the simplest inquiry as to the fulfillment of any of the UN's promised rights leads us down a dizzying, bureaucratic rabbit hole, in which Kafka's *Trial* does not seem so absurd or incomprehensible after all.

Upon closer examination, there is absolutely no reasonable justification for the UN's failure to appoint an equal number of female Special Rapporteurs. Notably, the positions are completely without remuneration and can be from any field, thereby making even larger a pool of candidates from which to choose, since presumably the threshold for qualifications is more liberal.³⁷ It would be preposterous (and a very hypocritical stance) for UN administrators to argue that they cannot find at least 20 appropriate female candidates from around the globe. Despairingly, this is just the tip of the iceberg in terms of the UN breaching its own formulas for equality and non-discrimination. Consider the following: how many decision-makers within the UN are individuals directly affected by the policies they intend to implement? For example, how many migrant workers are part

³³ Ratifying countries for the CEDAW are available at: https://treaties.un.org/pages/ViewDetails.aspx?src=Treaty&mtdsg_no=IV-8&chapter=4&lang=en. Accessed on 15 May, 2017.

³⁴ UN Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981, 1249 UNTS 13, CEDAW). Arts. 4.1., 7, 8, 11, 15.1,

³⁵ "The term 'affirmative action' is used in the United States of America and in a number of United Nations documents, whereas the term 'positive action' is currently widely used in Europe as well as in many United Nations documents. However, the term 'positive action' is used in yet another sense in international human rights law to describe 'positive State action' (the obligation of a State to initiate action versus a State's obligation to abstain from action). Hence, the term "positive action" is ambiguous inasmuch as its meaning is not confined to temporary special measures as understood in article 4, paragraph 1, of the Convention. The terms "reverse discrimination" or "positive discrimination" are criticized by a number of commentators as inappropriate." This can be found as the 4th footnote to CEDAW's General Comment No. 25, on Art. 4, para.1. Also of note is that all General Comments now presented online are being changed to "General Recommendations" with no date of publication or author available.

³⁶ Qualifications for Special Rapporteurs and descriptions of their function can be found in OHCHR Fact Sheet #27, a UN publication. Available at: www.ohchr.org/Documents/Publications/FactSheet27en.pdf (p.6). N.B. The Fact Sheet and links to it online do not provide the date of publication or author.

³⁷ *Ibid.*

of the Committee on Migrant Workers? How many CEDAW affiliates are rural women living in Sub-Saharan Africa? How many of those involved with the education reform agenda received anything other than a classical, Western-based schooling, especially at the post-graduate level?

Furthermore, since the UN refuses to overtly develop class-conscious programs, none of the decision-makers within the organization are poor, despite the fact that by sheer numbers alone, this is the largest, most vulnerable section of the world's population, and the one at which most human rights policies and development agendas target for change. The seemingly innocuous and benevolent nature of many of the UN's functions being filled on a voluntary basis is a poorly executed camouflage obfuscating a simple truth: in order to work for the UN or similar organizations and subsidiary bodies, it is likely that you must be independently wealthy or have a relatively large income by independent means.

There are numerous other examples we can turn to illustrate the operational deficiencies of the UN. Ignoring the more controversial and publicized challenges, such as Syria, I prefer to use the baffling example of Eritrea. Eritrea has, for eight consecutive years,³⁸ been listed in last place of 180 countries on the World Press Freedom Index (compiled by Reporters Without Borders, RSF).³⁹ Furthermore, although Special Rapporteurs and UN missions have not been granted access to the country, reports to the UNGA about Eritrea for several years have alleged nearly every gross human rights violation one could imagine. From enforced disappearances to extrajudicial killings, to rapes and total control of information and media access, 90% of Eritreans live without internet, and their lives (if reports are correct) appear to be lived mostly in indentured servitude to their government.⁴⁰ Though the special missions and mandates of Special

³⁸ As of 2017, Eritrea has moved from last to second last position on the World Press Freedom Index scale (of 180 countries), now one place above North Korea. N.B. For eight years, RSF considered Eritrea less free in its speech and media than North Korea.

³⁹ Country rankings in the "World Press Freedom Index" can be found on the Reporters Without Borders (RSF) website. Available at: <https://rsf.org/en/barometer>. Accessed on 26 March 2017.

⁴⁰ UNGA, Human Rights Council (HRC), *Report of the commission of inquiry on human rights in Eritrea*. A/HRC/29/42. 4 June 2015.

Rapporteurs have been extended to continue the ‘inquiry’ into Eritrea’s situation, there has been no intervention/external presence in Eritrea since 2000.⁴¹

If the case of Eritrea is considered purely in terms of international human rights obligations, disregarding considerations of sovereignty or alternate geopolitical interests, there can be no justification for an authoritative body such as the UN concluding severe violations of rights in consecutive years for nearly a decade, in which a significant number of the population are deemed to be suffering, and still refuse to intervene on behalf of the protection of their rights. Here I will be stubborn: regardless of plausible counter-arguments, either in favor of defending the fragility of sovereignty, or citing a lack of reliable information as the cause for an international disregard for Eritrea, this situation is unacceptable in terms of rights compliance⁴². Additionally, if the UN would defend its position as regards Eritrea by citing the state’s own lack of cooperation and compliance, the situation regardless indicates a need for reassessment of intervention capabilities.

⁴¹ Details can be found at: www.un.org/en/peacekeeping/missions/past/unmee/. Accessed on 10 May, 2017.

⁴² I invite challenges to this claim.

Chapter 6: Understanding Reform

“The never-ending quest for reform, for improving the functioning of the United Nations, has been an integral part of the life of the world body since its earliest days.”⁴³ It would be entirely unfair to say that the UN has not, and is not constantly attempting to ‘improve’ itself. Commendable as this is as an organizational endeavor, I am hard-pressed to identify any reforms that have had a large-scale positive impact on human rights. Think about it this way: if the UN is committed to effective reform, then wouldn’t at least *some* of the proposals, suggestions, and implemented changes take hold? Can we really confidently say that we have fully “achieved” a majority fulfillment of any legislated human right or associated aim, such as a SDG? Like Banbury, there are those who certainly propose modifications while in office, and continue to do so outside of the UN. These types of alterations are specific practical suggestions from those who believe in the overarching system of the UN and its positive impact, but who also believe that change can come from within. Banbury advocates that:

The bureaucracy needs to work for the missions; not the other way around. The starting point should be the overhaul of our personnel system. We need an outside panel to examine the system and recommend changes. Second, all administrative expenses should be capped at a fixed percentage of operations costs. Third, decisions on budget allocations should be removed from the Department of Management and placed in the hands of an independent controller reporting to the secretary general. Finally, we need rigorous performance audits of all parts of headquarters operations.⁴⁴

Reforms initiatives in keeping with Banbury’s, or the rather optimistic ‘change from within’ position, paint the UN as a positive entity that is unfortunately becoming dangerously bureaucratic, and overwhelmed by its own mandate, personnel, and operations. I take this position to be radically different from the one I believe to be

⁴³ Luck. p. 359.

⁴⁴ Banbury.

supported by evidence from actual UN reform history, in which the UN was never truly functioning as intended, even immediately after its inception. Once, long ago, I remarked a Facebook status that read, “the system isn’t broken, it was made that way”. Or, alternately, we could employ the old adage, “even a broken clock is right twice a day”. Just because the UN occasionally has positive outcomes in the field of rights does not justify it as the best option for the governance of our rights paradigm or for other considerations of inter- and intrastate politics.

I have mentioned that I believe this to be historically supported:

On a more operational level, the UN had barely passed its second birthday before member of the U.S. Congress started to call for sweeping reforms of the UN finance and administration. In October 1947 the Senate Expenditures Committee launched a study that found serious problems of overlap, duplication of effort, weak coordination, proliferating mandates and programs, and overly generous compensation of staff within the infant but rapidly growing UN system. Similar complaints have been voiced countless times since.⁴⁵

Interestingly the UN in theory is preoccupied by reform:

If gauged by the sheer quantity of deliberations, debates, studies, and resolutions devoted to it, reform has become one of the enduring pastimes and primary products of the UN system. For example, during the last broad-based reform drive, from 1995 to 1997, the General Assembly was consumed with no less than five working groups on different aspects of reform, its president was engrossed in developing his own reform package, the Security Council reviewed its working methods, the Economic and Social Council (ECOSOC) adopted new procedures for relating to NGOs, and the new Secretary-General offered a comprehensive, if generally modest, plan for Secretariat reform.⁴⁶

What is truly curious regarding the United Nations are two recognizable arguments: first, that problems were identified with the efficacy of the UN very shortly after its formation, and second, that the same problems continue to be identified consistently today. In 1958, Clark and Sohn in their prescient text, *World Peace Through World Law*, were arguably the first legal scholars to constructively aim to reform the UN.

⁴⁵ Luck. p. 359.

⁴⁶ *Ibid.* p. 361.

Their comprehensive text calls for six main reforms, including the establishment of a world police force, restructuring the representation of states within UN bodies, removal of the veto power from the Security Council, and a broadening of the legislative capability of the General Assembly. Impressively, Clark and Sohn also rewrote the entire UN Charter, outlined a plan of feasible economics and enforcement for the UN, and detailed a plan for complete disarmament within ten years.⁴⁷

Clark and Sohn were well respected in both academic and legal circles, publishing *World Peace Through World Law* while holding positions at Harvard. Both men received several nominations for the Nobel Peace Prize,⁴⁸ and Secretary-General Kofi Annan described Sohn upon the latter's death in 2006 as, "an important figure in the history of the United Nations and of international law, [...and...] a voice of reason and source of wisdom."⁴⁹ Annan's press release is worth note here:

Louis Sohn, who served as Professor of Law at Harvard and the University of Georgia, was a member of the United States delegation at the San Francisco conference in 1945, at which the United Nations Charter was drawn up, and also, from 1974 to 1982, at the conference which drafted the International Convention on the Law of the Sea. Throughout his life, he won wide respect [...], and was a firm believer in the importance of the United Nations and of the rule of law in settling international disputes.⁵⁰

There remains a curious point here: if Sohn and Clark (and doubtless countless others) were so indispensable to and commendable by the UN, then why were none of their reforms ever successfully implemented? Though this line of inquiry is beyond the scope of this paper, I suggest that perhaps it is time to seriously consider the possibility that the nation state as we know it has a fundamentally negative impact on our lives, and that states (and their representatives exclusively prioritize their own interests, because such is the self-propagating nature of power. The reform of the (legal) order would require state

⁴⁷ Clark, Grenville, and Louis B. Sohn. *World Peace Through World Law*. Harvard UP, Cambridge 1958. In my opinion, this should be a required text in all introductory law courses.

⁴⁸ For an exhaustive list of past Peace Prize nominees visit:

<https://www.nobelprize.org/nomination/archive/>.

⁴⁹ Statement issued by the Spokesman for Secretary-General Kofi Annan. SG/SM/10534, 23 June 2006. Available online at: <http://www.un.org/press/en/2006/sgsm10534.doc.htm>. Accessed 17 November, 2016.

⁵⁰ *Ibid.*

members' approval, but since such reform could in fact limit their space for maneuvering, make them more accountable, and tie them more strictly to their declared responsibilities, states may not be willing (or not interested) in realizing these types of reform.

Part II: Theory

Chapter 1:

Theory, Practice, and the Tradition of Thought

I have spent a considerable amount of space in this work dedicated to providing evidentiary support that human rights are ‘not working’, before I even attempt to address the question of why. There are two primary reasons I have chosen to do so. First, although it seems obvious to me that rights are not working in the sense I have expounded upon, I feel the need to defend this position academically, since I am aware that many within the rights field and its affiliates would challenge this assertion. Second, in spite of copious evidence to support my position, substantial changes to our configuration of the rights framework continue to be unimplemented in any real sense. There persists an anomalous and opaque intellectual wall, wherein although the theoretical connections between power (whether we name it ideology, hegemony, sovereignty, etc.), become apparent, and yet we continue to tragically reconfirm our complicit enslavement, bordering on sycophantic devotion, to these systems of control.

The reason I have included the criticisms of the UN and human rights framework above by various thinkers is that I think these assessments of failures within the system are not only viable, but also correct. I believe that the numerous theories concerning the problematization of compliance, enforcement mechanisms, political will, geopolitical considerations, etc. are fundamentally accurate in their assertions of why human rights are not working as they should, or as they were intended. However, though these analyses are useful in determining failures within the realm of human rights practice, and even to some extent at the level of theory, they leave something to be desired in the way of a cohesive explanation. As I have mentioned several times, the criticisms typically provided of the rights paradigm have been repeated and expounded upon for decades to little avail. I have alluded to the perplexing question: if we have successfully identified a host of barriers to the implementation of a healthy rights mechanism, then why have we not radically altered our approach and realized lasting reforms? I believe the answer can partially be gleaned from a reexamination of the ‘theory’ portion that governs rights; in other words, an investigation of the metaphysics that has been developed to justify

normative and legal frameworks could lead to a more fruitful, and deeper understanding of how power relations create the largest impediment to human rights fulfillment.

For the sake of introducing an element of meta-narrative at this point in my research, I wish openly to indicate not only my reluctance and misgivings, but my vehement opposition to the form I am required to give to my arguments in order to be academically legitimized. This may seem tangential, but in fact this is a perfect embodiment of the theoretical arguments I am about to elucidate. The rules are often unspoken, but somehow are made extremely clear. I have been informed several times that I must play by these rules in order to receive academic recognition (my diploma). A presupposition that I am allowed to break or flex these rules in the pursuit of knowledge is not only unwelcome and often disallowed, but also I have often been told it is insulting to others in academia, since I have not yet been legitimized. It is clear that my success is contingent upon certain criteria. I must be able to repeat and reflect material that has been chosen for me; I must keep within the confines of ‘acceptable’ academic writing (and everything that entails from vocabulary, argumentation, word count, etc.); I must give due respect to my predecessors and peers, etc., etc. In fact, I feel that among all of these criteria, the intellectual merit of my ideas is of the lesser, if not the lowest, worth.

Let me be clear, this is not a ‘rant against the system’, it is dissent and I state it here with full force. Plainly, there are limits to what I can say or write if I want to have effective participation in my institution and graduate. I have trouble convincing people that this is, in fact, part of why human rights are not working – that there is a tangible, not tenuous connection between how I am being educated, and why there is so little reform within the realm of rights. Recently, a friend put it in the following terms, when I asked his opinion of why rights are not working: if you educate people in a certain way, with much restriction, and indoctrinate them as to how to think, you can’t really be surprised that you end up with similar results every time. Or, one can turn to the compelling narrative expression of this view found in Orwell’s *1984*. In the novel, citizens of Oceania are educated in the language of Newspeak, in which unnecessary language (primarily vocabulary that expresses beauty, liberty, etc.) is eliminated. Instead of

‘horrifying’, individuals in *1984* may instead say something like “double plus ungood.”⁵¹ Perhaps the most vital point to be gleaned from the ideology of Newspeak is the following: restrictions in expressions of thought, such as vocabulary, result in restrictions of thoughts themselves. If I do not have access to the word ‘freedom’ then the way in which I will conceptualize freedom necessarily changes (though the concept may not be fully eliminated). Thus, what I am allowed to express is inextricably linked to what I am allowed to think. The same rules apply to academic inquiry, and our assessment of structures of power. If I am trained for most of my life in specific academic thought processes incorporating certain vocabularies, the very way in which I think about things is transformed.

The reason I choose to include these comments precisely here, before I proceed with my theoretical inquiry is that I wish to use it as an illustration of how ensconced and insidious power becomes in the everyday. The seemingly unconnected, apolitical details of our lives, such as requirements for chapter headings in a specific academic program, are miniscule inscriptions of hegemony that we enact in the quotidian, but formulate part of a great nexus that determines our political ideology. As Agamben argues:

[O]nly a reflection that, taking up Foucault’s and Benjamin’s suggestion, thematically interrogates the link between bare life and politics, a link that secretly governs the modern ideologies seemingly most distant from one another, will be able to bring the political out of its concealment and, at the same time, return thought to its practical calling.⁵²

Also:

What we have witnessed in our own time is the death of universities as centres of critique. Since Margaret Thatcher, the role of academia has been to service the status quo, not challenge it in the name of justice, tradition, imagination, human welfare, the free play of the mind or alternative visions of the future. We will not change this simply by increasing state funding of the humanities as opposed to slashing it to nothing. We will change it by insisting that a critical reflection on human

⁵¹ Orwell, George. *1984*. Penguin, London 1989. I am indebted to Nigel Joseph at the University of Western Ontario (London, Canada), for elucidating this point.

⁵² Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Daniel Heller-Roazen (trs). Stanford UP, Stanford 1998. p. 10.

values and principles should be central to everything that goes on in universities, not just to the study of Rembrandt or Rimbaud.⁵³

⁵³ Eagleton, Terry. "The Death of Universities". *The Guardian*. 17 December, 2010. Available online at: www.theguardian.com/commentisfree/2010/dec/17/death-universities-malaise-tuition-fees. Accessed on 15 May, 2015.

Chapter 2: Biopolitics, the Sovereign, and the Individual

This is the point at which we may turn from practice to theory, and where interdisciplinarity becomes essential to understanding both the law, and why the UN and our current international framework of rights cannot, and probably will not be successful in its existing form.

There are countless models of power, sovereignty, and political theory that span across all academic fields that have a contribution to make to our understanding of rights and the UN at this point. Everything from history, to philosophy, to critical theories of song and visual art, and exciting emerging fields such as postcolonial health communications have compelling hypotheses about the nature of power and authority, and the institutional and governmental structures through which it is manifested.⁵⁴

Unfortunately, there persists an invisible, yet insidious divide between the faculties of arts, humanities, philosophy, social sciences, etc., and faculties of science, law, or engineering, for example. Somehow the latter continue to be vaguely construed as more precise, legitimate, and authoritative disciplines containing more truth than more subjective, socially-oriented fields. These ‘truer’ faculties are falsely given the attribute of superior objectivity than their counterparts, and possibly the law, (uniquely positioned as a discipline inextricable from structures of sovereignty, power, and humanity) is given the supreme place at the summit of this metaphysical hierarchy.

Recognizing that there are several perspectives from which I could begin an analysis, and acknowledging my own biases, I will use theories from a white, male, Western tradition, simply because these are the theories with which I am familiar that are be applicable in my research. This does not signify that I believe it to be the correct perspective, or even among the best suited for answering our current problems within human rights.

I believe the question of the UN as a structure and its reforms (or lack thereof) can be more adequately explained by theories outside of legal sphere, and even at the liminal

⁵⁴ For an excellent introduction to the emerging field of postcolonial health communications, interdisciplinarity, and human rights, see: Dutta, Mohan, J. and Shaunak Sastry. *Postcolonial Constructions of HIV/AIDS: Meaning, Culture, and Structure*. Online: Routledge, 2011.

edges surrounding political science and the fields typically associated with rights work. The supremacy of law within the law has become indisputable, admitting no higher authority than its own power, and therefore though tenable theories and even possible solutions (or at the very least advances) in other disciplines have been made, the gains are seldom included in syllabi of law faculties. I will return to this theme later in the work, to discuss the insights that theory from various disciplines can bring to an understanding of the law, and how their exclusion is an impediment to the success of the international rights paradigm.

For now, I will continue my analysis of how the structure of the UN itself contributes to failures in rights theory and practice; however, instead of dissecting operations or power relations of the UN body via legal analysis or geo/political theory, I will apply an interdisciplinary theoretical approach, primarily utilizing Giorgio Agamben's and Michel Foucault's theories of biopolitics and their philosophies regarding power, the sovereign, and the individual. As Agamben notes:

One of the most persistent features of Foucault's work is its decisive abandonment of the traditional approach to the problem of power, which is based on juridico-institutional models (the definition of sovereignty, the theory of the State), in favor of an unprejudiced analysis of the concrete ways in which power penetrates subjects' very bodies and forms of life.⁵⁵

Agamben was heavily influenced by Hanna Arendt and Michel Foucault, both of whom he references at great length in his discussion of sovereign inscriptions of power on the body of the subject. In *Homo Sacer*, Agamben locates the emergence of the political subject, and identifies its separateness from the biological subject, using the Greek terms "zoē" and "bios"⁵⁶ to underscore that historically and linguistically the concepts of the political being (*bios*),⁵⁷ and the biological or natural physical life (*zoē*) of the individual were respected as two distinct entities.

Agamben also traces a comprehensive history of the metamorphosis of governing powers into the contemporary concept of the (sovereign) state, and claims that this

⁵⁵ Agamben. p.10.

⁵⁶ "zoē" as equivalent to the biological fact of life, and "bios" as equivalent to the manner or form in which life is lived.

⁵⁷ N.B. Agamben does not necessarily identify *bios* as the sole realm of the political being, but he does trace the origins of our identity as legal subjects as belonging to the sphere of bios, as opposed to zoē.

evolution simultaneously and symbiotically served to blur the boundaries between natural and political life, until finally the individual emerged as *homo sacer*, a being reduced to “bare life”, on which the sovereign can inscribe its desire at will. The *homo sacer* is diminished to mere biology, with no regard for the quality with which that life is lived.

The loss of this distinction [between *zoē* and *bios*] obscures the fact that in a political context, the word ‘life’ refers more or less exclusively to the biological dimension or *zoē* and implies no guarantees about the quality of the life lived. Bare life refers then to a conception of life in which the sheer biological fact of life is given priority over the way a life is lived, by which Agamben means its possibilities and potentialities.⁵⁸

In other words, “natural life begins to be included in the mechanisms and calculations of State power, and politics turns into *biopolitics*.”⁵⁹ Agamben reminds us that, “Michel Foucault began to direct his inquiries with increasing insistence toward the study of what he defined as *biopolitics*, that is, the growing inclusion of man’s natural life in the mechanisms and calculations of power.”⁶⁰

Although there exist obvious discrepancies between Foucauldian theory and that of Agamben, the two scholars are in agreement on several points, including the reduction of the individual to biological political subject in the eyes of the sovereign. A notable difference, however, is that Agamben identifies the evolution of *homo sacer* as a simultaneous process, and inextricably linked to the evolution of the sovereign state of exception, and its increasing frequency (and ultimately permanence) within the political sphere. He uses “Carl Schmitt’s definition of sovereignty (“Sovereign is he who decides on the state of exception”⁶¹), and asserts that the sovereign state of exception has expanded so much so as to make the exception the rule. Agamben argues that, in fact, the state of exception is integral to the concept of sovereignty, since it is the sovereign (and exclusively so) that can create or suspend the law, and as such be simultaneously within the law as well as outside it. The inquiry in *Homo Sacer* concerns “[the] hidden point of

⁵⁸ Buchanan, Ian. *A Dictionary of Critical Theory*. Oxford UP, Oxford 2010. p. 41.

⁵⁹ Agamben. p. 10.

⁶⁰ *Ibid.* p. 71.

⁶¹ *Ibid.* p. 13.

intersection between the juridico-institutional and the biopolitical models of power.”⁶²
 He deduces that these two modes of analysis “cannot be separated”, and that:

[T]he inclusion of bare life in the political realm constitutes the original – if concealed – nucleus of sovereign power. *It can even be said that the production of a biopolitical body is the original activity of sovereign power.* In this sense, biopolitics is at least as old as the sovereign exception. Placing biological life at the center of its calculations, the modern State therefore does nothing other than bring to light the secret tie uniting power and bare life, thereby reaffirming the bond (derived from a tenacious correspondence between the modern and the archaic which one encounters in the most diverse spheres) between modern power and the most immemorial of the *arcana imperii*.⁶³

Although Agamben, Foucault, and other philosophers in this tradition have elaborated compelling models of power structures and their effects on the individual, these considerations are highly theoretical, and seem to belong predominantly in the realm of a rights metaphysics.

At this juncture, we may well inquire: how do these theories inform rights practices, and aid in our understanding of the success or failure of an international rights paradigm? In the subsequent section I will apply these theories of biopower to our current system of rights, but it is important to note that Agamben himself devotes considerable attention to the practical aspect of how the implications of sovereign inscriptions of power, particularly in the state of exception, have historically created conditions for large-scale abuses of rights in their perpetual devaluation of citizens to mere biology. He enters into an in depth analysis of Arendt’s vision of the Holocaust, and expands her theories on totalitarianism to accommodate his theory, claiming that, “the Jews were exterminated not in a mad and giant holocaust but exactly as Hitler had announced, “as lice,” which is to say, as bare life. The dimension in which the extermination took place is neither religion nor law, but biopolitics.”⁶⁴ Furthermore, he argues:

⁶² Agamben. p. 11.

⁶³ *Ibid.*

⁶⁴ *Ibid.* p. 71.

[W]hat escapes Arendt is that the process is in a certain sense the inverse of what she takes it to be, and that precisely the radical transformation of politics into the realm of bare life (that is, into a camp) legitimated and necessitated total domination. Only because politics in our age had been entirely transformed into bio-politics was it possible for politics to be constituted as totalitarian politics to a degree hitherto unknown.⁶⁵

Building on his historically established biopolitics, Agamben continues by projecting his theory onto contemporary issues and attempts to uncover the link between the (sovereign) state of exception *cum* state of permanence. He contends that the “disciplinary control achieved by the new bio-power” [and...] a series of appropriate technologies [created the conditions for] the development and triumph of capitalism.”⁶⁶ Additionally, Agamben locates recent political conflicts and human rights violations within the realm of biopower, elucidating:

[W]hat is happening in ex-Yugoslavia and, more generally, what is happening in the processes of dissolution of traditional State organisms in Eastern Europe should be viewed not as a reemergence of the natural state of struggle of all against all – which functions as a prelude to new social contracts and new national and State localizations – but rather as the coming to light of the state of exception as the permanent structure of juridico-political de-localization and dislocation. Political organization is not regressing toward outdated forms; rather, premonitory events are, like bloody masses, announcing the new *nomos* of the earth.⁶⁷

Extending Agamben’s examination, I will now re-analyze the UN as a sovereign body acting within the realm of biopower to determine its impact on the practice of rights as we know them today.

⁶⁵ *Ibid.* – Using Foucault’s biopolitics and Arendt’s *Origins of Totalitarianism* to inform and complete one another as political theories, Agamben argues that these connexions were curiously never made by Foucault or Arendt themselves.

⁶⁶ *Ibid.* p. 10.

⁶⁷ Find [source](#) in agamben

Chapter 3: The Human Rights Machine as Sovereign

According to Agamben, human rights discourse, as we know it, was constructed alongside and within the discourse of the law, and a now long-standing tradition of the state of exception-as-rule. Historically, he locates the establishment of bare life (*homo sacer*) as an evolving process that began to solidify in during the events of the French Revolution. Ironically, many scholars also identify this as one of the historical turning points that helped to give birth to our modern system of human rights.⁶⁸ This is not incidental, and both Foucault and Agamben stress the emergence of our avid declarations of rights as a reaction to the concurrent materialization of the politics of biopower.

It is almost as if, starting from a certain point, every decisive political event were double-sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.⁶⁹

As opposed to an expression of liberty and equality, our rights have become a mere facet of our complicit enslavement to power, and every aspect of our being is governed by the state, from the food we consume, our appearance, our means of communication, how our children are educated, and recently (rather frighteningly) reproductive rights.⁷⁰ This is not to suggest that every right we possess is negative, or even that any rights are inherently undesirable at all; it is merely the elucidation of the idea that what we consider an expression of personal and collective liberties and entitlements is always inextricably connected to the state's affirmation of its own power and control over its subjects.

Agamben notes:

⁶⁸ For an expanded discussion of French and U.S. contributions to modern human rights see Hunt, Lynn. *Inventing Human Rights: A History*. W.W. Norton & Co., New York 2007. pp. 113-145.

⁶⁹ Agamben. p. 72.

⁷⁰ Not to mention everything we still think of as 'choice' in free flowing global capitalist markets (i.e. almost every physical possession or experience we have).

“The ‘right’ to life’, writes Foucault, explaining the importance assumed by sex as a political issue, “to ones body, to health, to happiness, to the satisfaction of needs and, beyond all the oppressions or ‘alienation,’ the ‘right’ to rediscover what one is and all that one can be, this ‘right’ – which the classical juridical system was utterly incapable of comprehending – was the political response to all these new procedures of power” (*La volonté*, p. 191).⁷¹

Consider Agamben’s historical description of the sanctity of the body and image of the king, wherein funereal rites represented both a spiritual and physical demonstration of the transference of sovereign power from one ruler to another:

The macabre and grotesque rite in which an image was first treated as a living person and then solemnly burned gestured instead toward a darker and more uncertain zone, [...] in which the political body of the king seemed to approximate – and even to become indistinguishable from – the body of *homo sacer*, which can be killed but not sacrificed.⁷²

This biological connection to power remains intact today in myriad ways. For example, the linguistic features that we use to refer to rights - human rights *bodies*, treaty *bodies*, various *organs*, and concepts such as *development* - mirror the vocabulary that we use to describe the physical body and growth. This is not accidental. Linguistically speaking, even if Saussurian structuralists or Nietzscheans would argue that arbitrariness is a primary rule of language when translating concepts to word sounds and utterances, by the time those concepts evolve into the realm of conscious metaphor we construct them using logical comparison. Thus, there is a discernible connection between the self-conscious concept of our own bodies and a “body” of government-as-sovereign.

We may also assess the ‘bodies’ that govern rights (primarily the UN) in terms of their composition, which is, in fact, a collection of member states (sovereigns) into a super-sovereign or supreme authority. We participate in a grave collective self-deception: the erroneous illusion that the UN and its affiliates are somehow a benevolent source, independent from the sovereign machinations of power. As I have argued above, I believe we can specify the UN as a (world) government, and as such it functions as a

⁷¹ Michel Foucault as quoted in Agamben. p. 72.

⁷² *Ibid.* p. 58.

sovereign for all intents and purposes, including legislative ability, demanding obeisance from its subjects (which now comprise almost every state in the world), the right to determine where and when violence is permissible, and the ability to dictate our normative perceptions. The implications of understanding the UN as a sovereign entity are incredibly profound, especially when taken in tandem with Agamben's problematization of states of exception. He reiterates the nature of the relationship between the sovereign and the law:

The specification that the sovereign is “*at the same time* outside and inside the juridical order” (emphasis added) is not insignificant: the sovereign, having the legal power to suspend the validity of the law, legally places himself outside the law. This means that the paradox can also be formulated this way: “the law is outside itself,” or: ‘I, the sovereign, who am outside the law, declare that there is nothing outside the law [*che non ce unfiiori legge*].⁷³

If, as Agamben argues, the permanent state of exception creates the conditions for the apotheosis of bare life, then we must comprehend that the UN and the human rights paradigm are the ultimate expression of this permanent state: since we willingly deceive ourselves as to the nature of the UN, and it is not understood as a legal entity (in the same way that a state is), then it need not adhere to justifications for its own fluctuating parameters in terms of the law. In other words, the international human rights organ is free to operate in a permanent state of exception, cultivating the whole world as bare life, and never needing to excuse itself, as we would demand of other legal entities.⁷⁴

⁷³ *Ibid.* p. 17.

⁷⁴ An interesting extension of this line of inquiry would be a discussion of ‘who polices the police’, or rather who holds, or can hold, the ultimate authority accountable?

Chapter 4:

The Limits of Dissent and Violence

As mentioned above, it is only the sovereign or the state itself and its actors that appear to be given license to operate outside of the law, and very little space is left for the dissent of individuals and groups that find themselves in conflict with the law. We must then ask ourselves, how do we dissent? What avenues are left open to us both alone and in our communities to manifest our own rights, particularly when we feel they are not being respected by the rule of law? I see two reasons why this is most pertinent in any discussion of why the rights paradigm does not function as it should. First, because dissent suggests unhappiness and dissatisfaction in a given situation; moreover, dissent in the political or social sense connotes an active component, in which displeasure is expressed with the specific aim of shifting normative perceptions and values, as well as the possibility of initializing change within legal frameworks. Second, global government discourse has largely proclaimed (at least via elite policy makers, institutions, and media) that democracy is the preferred manifestation of politics towards which all nations and communities should strive. Although I find this point debatable and problematic in and of itself, I proceed based on the general assumption that democratic systems are considered positive. By necessity, a healthy democracy not only includes, but should invite dissent as a means of inducing positive changes and encouraging civic engagement and participation in both local and larger-scale governments. Therefore, a system that has a healthy engagement with its own dissenters, and accommodates their political will within shifting policies would indicate that rights are working. The opposite, a system that attempts to quell dissenters, silence their opinions, or is too slow in providing justice indicates a paradigm in which individuals opinions about their own rights are disrespected.

I propose (as do a multitude of other scholars) that rebellion is woven into the very fabric of our culture, in our expressions of literature, poetry, visual art, journalism, music and the like. Obviously, not everyone is a lawyer, nor a human rights expert or political scientist; in fact, most people have a limited familiarity with the law and their own rights. At this juncture, I would like to draw attention back to the introduction of my

paper, where I describe the metaphysical realm in which we attempt to define overarching concepts such as justice or peace. Our ideas about how to define these concepts, whether we are legal scholars or not, are informed by the very things I have just listed above. As powerful as liberal middle class norms and propagative hegemonic ideals are, there remains an element of culture, and our interpersonal or private interactions therein that formulate some of our opinions and affect how we express those. Democratically speaking, then, the right to dissent, and healthy counter-reactions to unfavorable policies that infringe upon human rights should regularly inform legal and normative discourses.

Here, I wish to draw attention to a passage of the UDHR that has (at least in my experience), been under-discussed within circles of rights academics and policy influencers: “Whereas it is essential, *if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression*, that human rights should be protected by the rule of law.”⁷⁵ It would be prudent, of course, to ask why this passage is not often deconstructed for students of the law or human rights; however, my argument here lies with the content itself, and how this indicates an alternative right to dissent and ‘rebellion’. I contend that the above passage denotes neither a positive nor a negative association with ‘rebellion’, but rather posits it as a necessary last resort for individuals and groups to fight for those eternally difficult-to-define words such as freedom, justice, liberty, security, peace, etc. Thus, rebellion becomes a legitimate form of political dissent when the law falls short of ensuring the rights of “man.”

Yet the question remains: which forms of rebellion specifically *outside of the law* are recognized as legitimate *by the law*? I argue that only those acts that are either committed by the state itself (sanctioned by its legislators, sovereigns, policy-makers, etc.) or by transnational corporations (TNCs) or business owners wealthy enough to purchase security that the law protects in acts of rebellion (i.e. acts that are against the law, but which become new law by popular demand of the privileged few). The individual is thereby divested of his or her recourse to rebellion, and is severely restricted in manifestations of dissent.

⁷⁵ UDHR. Preamble (emphasis mine).

In his *Critique of Violence*, Walter Benjamin proposes that violence has been almost exclusively annexed by the state, wherein systems of law sanction their own expressions of violence for their own ends, and that there is a “tendency of modern law to divest the individual, at least as a legal subject, of all violence, even that directed only to natural ends.”⁷⁶ Benjamin begins with a juxtaposition of perspectives of violence between positive law and natural law, and attempts to supplement both philosophies’ understanding of violence as regards state power. I believe Benjamin’s arguments also prove quite useful in a more general discussion of dissent, particularly since he defines violence (in respect to the law) not only as acts of physical aggression, but also acts that through omission or noncompliance challenge the authority of the law to manifest itself, since these omissions lead to what he refers to as a type of extortion.⁷⁷ Here, Benjamin expounds upon the instrumentality of violence within the law:

For the function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power. Lawmaking is power making, and, to that extent, an immediate manifestation of violence. Justice is the principle of all divine end making, power the principle of all mythical lawmaking.⁷⁸

Furthermore, Benjamin contends that, “that a system of legal ends cannot be maintained if natural ends are anywhere still pursued violently.”⁷⁹ According to Benjamin’s suppositions, then, the natural ends of individuals are in direct conflict with the ends of the law, and our ability to dissent is severely undermined by the fact that the state has sanctioned force on its side, and the individual is powerless to use violence (or dissent) to combat violations of his or her rights.

This is similar to the argument I have proposed above regarding the structure of the UN, and most particularly the SC, in the vein that as a world government or authority,

⁷⁶ Benjamin, Walter. *Reflections: Essays, Aphorisms, Autobiographical Writings*. Edmund Jephcott (trs). Schocken Books, New York 1986. p. 283.

⁷⁷ *Ibid.* pp 281-282.

⁷⁸ *Ibid.* p. 295.

⁷⁹ *Ibid.* p. 280.

the SC has given itself the liberty to allow or disallow violence as a means of control at the systemic level, inextricably intertwined with the organ that determines our rights. Often, critics contend that the SC, though not in its primary mandate, is also charged with taking decisions in light of established international rights norms. This only proves more problematic in Benjamin's paradigm, considering that a mechanism of power (such as the SC) that is meant to uphold constitutional rights and civil liberties is the same mechanism that through violence ensures the ultimate subjugation of all subjects under its power with the, sometimes unuttered, sometimes manifested, use of force.

There are, of course, those that would take the position that the ends justify the means in terms of state (or UN) violence, and even proponents such as Clark and Sohn suggested that a world police force would be (at least temporarily) necessary in order to ensure justice. To those that would defend this position, Benjamin contests:

[O]ne might perhaps consider the surprising possibility that the law's interest in a monopoly of violence vis-a-vis individuals is not explained by the intention of preserving legal ends but, rather, by that of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law.⁸⁰

In regards to manifestations of individual or collective dissent, then, Benjamin's hypothesis can illustrate that as opposed to a paternalistic and benevolent view of institutional violence *on behalf of* the individual, state violence is in actuality a self-preserving function of the law in which the "law sees violence in the hands of individuals as a danger undermining the legal system."⁸¹ Dissent and rebellion – whether they are physically or conceptually violent – are a danger to the stability of the law, sovereigns, and governments when enacted in protection of those that would oppose the law (in other words, individuals or collectives that accurately perceive the law as detrimental, or at odds with their own natural ends.

⁸⁰ *Ibid.* p. 281.

⁸¹ *Ibid.* p. 280.

Benjamin identifies that, “[o]rganized labor is, apart from the state, probably today the only legal subject entitled to exercise violence.”⁸² He also underscores the danger that violence poses to law when wielded by these legal subjects:

By what function violence can with reason seem so threatening to law, and be so feared by it, must be especially evident where its application, even in the present legal system, is still permissible. This is above all the case in the class struggle, in the form of the workers' guaranteed right to strike.⁸³

Some may ask at this point: so what? How does this pertain to failures in the system of international rights? And, moreover, Benjamin himself has provided a state-sanctioned example wherein dissent is still alive and healthy in the form of union strikes. Also, individuals (though not perhaps in the sense we may prefer) still have the right to dissent within the legal framework and the confines of international and domestic norms. Surely, then, dissent (or violence, or rebellion) has not been completely eliminated? I believe the most illustrative examples to counter these problematizations are those of ‘reverse sexism’ or ‘reverse racism’.

Reverse sexism and reverse racism have often been leaned on as counterarguments to proposals that pursue *de facto* equality, such as affirmative action practices or instances where ‘extra’ is given to the vulnerable group in order to level the playing field. Ignoring for now the problematic notion that equality is benevolently bestowed, as a gift, to those less fortunate (as oppose to positioning them as equal autonomous agents that have the right to self-determination and demanding equality in their own names. I think to a large extent we have achieved clarity, at least within academic circles, that no such thing as reverse racism or reverse sexism actually exist. The common argument is that, by necessity and by their very nature, racism and sexism (and various other types of discrimination against vulnerable groups), are systemic. Occasions of individual complicity with, and participation in these systems only serve to enforce the stereotypes that affect almost every facet of a minority individual or group’s position in society. Conversely, instances of prejudice by the minority group against the oppressor or majority, though they can be injurious, do not affect the privileged position

⁸² *Ibid.* p. 281.

⁸³ *Ibid.*

that person enjoys in society, since they belong to the advantaged group. In some ways, this is similar to how we consider violations of human rights: violations can only be perpetrated by states (and actors on behalf of states) because abuses of rights can only happen on a systemic level; individual instances of harm against others are considered distinct types of crimes.

This understanding of systemic violence is necessary to our understanding of why rights are not working, since presumably a positive incorporation of dissent into legal frameworks would serve to remedy at least some human rights breaches. Herein lies the problem: systemic violations require systemic remedies; by divesting individuals of a right to violence against the state and fragmenting dissent, structures of power ensure that their organisms remain intact. Like scratching away at a brick wall with fingernails, one may leave a few marks, but it is highly unlikely the wall will come down anytime soon. Benjamin alludes to this fragmenting of dissent in the aforementioned discussion of organized labor:

The antithesis between the two conceptions [of state violence versus individual violence] emerges in all its bitterness in face of a revolutionary general strike. In this, labor will always appeal to its right to strike, and the state will call this appeal an abuse, since the right to strike was not "so intended," and take emergency measures. For the state retains the right to declare that a simultaneous use of strike in all industries is illegal, since the specific reasons for strike admitted by legislation cannot be prevalent in every workshop.⁸⁴

Thus is evidenced an example of the fragmentation of dissent, concerning workers versus the state apparatus, in which the possibility to unite in larger numbers to force change (in one of the last vestiges of opposition available to the citizen) is effectively disabled, and systemic solutions to problems of worker's rights become less likely. I believe that apart from organized labor, we can also include artists, or what I prefer to call creative dissenters, among the legal subjects still entitled to exercise sanctioned violence. I will expand upon this idea further in the next section.

⁸⁴ *Ibid.* p. 282.

Chapter 5:

Spaces of Creative Dissent Within the Law

I use the term ‘creative dissenter’ to distinguish from overtly political dissidents, such as recognized opposition parties, agents engaged in rebel or guerilla warfare, workers and activists within non-governmental organizations, etc. By creative dissenter, I refer to those individuals that through writing, art, poetry, editing, philosophy, academia, public intellectualism, and at times journalism do not always primarily seek to create opposition to state institutions and actions, but rather do so by expressing ideas through creative means, through critical civic and cultural engagement with their environment. These figures were once celebrated as an indispensable facet of society and were recognized for their contributions, both shaping and contesting public opinion. From ancient Greece’s philosopher kings and dramatists, to Voltaire in the French Revolution, and to more modern dissenters such as Diego Rivera, Gramsci, Orwell, Foucault, Chomsky, and Orhan Pamuk these individuals have formed a comprehensive part of the social fabric from time immemorial; in more recent times, these agents (though still present, active, and engaged) are relegated to the realms of fine arts and humanities, and sometimes labeled under the blanket term ‘activist’. They have been exposed to the blows of a double-edged sword: the political legitimacy and protections for creative dissenters is undermined, and yet they are often the first to be targeted by states or opposition groups as potential threats to the stability of a regime.

As Benjamin notes, violence in the hands of the individual is threatening to the law itself, and thus seemingly innocuous criticisms of the state (in the forms of satire, painting, etc.), must be suppressed. These iconoclasts face imprisonment, censorship, threats, surveillance, fatwahs, and even death; they are members of civil society that do not have the protections offered to members of political groups, NGOs, and institutions, and yet they face severe political penalties for their personal opinions. The fact is that creative dissenters do, in fact, drive major social and political change, and this is rarely disputed; however, I argue that they have been denied political legitimacy, recognition within other disciplines concerned with human rights, and that their potential for change

could be redirected and maximized in fields such as freedom of expression, development, and pacific regime change.

As I have argued several times above, I consider it highly problematic, and ultimately detrimental to the fulfillment of human rights, that the contributions of creative dissenters do not have a more direct effect on the formation of both our international and domestic legal and normative frameworks. As has been established, the law, epitomized in the form of sovereign, recognizes no higher authority than itself. And yet, if we revisit the notion of how metaphysical paradigms inform rights practice, it must be noted that theories of rights (or justice, equality, freedom, peace, etc.), in reality, are culturally informed by creative dissenters to a great extent, and not exclusively by legislators and policy makers. Therefore, to ignore the cultural content of dissent is to ignore the political will of a large majority of individuals. As previously noted, the majority of people are not lawyers, judges, politicians, or even associated with professional fields neighboring rights work. Instead, citizens register their political opinions, including dissent, using the tools that they have at their disposal; for creative dissenters, this arsenal of tools is especially powerful.

In this next section, I will focus solely on literature as a form of dissent, and I will argue that its exclusion from the law in certain ways, results in barriers to rights working as they should. I have chosen literature for two reasons: first, simply because literature and critical literary theory are the artistic fields with which I am most familiar. Second, because the deep connections between law and literature have been well established and expounded upon for decades; however, I propose that the field of law and literature is, in some ways, lacking in its awareness of how literature may affect the law, and vice versa. Of course, in part, this brings us back to narratives of hegemony and ideology – why, in academia, we tend to view certain discourses as more legitimate than others, and thus better equipped either to affect the ‘practical’ spheres, (law, science, medicine, etc.), or to be relegated to the realm of theory (humanities, arts, social sciences, psychology, etc.), and therefore be considered less useful.

Chapter 6: The Utility of Literature in Legal Studies

The connection between law and literature has long been established, and the academic movement of law and literature “is still thriving, but [...] was at its most robust in the 1970s and 1980s.”⁸⁵ For an operational definition of how literature is read within the law (entirely different, conceptually speaking, to how law is read in literature), I refer to Robin West’s elucidation of the three chief interdisciplinary interpretations involved, namely the literary, the jurisprudential, and the hermeneutic. West offers:

First, law might sometimes be the subject matter of great literature, and when it is, literature should be read for the value of its insights into the nature of law. Second, literature might sometimes have the force of law, or might sometime in the past have had the force of law, or might have it in the future, and if so, then in order to know the law as it is, once was, or could be, we need to know its literary narrative root. There may not be a firm distinction, in other words, between the law that is, was, or could be, and the various products of our literary imagination. Third, law might be enough “like” literature that we can better understand how we glean meaning from legal texts, if we attempt a better understanding of how literature is read and interpreted.⁸⁶

West upholds the positive interpretation that we can glean truth about how the law impacts the lives of individuals. She surmises that, “[w]e ought to attend to the descriptions or depictions of law we find in imaginative literature, for the simple reason that great literature may contain truths about law that are not easily found in non-narrative jurisprudence.”⁸⁷

Richard Posner likewise notes that:

The field of law and literature is not new. Nineteenth-century English lawyers wrote about depictions of the legal system by Shakespeare, Dickens, and other famous writers. Wigmore thought lawyers should read the great writers to learn about human nature. Cardozo's paper "Law and Literature" analyzed the literary style of judicial opinions. But only since

⁸⁵ West, Robin. *Literature, Culture, and Law at Duke University*. Georgetown University Law Centre. 2008. Available at:

[pphttp://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1077&context=fwps_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1077&context=fwps_papers). p.1.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* p. 4.

the publication in 1973 of James Boyd White's *The Legal Imagination* has a distinct, self-conscious field of law and literature emerged.⁸⁸

However, despite Posner's acknowledgement of the deep historical and social connection between literature and the law, he declares, "that the study of literature has little to contribute to the interpretation of statutes and constitutions but that it has something, perhaps a great deal, to contribute to the understanding and the improvement of judicial opinions."⁸⁹ Moreover, "[t]he frequency with which legal subject matter appears in literature is [...] a largely adventitious circumstance. The literary character of judicial opinions, on the other hand, is an interesting and significant phenomenon."⁹⁰

At times, it is unclear whether Posner claims that literature itself is lacking in its applicability to the interpretation of statutes and constitutions, or whether it is merely schools of thought emerging from the literary-academic field that have nothing to bring to the table (such as New Criticism, Poststructuralism, Queer Theory, etc.). In fact, I have trouble discerning the merits of Posner's arguments; does he wish to underline that certain tools of literary analysis may not always successfully be applied to legal analyses (regarding "statutes and constitutions") and vice versa? Given certain arguments Posner provides, I lean toward the first interpretation (that literature itself is not a useful tool for interpreting the law), particularly since he suggests that, "the great false hope of law and literature [is] that it will change the way in which lawyers think about the interpretation of statutes and the Constitution."⁹¹ Nevertheless, I put forth that this is exactly the function that literature should (and continually attempts to) fulfill.

Additionally, Posner contends that "we do not read the Constitution or statutes for beauty; we read for guidance,"⁹² and that we read literature "for pleasure and to a lesser extent for instruction."⁹³ Posner posits sentiment as irrelevant to the law, and his entire argument relies on the erroneous assumption that a) we read literature almost exclusively for pleasure and not information or guidance, as he calls it (as opposed to how we read

⁸⁸ Posner, Richard A. "Law and Literature: A Relation Reargued". *Virginia Law Review*. vol. 72, 1986. pp. 1351-1392. p.1352.

⁸⁹ *Ibid.* p. 1351.

⁹⁰ *Ibid.* p. 1352.

⁹¹ *Ibid.* p. 1360.

⁹² *Ibid.* p. 1369.

⁹³ *Ibid.* p. 1367.

the law), and that b) the recurring appearance of the law in literature is insignificant, or incidental, and cannot teach us or provide the best informative source for learning about the law. As he notes, “[i]f I want to know about the system of chancery in nineteenth-century England I do not go to *Bleak House*. [...] There are better places to learn about law than novels—except perhaps to learn about how laymen react to law and lawyers.”⁹⁴ This is an extremely reductive analysis, and I believe an erroneous one: that there is a ‘best way’ to understand the mechanisms and effects of the law on the human being, and that this best way is somehow more factually objective than an artistic or literary instruction. This is mostly because the practical implications of the law as experienced at the quotidian level are utterly humanized, in the way that they affect the biology and psyche at both individual and collective levels. How, then, can it be argued with any validity that both readers and authors of fiction (or literature in Posner’s terms) do not provide significant tools for legal analysis (at the constitutional level, as opposed to the judicial level, which Posner argues can be beneficial). Put simply, and using Posner’s terms, isn’t learning “about how laymen react to law” absolutely integral to our understanding of the law itself, and vital to (re)constructing a metaphysics of rights that represents the interests of the “laymen”?

Glaringly obvious counter-examples come to mind, including the examples that Posner himself employs in his analysis. Can he truly argue that Orwell’s *1984*, or Huxley’s *Brave New World*, or Pamuk’s *Snow* cannot inspire in scholarly readers a healthy and informative new perspective on the legislative policies that govern human lives? And should we also admit Posner’s critique that these texts were not written, at least to some extent, with the motivation of providing considered socio-political and (perhaps even) legal analysis?

Posner’s paper also redirects us to a previous philosophical problem. If we allow ourselves to approach law and literature from another perspective, we may return to the question of dissent: how can individuals express political opinions and influence policy if they are not legitimized by the authority of the law?

⁹⁴ *Ibid.* p. 1356. Ironically, reading *Bleak House* is *exactly* how I learned about 19th century Chancery court.

In my opinion, Posner has taken a rather grim view of the impact that literature can have on law, but even more optimistic, validating perspectives such as West's or Boyd's that enthusiastically celebrate this symbiotic relationship are blind to the most important impact literature has on the law, whether it be constitutional, judicial opinion, or international human rights norms. In short, the academic field of law and literature remains reluctant to recognize the latter as a means of creative dissent, a narrative expression of that which we find theorized in political science and philosophy.⁹⁵

Interestingly, Posner himself unintentionally clarifies why this is so:

The difference has also to do with *power*. A literary critic may be an influential person, but he is a private individual in a competitive market. Unlike a judge, he wields no governmental power. In our society the exercise of power by appointed officials with life tenure (true of all federal and, practically speaking, many state judges) is tolerated only in the belief that the power is somehow constrained. The principal constraints are authoritative texts.⁹⁶

Once again, the superlative position of the law in relation to other types of knowledge is asserted, and the individual (be she literary critic or novelist) wields far less power than the legal scholar or lawyer as a representative of the sovereign state. And, as Benjamin, Foucault, and Agamben (and even critics of the UN I have cited above) all argue, power has very little constraint, and the belief that it is so, referred to by Posner, is merely the way in which power camouflages itself, though it remains insidious and ubiquitous.

Another important point that Posner does not attempt to address: if literature and its schools of criticism are largely irrelevant and ineffective in terms of legislation (in whichever manifestation, including 'popular justice' interpretations, garnering political sentiment and a desire for reform among groups and individuals, etc.), then why are authors, philosophers, and artists among the first to suffer infringements of their rights (or even harassment, imprisonment, and death), when a state system begins to deteriorate. This is not exclusively a historical phenomenon, as we may argue was the case with

⁹⁵ It is important to note that (at least in my experience) the same is not true when approaching the law from the perspective of literary faculties, partially because in long-standing tradition, literature has not shied away from its political nature, and partially because literature has never upheld itself as a supreme authority, omniscient and omnipotent in the way the law claims itself.

⁹⁶ Posner. p. 1370 (emphasis mine).

Socrates, Voltaire, etc. This practice continues today (Eritrea, France, Turkey, etc.).⁹⁷ If literature poses no threat to law then how can we explain the very obvious tension in the ideological relationship between the two? I answer: because creative dissent is dangerous in the hands of the individual in the same way that Benjamin argues of violence.

⁹⁷ For statistics regarding writers and journalists imprisoned, killed, disappeared, etc., both by country and year, see the previously noted RSF website: <https://rsf.org/en>.

Chapter 7:

A Brave New World: Biopolitics in Literature

It is curious that even within the discipline of law and literature, or other considerations such as Posner's, there is a marked lack of recognition for the *active* effect of literature upon the law. I believe there is an important connection we are missing, and though I am incapable of fully determining it myself, I can nevertheless sense that a) literature actively sways the opinions of people and can determine how they act, feel, vote, etc.; it becomes a comprehensive, and potentially unconscious aspect of how people engage with their environments, including the legal and political. b) there is obviously a more tangible connection between law and literature, or rather between ideas and power, since states are so quick to react with imprisonment, censorship, etc. for authors that challenge their authority. Even more than this, however, I believe creative dissent (and literature) to be the realm in which we allow ourselves to express the unexpressable. Let me clarify: in reference the aforementioned theory that Orwell illuminates with his example of Newspeak (limiting words is equated with limiting thoughts and concepts), I contend that although individuals may be divested of a certain ability to express their subjugation in political terms, given the elusive nature of power, the creative realm of the literary space allows for descriptions of subjugation, bare life, and individual reactions to power that are not bound by the restrictions of other types of political expression.

Furthermore, I believe that Richard Posner is fundamentally incorrect in his conclusions about what the literature can teach us about the law. Representations of power in novels, whether historically based or fictive, allow us to extrapolate not only a general political outlook, but also specific satisfaction or dissatisfaction with aspects of life in a given society (and thus a perspective on that wish the author or characters wish to change about their circumstances). In postcolonial literature, for example, authors often address violations of rights or restrictions on personal liberties that they associate directly with the oppression of the colonized. Although they may not always express this precisely in legal terms, this dissatisfaction clearly questions the authority and right of power, and connotes a desire for change, both social, and constitutional/legal. When read in conjunction with political and legal philosophy, literature is remarkably fruitful in

providing political insights, particularly as regards human rights. Rights (and the concepts they allude to), after all, are inherently political; rather, they express quintessential *human* emotions, such as happiness, goodness, peace, justice, and the like. Surely, the exploration of these notions in is useful when establishing a metaphysics of rights?

To illustrate my point more concretely, let us look to two seminal dystopian fictions, Aldous Huxley's *Brave New World* and George Orwell's *1984*. I put forth that these two works are nothing less than narrative manifestations of theories of biopolitics, simply expressed in literary terms instead of philosophical ones. Huxley and Orwell are often famously juxtaposed as depicting conflicting visions of totalitarian frameworks, signaling either two distinct origins and/or outcomes of the extreme political state of exception. Orwell's Oceania in *1984* is totalitarianism in Arendt's sense, state violence and control at its most extreme, whereas Huxley postulates the exact opposite, a perfected and peaceful utopia (at least in Europe) in which society is not only regulated to the utmost, but it's citizens are grateful for the regulation.

Orwell imagines the essence of future human existence as a "boot stamping on a human face – forever."⁹⁸ He also engages in a narrative that is directly pertinent to the practice of rights, since themes within the novel echo the very real historical circumstances of totalitarianism that were haunting the world in the aftermath of WWII. Propaganda, torture, freedom of thought and expression – in fact, almost all civil, political, social, cultural, and economic rights (and their violation or abuse) are discussed in the novel. Huxley, conversely, only sees this brand of vicious and exacting totalitarianism as only a possible version of future politics, though not a feasibly sustainable one. Instead, he believes, we as a people – both in the sense of *populi/polis* or political body (*bios*), and the sense of 'zoe' or bare life – must be pleasantly subjugated, and happily complicit in our subjugation. This subjugation, if we draw from Agamben, is nothing other than our ready acceptance of our state as *homo sacer*, unable to be sacrificed and simultaneously ready to be killed at any time by the "all".

Huxley and Orwell famously disputed the likelihood of these two paradigms in a personal exchange of letters after the publication of their respective works. What Orwell

⁹⁸ Orwell. p. 267.

and Huxley did not realize is that their divergent dystopian depictions are (and must be) *both* always ever-present in reality. The violence capable of being inflicted on *homo sacer* is, and must always be, juxtaposed with the pleasure of acceptance within the political body. These are the indicators of the delineations of the sovereign power paradigm. There can be no crime without the criminal, no state of law without an idea of lawlessness, no inclusion in the bios and polis without the ever-present threat of exclusion and expulsion from it.⁹⁹ Furthermore, this exclusion needs only be presented as an idea, image, sense, etc., and be sufficient to ensure docile bodies. It is enough for us to see a picture of the trope of ‘starving African child’ in order for us to be conditioned to the thought, “this must be avoided at all costs”. Laws may be suspended, states of exception declared, rights null and void, all in the name of defending the child’s image and an avoidance of becoming that child ourselves.

Ideally, not only is the bare life/physical body the space on which politics is manifested and inscribed (or negated), it is also the locus for the fulfillment or positive inscription of culture. Through various channels of hegemony, our bodies become the great physical homage to consumerism as the compliment to biopolitics. Agamben explains that, “[i]n particular, the development and triumph of capitalism would not have been possible, from this perspective, without the disciplinary control achieved by the new bio-power, which, through a series of appropriate technologies, so to speak created the “docile bodies” that it needed.”¹⁰⁰

If we compare and analyze *Brave New World* in light of Agamben’s political theory, it becomes a text that simply logically extends the idea and evolution of biopolitics in the most insidious sense. Much more subtle, palatable, and economically profitable, this ‘benevolent’ biopolitics is more ubiquitous and difficult to subvert than its more violent manifestations, such as Agamben and Arendt’s reading of the bodies in concentration camps. Huxely provides a narrative mirror for that which Agamben seeks to express in juridico-political terms. Huxley’s world is one in which biopolitics have been perfected in their most efficient form. The state and its institutions have achieved full control over both the *zoe* and the *bios*, including genetic features, intellectual

⁹⁹ Agamben expresses this in his description of the ban.

¹⁰⁰ Agamben. p. 10.

¹⁰¹ *Ibid.* p. 25.

capability, skin color, sexual preference, performance, frequency, levels of consumption of all material goods, emotional regulation through the use of “soma”, and of course birth and death.

In a letter to Orwell, Huxley surmises:

The philosophy of the ruling minority in Nineteen Eighty-Four is a sadism which has been carried to its logical conclusion by going beyond sex and denying it. Whether in actual fact the policy of the boot-on-the-face can go on indefinitely seems doubtful. My own belief is that the ruling oligarchy will find less arduous and wasteful ways of governing and of satisfying its lust for power.¹⁰²

What Huxley argues is in keeping with Foucault and Agamben’s explication of docile bodies. One could fairly say that Huxley was far more preoccupied with consumerism and capitalism than Orwell, and the complementary way that they interact with structures of power to ensure a happy subjugation. He notes:

Within the next generation I believe that the world’s rulers will discover that infant conditioning and narco-hypnosis are more efficient, as instruments of government, than clubs and prisons, and that the lust for power can be just as completely satisfied by suggesting people into loving their servitude as by flogging and kicking them into obedience. In other words, I feel that the nightmare of Nineteen Eighty-Four is destined to *modulate* into the nightmare of a world having more resemblance to that which I imagined in *Brave New World*. The change will be brought about as a result of a felt need for increased efficiency.¹⁰³

Even if we were to argue that the aims of human rights are fundamentally good, and invested in creating the most perfect possible world, with near complete equality and a certain quality of life, we may consider that we are catapulting ourselves into a utopia, which may be undesirable in and of itself. Consider the epigraph to *Brave New World*:

Les utopies apparaissent comme bien plus réalisables qu’on ne le croyait autrefois. Et nous nous trouvons actuellement devant une question bien

¹⁰² Huxley, Aldous. *Letter to George Orwell*. Wrightwood 1949. Available at: www.openculture.com/2015/03/huxley-to-orwell-my-hellish-vision-of-the-future-is-better-than-yours.html. Accessed on 3 February 2017.

¹⁰³ *Ibid.* (emphasis mine).

autrement angoissante: Comment éviter leur réalisation définitive? ... Les utopies sont réalisables. La vie marche vers les utopies. Et peut-être un siècle nouveau commence-t-il, un siècle où les intellectuels et la classe cultivée reveront aux moyens d'éviter les utopies et de retourner à une société non utopique, moins 'parfaite' et plus libre.

NICOLAS BERDIAEFF.¹⁰⁴

¹⁰⁴ Huxley, Aldous. *Brave New World*. London, Chatto & Windus: 1934. Epigraph. "Utopias seem to be much more attainable than we once believed them to be. And in reality, we find ourselves faced with another agonizing question: How to prevent their definitive actualization? Life is marching toward utopias. And perhaps a new century is beginning, a century in which intellectuals and the privileged will dream of means to evade utopias and to return to a non-utopian society, less 'perfect' and more free." (translation mine)

Chapter 8: Conclusions

What I have attempted to demonstrate in my research is that first, the current system of human rights is not working at the practical level of operations, implementation, and enforcement, but more importantly that the underlying reason for these failures is best explained through an understanding of rights theories from varied disciplines, especially theories that contribute to our comprehension of the dynamics of power vis-a-vis the state and the individual. Although I lean heavily towards the paradigms put forth by Foucault and Agamben, I do not discount the criticisms of rights practice or geopolitics that are more commonly discussed, nor do I think that significant changes in practice would not lead to an improvement in the very real realm of rights. I believe there are great thinkers within faculties of law, human rights, and associated fields (and within the UN itself) that provide apt criticisms and suggestions for reform that would facilitate and enhance the success of rights; however, the theories I have outlined in the latter portion of this paper seem better equipped to answer questions addressing the seemingly perpetual historical existence of ‘haves’ and ‘have nots’, the one percent, and even seem to hold strong in the face of Marxist analysis. Despite the obvious utility of practical considerations in determining how rights can be improved, I sincerely think that concerting so much effort in miniscule details, such as deconstructing every word of a human rights treaty (which happens), is often “like worrying about watermarks on the furniture when the house is burning down.”¹⁰⁵ Perhaps it is time to consider building a new house.

Unfortunately, since I have attempted to do a ‘bigger picture’ examination, there are innumerable works that could have been relevantly mentioned, if brevity were not an issue. Notably, Guyatri Spivak’s ideas on dissent, otherness, and the subaltern, Antonio Gramsci’s *Prison Notebooks*, Louis Althusser’s concept of state apparatuses, and Noam Chomsky’s prolific writings on consent and dissent would have brought insightful and pertinent contributions to my arguments.

¹⁰⁵ Kingsolver, Barbara. *The Bean Trees*. New Harper Perennial, New York 1992. p. 136.

As for the section on creative dissent, it would be asinine and impractical to suggest that creative dissent and alternative fields of thought be taken literally, and extrapolated to amend rights and constitutions, but at the very least we could acknowledge them more fully in our metaphysical considerations and allow them to have more influence on the development of our rights in practice. A telling point that literature in fact does have a significant practical relationship to the law is the appalling and alarming rate at which thousands of artists and writers are imprisoned, tortured, disappeared, intimidated, or censored for their ideas. To put it bluntly: books are dangerous, and perhaps we should think more about why they are so. In arguably every dystopian fiction or film, there are no books, no reading for pleasure, and often no films, music, etc. This erasure of culture not only allows for the easy manipulation of information, but impedes any form of interpersonal communion that may lead to solidarity amongst those reduced to bare life.

The omission of extra-legal considerations of rights from rights discourse, in part, ensures their failure, since it divests large portions of the population (who are not in the business of rights or law) of influencing policy and political opinion in any immediate sense. Engagement in political or legal spheres ruthlessly limits the choices individuals can make about their rights. Voting is a severely restrictive avenue of civic participation in the *polis*, and hinders the ability for successful rights fulfillment. As we have learned from Orwell, to some extent, if you cannot say it, you cannot think it; therefore, it is imperative that we widen our ‘vocabulary’ of rights to embrace new ways of conceiving them.

In regards to my introductory remarks on the distinction between the metaphysical and practical spheres of rights, what I have attempted to demonstrate is that the success of rights is most hindered by the false notion that we have a relatively stable theoretical framework, and that that framework can somehow be perfected, and that a utopian world of fulfilled human rights is possible or even desirable. Furthermore, the supremacy that we have given the law (and the human rights it establishes), to the devaluation of all other forms of knowledge stultifies any opportunity we have to reconstruct that metaphysics. The processes by which we establish the theory and practice of human rights are not sequential, but rather simultaneous. Not only that, but

they are, by their very nature mutable and in constant flux. To pretend otherwise, particularly concerning aspects of theory, is severely detrimental to our evolution as rights bearers.

Finally, it seems fairly obvious that no one has ever definitively solved the problem of why rights are not working as they should, and I do not even presume to have made a significant contribution to the discussion; I have merely tried to reignite the flames of thinkers much wiser and more eloquent than myself. Perhaps it is simply my own conjecture, but I often detect traces of sadness and disillusionment in the theorists I admire, an eventual disappointment that thoughts have not translated into deeds, and that those who suffer continue to do so despite our best efforts. Reflecting on his contributions to philosophy, Foucault commented:

If I look back today at my past [...] I can see that the true motivating force was really this problem of power. Ultimately I had done nothing but attempt to trace the way in which certain institutions, in the name of "reason" or "normality," had ended up exercising their power on groups of individuals, in relation to established ways of behavior, of being, of acting or speaking, by labeling them as anomalies, madness, etc. In the end, I had only produced a history of power.¹⁰⁶

However, in response to the despair and confusion that plague us in relation to human rights, I prefer the following hopeful sentiment: “In reply to Marx’s famous thesis that philosophers have hitherto only interpreted the world when the real point is to change it, Foucault would no doubt have argued that our constant task must be to keep changing our minds.”¹⁰⁷

¹⁰⁶ Foucault, Michel. *Remarks on Marx: Conversations with Duccio Trombadori*. R. James Goldstein and James Cascaito (trs). Semiotext(e), New York 1991. p. 17.

¹⁰⁷ *Ibid.* p. 14.

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