Rights, Care, and Democratic Ethics

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Abstract

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This dissertation explores the relationships among rights, care, and communicative (or deliberative) democracy. I argue that ethics of care and rights are distinct and mutually irreducible political ethics, but that they are most morally and politically potent when deeply embedded in one another, and that properly understood, they supply the foundations of democratic discourse. I illustrate my argument through exploration of case studies on disability rights, same-sex marriage, and school desegregation.

CONTENTS

RIGHTS, CARE, AND DEMOCRATIC ETHICS

Democracy is experiencing a moral crisis. In the United States, deepening partisan polarization exposes and reinforces profound "tribal" rifts in societies, while escalating attacks on minority communities – both rhetorical and physical, state-perpetrated and state-condoned – intensify existing forms of oppression and exclusion. Meanwhile, the basic mechanisms of democratic governance are under attack, from measures curtailing voting rights and undermining freedom of assembly, to rhetoric from state actors delegitimizing the free press and the independent judiciary.

How, in these times, can democratic communities recover the will and the ability to understand, and meaningfully account for, the interests and perspectives of their most marginalized members? How, indeed, can democratic communities themselves survive across the gulfs of ideology, of identity, and even of basic trust, that divide us from one another? With so much at stake, it is incumbent on democratic citizens to give close attention to the foundational ethics and ideals of healthy democracy – to recognize our most basic commitments to each other and to understand the importance of those commitments in structuring a functioning and inclusive democratic community. It is critical that we give careful attention to how those commitments operate in real political context, and think carefully about how we can best secure and extend their reach into a fractured polity.

To that end, the essays in this collection all explore different facets of the relationship among rights, care, and communicative (or deliberative) democracy. The literature on these various paradigms often situates them in opposition to one another – arguing, for example, that care should take moral priority over rights, that rights have greater political efficacy than care, or that either or both operate at the expense of truly democratic discourse. Here, however, my purpose is not to take a side in those debates, but rather to refute the “either/or” premises on which they rest. Instead, I show in the following chapters that ethics of care and rights are at their most morally and politically potent when deeply embedded in one another, and that properly understood, they supply the foundations of democratic discourse.

The central lessons that emerge from my exploration are, first, that none of these ethics is safely understood as merely ancillary to a well-functioning democracy; and, second, that the visions of them that we nourish must, in order to be politically potent, be unrelentingly ambitious in their reach. When democracy is under duress, it might be tempting to retreat to a minimalist conception of its demands, on the supposition that we cannot afford sweeping idealism but must concentrate our intellectual resources more narrowly in order to mount a more vigorous defense of the limited ground to which we cling. However, the following chapters show that the democratic project cannot be thus pared down, its elements either diminished or severed from one another, without being neutralized in the process. This is not, however, reason to despair. Instead, I aim to illustrate that a rigorous and fully elaborated account of democracy’s interlocking ethical foundations is all the more defensible, because each of our basic commitments, when well understood, serves to create the case for the others. The fuller and farther-reaching our commitment to democracy’s ethical underpinnings, the more compelling the democratic ideal becomes.

In the liberal tradition, “rights” have long been the framework used for thinking about those fundamental interests of every person that must be secured regardless of who holds political power. The bulk of the rights tradition emphasizes the primacy of the individual, the basic moral equality of all persons,[1] and the rejection of undue interference with bodily integrity and personal autonomy. It emphasizes the theoretical articulation of abstract, universal principles of right, and their subsequent application to individual circumstances through processes of logical reasoning.

Care ethics, as articulated by feminist thinkers since the late 20th century, present an alternative form of political morality: an emphasis on relationships between persons as the sites in which our basic needs are met, and as generative of positive obligations binding on the persons who participate in them. Care-based morality begins with the particularities of specific persons and relationships, informed by deep, empathetic engagement with the other, and builds outward to an understanding of the bonds and obligations that structure the broader political society.

Carol Gilligan describes the distinction between these forms of moral reasoning as a contrast between "morality as fairness" and "morality as responsibility." The former focuses on "rights and rules," reasoning deductively from purportedly objective premises to solve moral dilemmas while placing a high priority on preserving the sanctity – the dignity, security, and autonomy – of the individual. The latter focuses instead on our situation in relationship to particular others and calls for working within the relational network to ensure that needs are met and that relationships themselves are sustained. As elaborated by subsequent theorists, including Sara Ruddick and Joan Tronto, whereas morality as fairness, or an ethic of rights and justice, might dictate setting aside particular relational attachments in order to assess large-scale questions of right and wrong from a position of pure principle, morality as responsibility, or an ethic of care, draws on relational ties to inform our understanding of right and wrong – what

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[1] Of course, this moral commitment has been laden in practice with so many caveats, exclusions, and ascriptions of "natural" difference justifying differential treatment as to render it, at most times, essentially meaningless in its application to large portions of the human population. Chapter 2, *infra*, explores disjunctures between principled commitments to equality and their practical application to specific oppressed communities.

Ruddick describes as "maternal thinking" – and to situate us within the larger societal fabric in which our obligations to more distant others arise.

The idea that ethics of care and rights might coexist within democratic politics is hardly novel. Virginia Held, a passionate defender of the ethics of care, also highlights the effectiveness of rights discourses for feminist activists in specific areas, namely sexual harassment law and reproductive choice, and cites the arguments of feminist legal theorists who show "how rights cannot be replaced by what an ethic of care alone would provide" (Held, 67). Held recognizes that "debates among feminist moral theorists have moved beyond the justice versus care formulations" to consideration of "how these core values should be thought to be related or combined" (*Id*. at 66).

However, Held's analysis continues to focus on tensions between frameworks, and to treat these tensions as a problem to be solved – in her analysis, by insisting on the ultimate priority of care ethics over rights-based frameworks of justice. The latter may be invoked where useful, a sort of convenient legal fiction or analytical shorthand, "[b]ut we should not forget the reality and the morality this view obscures" (*Id*. at 72). Of course, Held has her counterparts among progressive thinkers committed to the primacy of liberal individualism who would nonetheless recognize the importance of care in political society, while maintaining that the individual – the bearer of conscious subjectivity, the one who ultimately experiences want and suffering – must be the fundamental unit of analysis in our moral theories; and that we must give ultimate priority to the idea of individual rights in order to ensure that no individual's basic interests can ever be occluded by constructions of the "greater good." In effect, both perspectives sustain the "care versus justice" debate at a foundational level, even while allowing that the primacy of one framework need not preclude – indeed, may even invite – the deployment of the other, at appropriate times and places.

By contrast, my aim here is to argue that, whatever the philosophical import of assessing care and justice in opposition to one another, the greater political truth is their mutually generative and importantly complementary character. I will show that neither can be reduced to a mere facet of the other, nor understood simply as a useful augmentation of politics rooted in the other. They exist in tension with one another, and yet the basic ethics and understandings at the core of each create the conditions of possibility for the other. Moreover, the tension between them is itself best understood not as a problem to be dealt with at a theoretical level, but as a political resource, a perpetual driving force toward deeper and more dynamic engagement with challenging problems of political inclusion.

In the first place, I take on commentators who would set aside "rights" as too abstract and too individualizing, favoring discourses rooted in materiality and relationality – specifically, a focus on "needs" and on responsibility for meeting those needs. Here, I highlight synergies between feminist care ethics and the critical legal studies movement's critique of rights. Mark Tushnet, a central voice in critical legal studies, suggests several limitations of the rights paradigm and proposes a politics instead driven by discussion of needs; and it is in the work of feminist care theorists such as Held and Joan Tronto that we find the most robust elaboration of the understandings and ethics that might underpin such a politics. Tronto, indeed, goes so far as to offer an account of democracy in which the organization of "care" – attention to the material needs that must be met in order to sustain life, and the work performed in meeting them – is the central project of politics (see generally, Tronto [2013]).

While I find much to admire in the articulation of a politics that incorporates the core premises of care theory – especially, an acknowledgment of our materiality and the need and vulnerability that accompany it, a commitment to attentiveness to the particularity of individual embodied experience, and a recognition of our existence in relationship to one another as a constitutive element of our individuality, rather than an overlay to it – I argue that rights have a foundational role to play in any "caring" politics. To illustrate the point, I focus on the experiences of the disability community in the United States. Historically the objects of policies oriented toward the meeting of needs and the provision of care, people with disabilities in the last half-century have organized instead around a politics that emphatically centers rights.

Drawing on the work of disability theorists themselves, alongside Patricia Williams's response to Tushnet on the topic of race and rights, I elaborate the shortcomings of a pure politics of care. Needs-based policies often overemphasized materiality at the expense of more abstract but still important goods such as personal dignity and social inclusion. Meanwhile, by failing to address – or even reinforcing – the withholding of the latter from people with disabilities, these policies failed to yield political empowerment, with the result that when, in fact, policy gave short shrift to their material needs, people with disabilities were ill-situated to advocate for more adequate provision. In contrast, the invocation of a rights paradigm has enabled the disability community to claim its own political voice and more effectively assert a broad array of claims.

At the same time, however, I recognize that the backlash against a needs/care paradigm within the disability community has itself produced forms of exclusion and marginalization, both of some members of that community and of other vulnerable individuals – such as caregivers and hired assistants – situated in relationship to it. I thus turn to insights from David Engel and

Frank Munger's study of the lived experiences of people with disabilities under the ADA, to draw out the idea of "rights to care" – the idea of reconstructing our relationships in more caring terms, terms that demand attention to particularity and materiality, but doing so atop a framework of rights. I reject the idea from some care theory that rights are inherently anti-relational – that their individualism isolates us from one another, or that their conflictual character undermines strong relational ties – by instead showing how acknowledgment of one another's individuality, along with the possibility of constructive disruption through conflictual engagement (an idea elaborated in Martin Luther King, Jr.'s writing and activism), creates the conditions of possibility for healthy relationships. I also draw on Axel Honneth's taxonomy of forms of recognition – intimate ("love"), abstract universalist ("legal"), and solidaristic – to illustrate a more dynamic relationship among these than Honneth posits, one in which the delicate character of robust intersubjectivity is maintained precisely by our simultaneous engagement with one another as both individuals and co-relationists and our simultaneous acknowledgment of one another in both the abstract terms of moral/legal personhood and the concreteness of our particular materiality.

My argument thus far might ally me with those liberal thinkers who welcome care as an overlay to a foundationally individualist and rights-driven conception of politics. However, the next prong of my argument turns the first on its head. Looking to the experience of the LGBT community with rights discourses in the fight over same-sex marriage, and in particular in the campaign to stop Proposition 8, a voter initiative that revoked the state constitutional right to same-sex marriage in California, I argue that rights themselves are meaningful only when built on a foundation of care. The ideals that form the core of a rights paradigm, abstractions such as self-determination and equal respect, must be realized in concrete terms – in particular answers to particular questions about the social and political order. I point to Lynn Hunt's historical study of the development of the "rights of man" in France, which illustrates how the "logic of rights" ideally works to produce such realizations, but also how it often fails to achieve its goals, and I emphasize that meaningful translations from abstract ideal to concrete policy are possible only with reference to the context of one another's particular characteristics and particular lived experiences. Moreover, in a diverse polity – that is, in any real society that aspires to the political inclusion of all its members – care is essential to our ability to adequately engage this context. It is through relational contacts, imbued with attention to one another's particularity and genuine concern for one another's well-being, that we come to understand those different from ourselves well enough to apply our ideals of right to them and to their lives.

In the case of the same-sex marriage debate, this meant heterosexual decision-makers needed to understand enough about queer individuals and their relationships and families to critically assess the rationales provided for legal differentiation between same-sex and opposite-sex partnerships. The "No on 8" campaign in California, relying overwhelmingly on abstract arguments from general principle, failed to cultivate these understandings on the part of the voting public. As public opinion shifted, it did so largely through heterosexual voters' first-hand relational contacts with queer individuals, and their internalization of those individuals' experiences of oppression and aspirations to more meaningful forms of political equality. In turn, the framework of rights served to elaborate the concern thus cultivated for the well-being of particular queer individuals into principled positions on the political entitlements of the queer community as a whole. I theorize this example of the invocation of a political ethic of care as beginning from a queer "politics of presence," following Gretchen Ritter's expansive account of the term coined by Anne Phillips, and developed through the use of "greeting" and "narrative," illustrating Iris Young's argument that these merit recognition as politically significant forms of communication.

I then turn to critiques of the same-sex marriage campaign by radical queer theorists such as Michael Warner, along with a contrasting empirical exploration by Shannon Weber. Weber shows that, in contrast with Warner's concerns, same-sex marriage activism has not necessarily depended on an "assimilative" posture by queer activists, but in fact has been generative of more radical claims. I argue that a politics of rights rooted in care allows this result, permitting the articulations of more liberatory and expansive conceptions of equality. Whereas simplistic rights logic dictates, on the parts of marginalized claimants, syllogistic identifications with – and therefore conformity to the norms of – the dominant group, a rights paradigm informed by care invites claims that are rooted more deeply in the particularity of marginalized groups, asserting their human dignity on its own, more fully realized, terms.

Between these two examples, I thus depict rights and care as mutually constitutive and deeply dependent on one another. Neither, I have shown, has meaning as a political ethic in the absence of the other. This is not, however, an argument for a single unifying ethic that somehow encompasses both paradigms, or that marks a mediating path between them. The contrasts between the two frameworks are substantial, and foundational. Any philosophical account that attempted to coherently negotiate the dichotomy between seeing persons as essentially individual and essentially relational, or that between, on the one hand, conceptualizing political subjects through a frame of abstract universalism and, on the other, engaging the concrete particularity of specific persons, would necessarily neutralize the power of one of these two accounts, if not both. Political praxis, however, is not philosophy. The conceptual incoherence of an account that both situates rights atop a foundation of care and care atop a foundation of rights is, in the space of real politics, a source of productive tensions – a check on the self-defeating excesses of any totalizing conceptualization, and a perpetual generator of the critique and contestation that are the engine of political engagement.

The argument thus far has focused on the function of rights and care within a democratic framework in securing particular political goods to all participants. However, in the second half of my discussion, I go further, arguing that the basic discursive processes that constitute democracy must be rooted in both rights and care ethics. I work within the normative framework of "communicative democracy," a term employed by Iris Young to build on deliberative democratic theorists' conception of democracy as collective decision-making by the members of a polity on the basis of inclusive processes of contestation, while better acknowledging the valuable contributions to those processes made by forms of communication other than pure deliberation. My discussion highlights the roles of both rights and care ethics as conditions of possibility for inclusive democratic discourse.

This portion of my discussion is more overtly aspirational in its orientation than the preceding chapters. While I have highlighted the profound transformative potential of reimagining care on a foundation of rights, and rights on a foundation of care, I have suggested that these transformations are solidly rooted in our existing political practices and norms, requiring, for the most part, only more deliberate cultivation for their fuller realization. In this second part, however, I explore key foundational weaknesses in our existing political ethos, and I call for radical reimagining of key norms. I recognize that rights, in particular, have been employed in our politics in a manner that tends to neutralize the very ideals that animate them; however, I invoke the writing of Patricia Williams to show why the reconstruction and reinvigoration of a rights framework, rather than its abandonment, is the necessary response to these failures. I also weigh in on debates over the desirability of treating “consensus” as the goal of democratic contestation, again arguing for reimagining rather than abandonment of the consensus ideal. In the course of these arguments, I figure rights and care as twin foundations of democratic discourse: Rights fuel our recognition of one another as speakers, while care underlies the mutual intelligibility of our speech.

My account of rights as the foundation of political speech takes on both advocates and critics of rights who work within the popular “rights as trumps” paradigm. Proponents such as Ronald Dworkin and critics such as Wendy Brown agree that rights function to remove certain matters from the realm of political contestation, submitting them to the exclusive judgment of actors who sit outside of, prior to, or above the political. For Dworkin, rights-claiming is the means by which the weakest members of a democratic society secure their fundamental interests against democratic intrusions; for Brown, it is the means by which the powerful secure their advantages against the same. I describe this as a “liberal-legalist” account of rights, one in which the liberal ideals expressed by rights are secured through a framework that situates legal and political judgment in opposition to one another, while locating rights squarely within the domain of the former.[2]

Notably, both advocates and critics tend to assume that a liberal-legalist rights framework functions to empower the holders of those rights to avoid political contestation of their interests. However, I offer a counterpoint to this view, in the form of a case study from judicial school desegregation project in the 1970s. In that case, I emphasize that the rights holders themselves were the ones who sought, and were denied, the opportunity to politically contest prevailing arrangements. In particular, a group of black students, who were members of the plaintiff class

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[2] Of course, few contemporary commentators would fail to recognize the interconnectedness in practice of the legal and political realms, but most would hold that their organization as conceptually and institutionally distinct imposes significant practical constraints on popular contestation of matters reserved to the legal realm.

in the litigation that put their schools under judicial supervision, and who were dissatisfied with the impacts of the court's adopted remedies on their educational experience, attempted to protest conditions at their newly integrated school, but their protests were suppressed by the courts as an "interference" with the desegregation process. Rights in this case functioned to shift power away from their own holders, securing not their interests as they conceived them, but their subjection to the will of the judiciary. I argue that this is not an aberration but a natural outgrowth of a paradigm that seeks to substitute deterministic judgment for open-ended processes in which free political subjects imagine and articulate their own claims.

This condemnation of the liberal-legalist paradigm is not, however, a condemnation of the rights ideal, but rather a call to a new understanding of it, for which I turn again to the work of Patricia Williams. Williams positions rights-holding as the antithesis of chattel slavery, highlighting the slave's political-legal construction as a mere object of property and arguing that the essence of rights-holding is the entitlement to speak for oneself and to assert legally and politically cognizable interests of one's own. This vision sits in stark contrast with the liberal-legalist reality I have highlighted, in which I have shown rights functioning to deny rather than to establish political subjectivity, and I argue that Williams's defense of rights therefore cannot be read simply as a valorization of existing constructions of rights, but rather as an assertion of what they can and must become. The rights paradigm's core commitment to individual dignity necessarily carries within it a radical assertion of the political weight of each individual's distinct subjectivity, and Williams persuasively argues that to set aside rights would be to discard this essence. Instead, I show how her reconstruction of the rights paradigm undoes the self-negating character of the liberal-legalist account, freeing rights to do the work of securing, rather than denying, their holders' political voices.

Securing to all the ability to speak, however, does not alone establish the foundations for democratic discourse. Speech is a unilateral act; communication, however, is relational. The latter can occur only when speaker and listener are already united by mutual access to a common framework of intelligibility – a shared space of language and ideas – and when both act to engage one another within that framework. This act is most successful when both parties genuinely concern themselves with one another's need to hear and be heard, and attune themselves to one another's particularity in the way they express themselves and interpret what they hear – when, in other words, they approach one another on the basis of an ethic of care. The effect is to transform what is particular to one party – their individual understandings and ideas – into an element of their shared conceptual space, a mutual awareness of what has been expressed, even if not agreement as to its truth or persuasiveness. Writ large, this process of constructing mutual understandings does the work of maintaining the space of mutual intelligibility that enables each individual communicative act. It is a form of the "world maintenance" that Joan Tronto identifies as the essential end of caring, and when carried out with intentionality as part of the practice of politics, it is an act of what Tronto defines as "caring with" – democratic engagement that is committed to sustaining and promoting the flourishing of democracy itself. In constructing this account of care-driven democratic communication, I situate myself at odds with a simplistic reading of Hannah Arendt's account of the "public" character of democratic speech. However, I return to the theme of the Hegelian recognition paradox to emphasize the impossibility of a one-dimensional account of political speakers as mere "others" to one another, and to reconstruct a vision of Arendtian intersubjectivity based, like recognition itself, on the dynamic interplay between what separates us and what we share.

Democracy, I argue, needs an ethic of caring communication at its core in order to live up to its essential normative aspirations. In making this claim, I highlight Chantal Mouffe's account of a "democratic paradox," the theoretical and historical roots of contemporary democracy in both liberal and civic-republican ideals. Mouffe emphasizes that these are fundamentally distinct and often conflicting theoretical frameworks, and she argues that 20th century ideals of "consensus" democracy, emerging both in theoretical accounts and in mainstream political practice, are rooted in what ultimately must be an illusory aspiration to philosophical closure. Mouffe accompanies this insight with an account of the ways in which politicians seeking the appearance of consensus work to marginalize dissent, and ultimately invite its re-emergence in essentially anti-democratic discourses and political movements.

For Mouffe, these observations are reason to reject consensus as an ideal for democracy. My own exploration of the liberal and civic republican visions, however, suggests an opposite conclusion: that the interplay of the two in fact demands that any normative justification of democracy hold out consensus as an ideal. Each tradition taken alone permits the choices of some to override the voices of others – whether through majoritarian or counter-majoritarian means – but each also acts as a check on the other's willingness to do so, and I thus argue that no "democratic" decision can be fully normatively satisfying unless it is in fact a consensus decision.

What I do not argue, however, is that consensus is possible. Instead, I refigure it as a horizon ideal – a direction in which to orient our processes of democratic contestation, and a measure of our accountability for their limitations. In this, I highlight Danielle Allen's conception of democratic responsibility for "residual disagreement" and for its impacts on those not satisfied by the polity's choices. Moreover, it is my conception of care-driven communication, taken in conjunction with the reconstruction of rights as meaningful guarantors of political voice, that provides the normative foundation for consensus-oriented processes of contestation that avoid the exclusions Mouffe describes. The potential for leaders to trade in the mere illusion of consensus is checked by the cultivation of a communicative sphere in which no voice can easily go unheard.

This is an ambitious normative vision, and I do not claim that ethics alone can heal all the ills of our contemporary politics. They are merely foundations, on which structures themselves remain to be built – and yet, it is with the construction of solid foundations that the building of structures must begin. However, a key differentiator between this project and other efforts to identify the ethical underpinnings of healthy democracy is the commitment to rights/care dualism – to foundational commitments to two fundamentally distinct ethics. Paradox, indeed, is a theme that haunts my discussion – the mutually dependent and yet mutually irreducible character of rights and care interweaves with the uneasy relationship between the identity and alterity of subjects in the Hegelian recognition paradox, while the contrasts between the two frameworks overlap with the tensions between liberalism and civic republicanism. Indeed, taken together, the different elements of my discussion dance around a central truth – that Mouffe's argument that democracy is essentially dualistic, and paradoxical at its heart, runs much deeper than she herself recognizes. Democracy is built on intersubjectivity, on recognition and discourse among distinct subjects who nonetheless share enough to engage one another in processes of contestation and resolution. Our theories of politics and our ethical orientations must speak to our individuality and to our relationships; to our rationality and to our materiality; to everything we share as common inhabitants of a physical and conceptual universe and to the separate interests that divide us. Paradox inheres in the human condition, and democracy must consist in its unequivocal embrace.

The entirety of my discussion is organized into four chapters, each addressing one prong of the argument outlined above. My first chapter situates rights as a foundation of care, drawing on the experience of the disability community with both paradigms; my second goes on to illustrate the opposite conclusion, using the experience of the same-sex marriage movement to show why care ethics must underlie an effective politics of rights. My third chapter elaborates the weaknesses of the "liberal-legalist" conception of rights, drawing on an example from school desegregation, and looks to Patricia Williams for the reconstruction of the rights ideal as a foundation of political speech. Finally, my fourth chapter delves into the work of Chantal Mouffe, arguing that we must maintain a consensus ideal for democracy despite the impossibility of achieving it, and highlighting the role of care in enabling the communicative practices on which a non-exclusionary consensus orientation might be based. Each chapter is intended to stand alone as an exploration of a particular facet of the relationships among rights, care, and democracy. Taken all together, they establish the overarching thesis that a healthy, inclusive democratic politics depends on simultaneous, vigorous commitments to rights and care as distinct and yet mutually constitutive political ethics.

CHAPTER ONE
RETHINKING RIGHTS, CARE, AND JUSTICE: LESSONS FROM THE DISABILITY MOVEMENT

I. Introduction: Needs, Care, or Rights?

In his 1984 "An Essay on Rights," Mark Tushnet wrote, "People need food and shelter right now, and demanding that those needs be satisfied – whether or not satisfying them can today persuasively be characterized as enforcing a right – strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced" (Tushnet, 1393). From this argument arose, among supporters and critics of the Critical Legal Studies (CLS) movement, debate over the idea of a "politics of needs" as an alternative to a politics of rights.

Meanwhile, a movement among some feminist theorists has elaborated the idea of an "ethics of care" as a source of political values and a framework for political decision-making. These claims framed a vigorous debate among feminists in which participants on both sides juxtaposed the practices and values of caring with established discourses of justice and rights. Below, I elaborate on the idea of a politics of care, and highlight its resonances with Tushnet's "needs" alternative and the CLS critique of rights more broadly.

Even as scholars debated these challenges to the politics of rights, however, a growing advocacy effort by people with disabilities sought to establish a new paradigm in United States disability policy, replacing an approach already based on needs and care with a commitment to disability rights. Below, I review this history and consider why rights proved such an attractive alternative to a politics of needs and care. I also highlight the ways in which the paradigm of rights invoked by the disability movement departs from the naively legalistic conception that Tushnet critiques, and instead embraces a situated, politicized approach.

However, I also show how a rights-oriented politics that rejects needs and care produces its own exclusions, and go on to suggest how rights discourses might function politically in combination with, rather than in opposition to, an ethic of care – aided by the dynamic contextualism that is already built into disability rights approaches. I also discuss the foundational role that rights can play in a framework of relationality. This analysis emphasizes the disability rights framework not only as a source of specific substantive guarantees, but as a tool for the (re)construction of disabled subjects on new terms. My conclusion links the preceding analysis to the philosophical idea of recognition, to argue that both rights and care must contribute to effective recognition among political subjects.

I. Theoretical Foundations: Feminist Care Ethics as a Framework for a Politics of "Needs"

Carol Gilligan introduced the idea of a distinctive care-based morality with *In a Different Voice* (1982), in which she highlighted gendered patterns of reasoning about moral dilemmas. Among her subjects, girls more often manifested a "conception of morality as concerned with the activity of care," in which moral reasoning centers "responsibility and relationships" (*Id*. at 19). This contrasts with "morality as fairness," the style of moral reasoning preferred by boys and privileged in previous psychological literature on ethics, which focuses on "rights and rules" (*Id*.) Gilligan highlights the contingency of the association between gender and approaches to moral reasoning (*Id*. at 2),[3] but her identification of the contrast itself, and of care as a distinct framework for moral reasoning – what she describes as a "morality of responsibility" (*Id*. at 19) – has been highly influential among moral and political philosophers. Within this framework, "an awareness of the connection between people gives rise to a recognition of responsibility for

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[3] Even given the caveats Gilligan asserts, some readers argue that her discussion as a whole tends to reinforce gender essentialism, or that the distinctions she draws between the morality of fairness and the morality of responsibility are too simplistic to meaningfully characterize individuals' practices of moral reasoning. For present purposes, however, the significance of Gilligan's legacy lies not in the empirical weight of her observations, but in the articulation of the two moralities as analytic categories, supplying a conceptual vocabulary on which subsequent normative elaborations of the ethics of care have drawn deeply.

one another" (30). Whereas conventional, or "masculine," moral reasoning consists of a deductive process of applying general principles in order to identify individual entitlements and allotting goods, Gilligan suggests that "feminine" morality instead entails a communicative process of working within a network of relationships in order to identify and meet particular needs while preserving the relational fabric.

Sara Ruddick's *Maternal Thinking* (1989) and Joan Tronto's *Moral Boundaries* (1993) highlight the political significance of care. Ruddick's book describes the activism of mothers of victims of state violence in Latin America, whose resistance was motivated not only by care for their own families, but by identification with similarly situated women: "extend[ing] their concern for their own children to other mothers 'like them'" (231). From these foundations, Ruddick explains, many women extended their concern "to all the people of the nation" and even to victims of violence worldwide (*Id*.). As Ruddick explains, these mothers "did not 'transcend' their particular loss and love; particularity was the emotional root and source of their protest. It is through acting on that particularity that they extended mothering to include sustaining and protecting any people whose lives are blighted by violence" (232). Rather than abstracting away from particular attachments to develop an objective political morality, in other words, they identified the ways in which those attachments embedded them in increasingly broad networks of relationships and responsibility, and they took responsibility for their own victimized loved ones in a manner simultaneously oriented toward meeting the needs of other mothers and victims.

Where Ruddick highlights the political participation of those whose daily labor was care, Joan Tronto's work goes on to consider the political significance and status of care itself. Her exploration of the centrality of care to the functioning of human societies highlights a contrast between care's collective importance, on the one hand, and the habits of thought, or "moral boundaries," that tend to exclude it from public moral discourse on the other. Ultimately, she insists, "[c]are is not a parochial concern of women, a type of secondary moral question, or the work of the least well off in society," but "a central concern of human life," and she calls on her audience "to change our political and social institutions to reflect this truth" (Tronto [1994], 180).

Subsequent scholarship, such as Virginia Held's *The Ethics of Care* (2006) further develops these themes, calling attention to the ways in which a political morality based on care ethics, if embraced throughout the political community, might inform and transform politics across a wide array of policy domains. Whereas Tronto calls for care to figure alongside justice (or what Gilligan accounted for as "morality as fairness") in our political thought, Held asserts the primacy of care, insisting that it is both more necessary to human existence, and more "inclusive as a value," insofar as she suggests that while, "[w]ithin a network of caring, we can and should demand justice," systems centering justice have tended to marginalize care (Held, 72).

A politics rooted in the ethics of care is the natural site for the politics of "needs" that Tushnet posits: One in which political claimants move away from reliance on the abstractions of rights politics, which Tushnet casts as fundamentally indeterminate and incoherent, and instead present the concrete needs of particular persons as inherently compelling. The resonances between Tushnet's framing and Gilligan's morality of responsibility are inadvertently highlighted by one of Tushnet's critics. Michael J. Perry writes,

> "If one wants to make a demand, then one is obviously in much better shape if one can say something in justification of the demand. The choice is between saying something, by way of justification, that employs the rhetoric of rights, and saying something that employs some other kind of moral-justificatory talk" (1415).

Perry here fails to recognize the very concept of a moral framework in which particular claims are the self-evident foundations of general principles, rather than the other way around. Understanding the style of moral reasoning involved in an ethic of care, however, makes it clear that Tushnet is situating particularized need claims as implicitly self-justificatory, without resort to deduction from abstractions.

The ethics of care also provide a natural counterpoint to the CLS critique of legal individualism. Tushnet distinguishes between the individualism of negative rights and the more collectivist potential of positive rights, but argues that prevailing discourses inevitably privilege the former:

> We fear that others with whom we live will act so as to crush our individuality, and thus we demand negative rights. But we also know that we need other people to create the conditions under which we can flourish as social beings, and thus we need positive rights. In our culture, the fear of being crushed by others so dominates the desire for sociality that our body of rights consists largely of negative ones (1392).

He suggests that this ideology of rights reflects beliefs in a "threatening public sphere" and "comforting private one;" as such it overlooks the possibility of "see[ing] the public sphere as comforting and the private one as threatening," and largely precludes challenges to the very presumption of a clear distinction between the two (*Id*.). This observation anticipates Tronto's emphasis on the public/private distinction as one of the problematic "moral boundaries" that an ethic of care can help to dismantle. The problem Tushnet poses, of preventing our "being crushed by others" without isolating us altogether, also highlights the need for a new approach to relationality within our politics: one in which human interconnectedness is acknowledged, valued, and exposed to nuanced assessment and adjustment. This is the mode of reasoning implicitly relied on by Gilligan's subjects and explicitly advocated by proponents of a political ethic of care.

II. Historical Counterpoint: The Turn From Care to Rights in the Disability Justice Movement

Even as theorists developed the case for care as the foundation of a progressive politics, however, one progressive social movement achieved significant gains by eschewing care-based policy discourses and pursuing a politics of rights. United States disability policy through the mid-twentieth century was primarily based on the welfare-state ideals of the New Deal, emphasizing an active role for the state in ensuring that citizens' basic needs were met, and focusing on economic redistribution to achieve this goal. The most significant policy of this type was the federally-funded Social Security Act, which provided incomes to people deemed unable to work due to disability (Shapiro, 62). Other policies pursued goals more akin to those that would later be central to the disability rights movement, such as the reintegration of people with disabilities into the workplace, but here, too, the central paradigm was typically one of care provision, commonly administered as "rehabilitation" programs, with those they served figured as "patients" (Shapiro, 63).

Institutionalization of people with disabilities has been a common means of streamlining delivery of the "care" they were presumed to need. During the nineteenth century, states assumed responsibility for local "almshouses" that had been established to shelter the indigent and disabled, but in which conditions had become inhumane and often abusive (Shapiro, 59). Over subsequent centuries, these developed into more specialized and professionalized facilities, into which states have "invested enormous public capital;" today they house more than 1.7 million individuals (Johnson).

During the era in which care dominated disability policy, despite "a few scattered cases of disabled people rising up on their own," the principal influencers of policy were "[p]rofessional and charitable groups" (Shapiro, 63). These actors, including researchers, health care providers, social workers, and educators, among others, functioned as experts on the needs of people with disabilities and advocates for those needs, as they understood them. They "were sophisticated in winning multibillion-dollar federal funding, but had not focused on civil rights legislation" (Shapiro, 65).

"Rights" were first introduced as a component of federal disability policy with Section 504 of the Rehabilitation Act of 1973, which prohibited federally funded entities from discriminating on the basis of "handicap" (Shapiro, 64-65). The provision appeared to have been inserted in the law with no lobbying by advocacy groups and no significant consideration by Congress, an offhand echo of the Civil Rights Act of 1964 (Shapiro, 65). However, its appearance in the law proved an inspiration to disabled activists who soon embraced nondiscrimination law as an avenue for pressing their claims and fought for meaningful enforcement of the regulation (Shapiro, 65). In subsequent decades, the movement grew as "proliferating independent living centers spread the new philosophy of the disability rights movement" and young adults with disabilities, educated under the nondiscrimination standard of Section 504, embraced the idea of a fight for their own civil rights (Shapiro, 73). The crowning achievement of this movement was the 1990 passage of the Americans with Disabilities Act. Rooted firmly in a rights paradigm, this law established a sweeping mandate of nondiscrimination in workplaces and public accommodations.

Significantly, the disability movement's invocation of a rights framework avoids reliance on some of the potential weaknesses of rights discourse toward which Tushnet directs his critique. Tushnet suggests that progressive social movements' invocations of rights are often ineffective because the goals of these movements extend beyond the mere restraints on state action to which constitutional rights frameworks have historically been tailored. Tushnet points out that positive rights, meanwhile, exist largely “through statutory entitlement programs, which are subject to substantial political pressure and which receive almost no constitutional protection” (Tushnet, 1393). Jeremy Waldron, in response to this point, suggests that Tushnet’s real concern is with excessive reliance on constitutional litigation as a means of addressing progressive agendas, and argues that the “language of rights … has long since ceased to be a language specific to (the threat of) legal action” (Waldron [2000], 116). The history of the disability rights movement reflects Waldron’s observations: The employment of rights discourses has not steered activists toward constitutional litigation as a means of establishing or asserting rights, but rather has framed a predominantly legislative agenda, and has functioned as a rallying point for pushing back, in the arena of popular politics, against the “political pressures” to which laws protecting people with disabilities have been subjected.

Tushnet also highlights the instability and indeterminacy of rights, observing that their specific content is always rooted in specific contexts, both material and ideological, and always involves a significant element of interpretation. Again, however, the disability rights movement has operated comfortably within these constraints. While invoking abstract commitments to equality and inclusivity, it has in fact insisted that the specific meanings of these commitments must be discerned within context: The presence of wheelchair ramps in certain spaces is asserted as a right precisely because of the way societies happen to have built those spaces, the capacities certain bodies happen to have, and the types of tools available to extend those bodies’ capabilities. That it would be absurd to insist upon wheelchair ramps in some other environments, such as one in which all buildings sat on a single level at exactly the height of the street, or one in which all wheelchairs had stair-climbing functionality, does not make the claim less compelling in the environment in which we actually operate. Neither does the existence of space for interpretation undercut claims to equality and inclusion; on the contrary, in many settings, activists themselves have called for case-by-case interpretation of the demands of inclusion, along with room for interested parties to contribute their own views about what is important. In public schools, for example, the Individuals with Disabilities Education Act mandates that each student with a disability be educated according to an Individualized Education Program (IEP), which must be collaboratively developed by parents and school personnel. In this process, key interpretive questions regarding the right to equal access to education – such as the relative importance of integration with nondisabled peers and of instruction tailored to the student's distinctive way of functioning – may, by design, be answered differently in different cases.

Tushnet's highlighting of instability and indeterminacy, along with his argument regarding the narrow scope of constitutionally protected rights, point to an underlying perception that claimants believe rights frameworks circumvent political decision-making in favor of purely objective processes invoking already-settled rules. Tushnet doubts that rights can satisfy these claimants' hopes. However, other observers suggest that motivations for making rights claims are often more complex than this – and, importantly, that they may be invoked to trigger, rather than to avoid, political contestation.[4] In the case of disability rights, their principal value has been to unsettle established frameworks for disability policy, and to debate those policies on terms that, as I explain below, establish people with disabilities as political subjects and expressly politicize questions of what disabled people "need."

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[4] See, *e.g.*, Karen Zivi's account of the Treatment Action Campaign's use of rights discourse in calling on the South African government to respond to the AIDS epidemic in the early 2000s (Zivi, 104-112).

III. Understanding the Turn to Disability Rights

The ideas of needs and care offer frameworks for political claims-making that emphasize concreteness and particularity. Meeting needs, or giving care, entails setting aside abstractions and attending directly to the substance of what is needed by a particular claimant under particular circumstances. Tushnet's contrast between needs claims and rights claims emphasizes that the latter deal largely in predetermined abstract forms, into which one must shoehorn the substance of what one claims. Where the fit is poor, making one's claims compelling requires that one first struggle to establish new theories of right, which one may then deploy as vehicles for one's specific claims. A claim of need, on the other hand, goes directly to the substance of what one seeks and why.

An ethic of care, and to an extent any needs-based discourse, also invokes empathy and relationality, in contrast to the liberal rights tradition's emphasis on the "self-sufficient, atomistic self" (Held, 48). An ethic of care emphasizes the connections that tie people to one another, our reliance on one another and our natural concern for one another's well-being. A politics of care, its advocates argue, attends to and develops those ties, whereas rights frameworks act to obscure and attenuate them. The consequence of promoting care in the public sphere, as Held describes it, is that political participants will prioritize what "members of communities really need," and will favor arrangements that provide for these needs (Held, 136). Waldron suggests that discourses based on "needs" implicitly attempt to appeal to the same values; they highlight "our lack of self-sufficiency [and] the implication of our lives with others" and suggest a duty of active attention to one another's well-being rather than mere non-interference (Waldron [2000], 125-126). "Talk of needs," he observes, "sounds somehow more compassionate, more open, more responsive, less aggressively individualistic, less male, than the table-thumping adversarial rhetoric of rights" (*Id*. at 123).

The experiences of the disability community, however, amply illustrate the limitations of needs and care as politically effective discourses. In the first place, a focus on meeting the needs of people with disabilities has produced very different policy priorities from those embraced by the disability rights movement. The idea of "needs" suggests first the tangible goods associated with survival – the most basic physical prerequisites to our existence – and in so doing, may obscure the commensurate importance of more abstract goods, such as inclusion, autonomy, and equal respect. Policies designed to meet disabled people's needs often respond as directly as possible to perceived material requirements, and do little to secure the opportunities for active participation in society on which disability rights advocates place primary importance. In some cases, need-oriented policies even preclude these forms of participation, as by conditioning access to material goods on a definition of disability that explicitly entails non-participation (Longmore). Positioning disabled people as "needy" has tended to reinforce, rather than challenge, the status of people with disabilities as second-class citizens. "[W]ith good intentions," Paul Higgins writes, "we have kept [people with disabilities] in a marginal position. Through charitable policies, we have turned disabled people into poor souls . . ." (Higgins 251-252).

Furthermore, experience has shown not only that people with disabilities experience intangible goals such as societal inclusion as primary goods in their own right, but that where these goods are not secure, neither are the purely tangible goods associated with need-oriented policies. Where the isolation and devaluation of people with disabilities goes unchallenged, society as a whole has few incentives to provide better than grudging support for material needs, and disabled people have few opportunities to contest what is provided. Instead, "the complex and often counterproductive matrix of laws and government programs intended to provide support and assistance … generally fail to deliver a level of benefits adequate to alleviate poverty and [trap] individuals in a lifelong cycle of hardship" (Wohl).[5] For example, Social Security's Supplemental Security Income, provided to disabled people with no pre-disability work history (including those who have always been disabled), provides a level of support well below the poverty line, while persistent public fear of fraudulent claims produces ever-increasing hurdles for potential claimants and subjects claimants to an atmosphere of persistent suspicion and distrust (*e.g.*, Silverstone). Meanwhile, concerns about the adequacy of institutional care persist, as do allegations that abusive conditions remain common (*e.g.*, Shapiro, 238).

The often grudging nature of public support for people with disabilities may be compounded by a tendency of needs discourse to naturalize, and thus privatize, the claims involved. Rights claims are inherently public in nature: The liberal paradigm holds that the protection of rights is the *raison d'être* of the state, and the demands of right define its scope and operation. The public implications of need, on the other hand, are often tenuous and indeterminate. Patricia Williams says, of Black Americans' needs claims, "The history of our need is certainly moving enough to have been called poetry, oratory, epic entertainment – but it has never been treated by white institutions as the statement of a political priority" (P. Williams, 151). Likewise, when people with disabilities speak in terms of need, the reaction of nondisabled institutions is often to mourn or pity the supposedly inherent "tragedy" of disability, without acknowledging the social and political dimensions of the hardships that disabled people

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[5] Wohl observes that for many people with disabilities, the promise of exercising rights within the employment arena remains illusory, as the meager resources and dependency-perpetuating incentive structures offered by these programs largely preclude economic mobility. Wohl's answer is continued and broader reinforcement of a rights-based paradigm, reforming social supports around an understanding that impoverished people with disabilities are capable of and entitled to equal employment opportunity, and that social supports should be oriented not simply toward meeting the most urgent physical needs of those in the direst situations, but toward equipping recipients to escape poverty and access work opportunities.

experience. At best, claims of need may inspire in some nondisabled audiences an impulse to private charity – but not to structural change.

Of course, this situation of need outside of public discourse and collective responsibility is precisely what Tushnet proposes that we challenge, and there is ample reason to do so. The naturalization of need traffics in half-truths, and its depoliticization hinges on the very private/public divide that Tronto and other care theorists seek to problematize. Need inevitably follows from embodiment, from the fact that we encounter the world as bodies dependent on and vulnerable to the tangible environments in which they exist. And yet, the specific shapes that need and vulnerability may take – what specific needs become salient to us at a given time, and what obstacles we might encounter to their fulfillment – are consequences of the social and political structures that pervade our environments. The disability movement itself has often emphasized this point, employing a "social model" of disability to argue that the specific vulnerability associated with some bodies' ways of functioning does not inhere in the bodies themselves, but arises from their presence in built environments designed for other bodies. To classify certain bodies, or certain subjects, as "needy" is often to say no more than that the prevailing social order, and the political order that sustains it, have thus far done less to meet the needs of some than of others.

And yet, what Williams highlights is that the mere assertion of need – even, as Tushnet exhorts, the "demand" that it be met – fails to trouble the dominant paradigm of naturalization and privatization. For a resistant audience, talk of needs is too easy to avoid construing as political claims-making.[6] Moreover, a claim's more forceful issuance, its clear figuring as a

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[6] Sociologist Sandra Levitsky highlights another dimension of the naturalization of "need" in United States politics: the pervasive ideology of family responsibility, and its construction of caregivers' identities on terms that encourage them to embrace and uphold the framing of their own and their charges' needs as purely private matters (Levitsky, 170-171). Like the ethics of care, the ideology of family responsibility emphasizes relationality as a basis for moral

demand rather than a pleas or lament, does not transform it from "poetry" into political speech within its listeners' understanding, but into unruliness and disorder. The audience perceives (or chooses to perceive) not democratic debate on new terms, but a threat from democracy's exterior. Here, "rights" claiming serves to bridge the intelligibility gap. Even where the content of a claim stretches convention – as did, prior to the passage of the ADA, a claim that built environments ought to be accessible to all bodies – its assertion via the language of rights makes its call for accountability within the political sphere far more difficult to overlook.

Meanwhile, as critics of the politics of "need" have observed, needs discourses do little to establish – and may undermine – the significance of the claimant's own voice within discussions of their entitlements. As Williams suggests, rights discourses figure the holders of rights as empowered subjects, endowed with protected interests and entitled to demand others' attention to those interests, whereas talk of "needs" figures claimants as supplicants, vulnerable and at the mercy of those to whom they present their claims.[7] Rather than invoking the mutual sense of connection and interdependence envisioned by advocates of the politics of care, needs claims tend in practice to suggest a disjuncture between those who must appeal to others for what they need, and those empowered to provide it. Neediness suggests a lack of capacity, a lack of

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obligation; unlike the ethics of care, it treats relationality as significant only within small, discrete family units, rather than figuring these units as a basis for broader societal interconnectedness and obligation. Thus, it holds family members as responsible for one another's needs, while simultaneously demanding that family caregivers fulfill the ideal of the self-sufficient individual in their dealings with the larger community – i.e., that they be independently capable of meeting not only their own needs, but the needs of those closest to them. Levitsky's research shows that caregivers' internalization of this ideology, their staking of their senses of self in the meeting of its demands, leads to a persistent – if, Levitsky suggests, gradually eroding (178-179) – reluctance, even among those whose caregiving involves considerable personal hardship, to acknowledge constructions of their charges' needs as politically significant.

[7] Martha Albertson Fineman's work on the "vulnerable subject" presents a noteworthy attempt to challenge the dichotomy highlighted by this juxtaposition, insisting in her very word choice on rejecting the appearance of tension between neediness and political voice. However, in my reading, Fineman asserts the subject's vulnerability more compellingly than the vulnerable person's subjectivity, largely attributing meaningful agency not to her "vulnerable subjects," either individually or in collectivity, but to state mechanisms that she figures as acting on, more than being enacted by, vulnerable individuals. Thus, despite the tantalizing potential of her central construction, she stops short of persuasively establishing that a focus on vulnerability can avoid undermining subjectivity.

authority, and, as Waldron notes, a passivity; "[t]he person who is needy… is breaking down the fences of his independent agency, and asking to be taken in by others."[8]

The effect is to call into question the entitlement of those in need even to speak for themselves. Instead, those who do have capacity and authority, those who are called to act on the other's behalf, are likely to perceive themselves as being, also, the better-situated to assess the circumstances of the other's need and identify the appropriate response to it. However, even where their intentions are benevolent, their conclusions on behalf of the needy other are often lacking. Iris Young argues that misjudgments of this type are inevitable due to the inherent limitations of empathy in guiding understanding; there are dimensions of each person's experiences and desires that cannot be understood purely imaginatively, and efforts to "look at it from their position" may generate deeply flawed conclusions (Young [1997], 58). As Anita

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[8] To be sure, rights discourses are not a perfect triumph of subjectivity over objectification. Indeed, Wendy Brown associates antidiscrimination rights in particular with a form of passivity not unlike what Waldron attributes to the idea of need. Brown suggests that rights against discrimination have the effect of "entrenching rather than loosening identities' attachments to their current constitutive injuries" (Brown, 134), *i.e.*, that they construct group identity around the experience of oppression, and thus cast group members as passive victims. At the same time, she observes, the turn to the state for protection can undercut agency: "[T]he heavy price of institutionalized protection is always a measure of dependence and agreement to abide by the protector's rules" (*Id*. at 169).

In the case of disability rights, however, naturalized identity rooted in vulnerability and dependence on the state were well-established prior to the turn from need to rights, and so the question becomes how the discursive shift transformed these conditions. I argue that, though the shift displaced neither, the tendency was to unsettle both. On the one hand, the invocation of rights refigured the disadvantage associated with disability as emphatically social and constructed, rather than innate, and thus instituted a perpetual laying-bare of the contingency associated with identity. Simultaneously, rights talk resituates disabled people as authors of and agents within the political-institutional apparatus being deployed for protection, its invocation in effect an act of laying claim to, instead of merely appealing to, the state.

In both of these regards, disability rights politics has the potential to operate as what Ben Golder, in his reading of Michel Foucault's late-career engagement with rights, identifies as a "critical counter-conduct of rights" (Golder, 20): one that "performatively undermines" (*id*. at 21) the constraints imposed by established paradigms of rights, challenging those constraints not through rejection of the discourse in which they appear, but through appropriation of that discourse to novel use. Another potentially unsettling dimension of disability rights talk is its insistent insertion of the particulars of embodied experience into a "necessarily abstract and ahistoricizing discourse" (Brown, 127). Consider Harriet McBryde Johnson's experience testifying before the South Carolina State Senate, on the question of who may provide state-funded in-home support services for people with disabilities: "I have been advised to sidestep the gory stuff, but here we go. 'Senator, if you need a urinary catheter inserted every time you need to go, say three to six times per day, that becomes a routine procedure -- for you.' … 'I want the legal right to say who comes in my bedroom and who sees me naked -- same as you do, Senator!' Redness rises from the senator's tie and washes up his face. Once we have him blushing, the others fall in line. The favorable vote is unanimous" (Johnson).

Silvers observes, moreover, such limitations are compounded when marginalization and stigmatization – "the invisibility and unthinkability of disability" – preclude even meaningful efforts at identification (Silvers, 49).

A key prong of the disability rights movement's agenda has been to assert the subjectivity of people with disabilities, staking out space for disabled voices in the public sphere and claiming authority for disabled persons as against the "experts" who have traditionally dominated the discourse. Waldron suggests that the rise of "technocratic authority" is a likely correlate of any politics of needs (Waldron [2000], 129), and evidence for this claim in the context of disability policy is overwhelming. The "professionalization of disability" throughout the twentieth century fed the dominance over both public policy and the lives of individual people with disabilities of "professional 'experts' who laid claim to specialized, esoteric knowledge" (Barnes & Mercer, 28-29), and it remains commonplace to see disabled people's interests discussed in the media and represented within advocacy organizations by groups of individuals who are highly credentialed but not, themselves, disabled, with the voices of disabled people themselves excluded or relegated to secondary roles in the discussion (e.g., Schwartz). By contrast, Waldron suggests that the invocation of rights asserts the speaker's "capacity and virtue to stand bravely witness to, and indomitably defiant of, assaults on their dignity as persons" (Waldron [2000], 130).

Within the disability movement, the assertion of "rights" has gone hand-in-hand with an emphasis on the principle of "nothing about us without us." The claim is not that people with disabilities speak in a unified voice, or that personal narratives and assertions of individual preferences and ideals are the only appropriate means of informing policy-making, but rather that the norm has been exclusion of any and all disabled voices, based on a presumption of incapacity, and that these elements have therefore been overwhelmingly lacking from discussions of what disabled people "need." The demand that people with disabilities be offered opportunities to participate in discussions of disability policy reflects an insistence that inclusive democratic processes must not be displaced by mere applications of technical expertise.

Amidst this context, the idealism of advocates for care ethics clashes sharply with the actual terms on which interdependence and relationality are realized. Silvers highlights the asymmetry, in practice, with which the ideal of "interdependence" is pursued: People without disabilities are perceived as "hav[ing] an obligation to care for the disabled," while those with disabilities "owe it to others to accept their care" in order to enable the would-be caregivers' "progressing along paths of virtue." She adds that "relating to others mediated by their perception of one's neediness is a distancing, not a bonding or integrating, experience" (Silvers 38-39). In a social context in which some are weak and some are powerful, the centering of "need" serves not to bring people together in awareness of the ties we all share, but rather to reinforce differentiation and otherness.

IV. Beyond Either/Or: A Role for Care Within the Rights Paradigm

The framework of disability rights embraced by advocates is not without its critics, and some key criticisms focus on the exclusions that arise when need and care are pushed too far outside the discussion. While rejecting their own asymmetrical positioning as dependent upon nondisabled persons' care, some advocates' uncritical embrace of the liberal individualist (or liberal capitalist) paradigm of rights has tended to privilege those claims and experiences that fit most neatly into these paradigms, and to figure those as a complete account of "disability justice," while occluding or further marginalizing what falls outside this vision.

Eva Kittay, for example, suggests that an emphasis on “independence” as the core objective of much disability policy fails to promote the well-being of individuals whose states of maximum flourishing will not match this ideal. Presenting her daughter Sesha as an example, Kittay claims that Sesha’s cognitive impairments will preclude independence regardless of her social environment. Nonetheless, social arrangements still have considerable impact on her opportunity to achieve what Kittay sees as the more fundamental good, “living as full and rich a life as one’s capacities permit” (Kittay, 172). However, Kittay argues that public policy devalues opportunities that would promote this objective for Sesha, because these opportunities will not promote her independence. The narrow definition of a good life as an independent life incorporates a key priority for many people with disabilities, but it simultaneously excludes goals that might be equal or greater priorities for others. In this case, moreover, the neat alignment between the “independence” ideal and already dominant liberal values tends to privilege the former in any contestation over alternative paradigms of human flourishing.

Meanwhile, Kittay suggests, the disability rights movement’s embrace of independence as a universal ideal, in which people with disabilities are both capable of sharing and entitled to share, may result in Sesha’s “reinstate[ment] as less than fully human” (Kittay, 173). While the disability rights movement seeks to secure recognition of equal personhood for all people with disabilities, choices about how to define personhood, and how to characterize the equality among persons, can define some people as effectively non-persons. The consequence, then, is not the breaking down of structural differentiation between nondisabled and disabled people, so as to eliminate oppression of the latter; but rather, the redrawing of lines between classes, so as merely to narrow the class of people subject to ableism. Silvers acknowledges as much, suggesting that discussions like Kittay’s of the needs of “profoundly impaired people … are based on the proposal that there are (a few) individuals for whom no possibility of surviving except in extended dependency exists and who therefore will never be equal" (Silvers, 144).

Lynn May Rivas points out that a commitment to "independence," no less in the disability community than in society as a whole, reinforces the invisiblization of work done to support others in meeting their needs, and of people whose lives are extensively devoted to this type of work. Other commentators have noted this phenomenon with regard to a variety of types of worker – not only those meeting basic needs in the home, such as mothers or housekeepers, but also secretaries and others whose function is defined as "support" for someone else's professional activities. Commitments to the ideal of the independent individual block recognition of our embeddedness within networks of people on whose contributions our own life activity depends. Among people with disabilities, Rivas observes that personal attendants are often subject to this type of non-recognition. Their work is under-acknowledged and poorly compensated, and their presence itself is frequently ignored in spaces where they are working, even as the nature of that work means their own attention is fully focused on the person who is ignoring them. Joseph Shapiro, describing the perspective of the mainstream disability community on the role and status of attendants, suggests – uncritically – that they are "best compared to a piece of assistive technology" (Shapiro, 255). Rivas notes that the invisiblization of these workers reinforces and is reinforced by other dimensions of social positioning – most are women of color, and many are immigrants.

Thus, while political discourses rooted in need and care have not proven liberatory for people with disabilities, it appears that a commitment to discourses that deny need and care, in favor of "independence," also fails to produce a comprehensive account of disability justice, or to align the cause of people with disabilities with a more comprehensive assault on structural oppression. Distancing ourselves too far from need results, instead, in marginalizing those for whom meeting needs remains a political priority, and in devaluing the contributions to society of those who devote themselves to meeting others' needs. To do better, we require a language of disability justice that, though rooted elsewhere than in need and care, still makes room for these. In the remainder of this section, I argue that the language of disability rights itself can and should achieve this.

Indeed, though scholarly debate tends to figure the politics of needs and care in opposition to rights discourses, or at least as narrowing the appropriate reach of "rights" into political discourse (e.g., Held, 145),[9] there is experience within the disability movement to suggest that needs and care can be invoked most effectively within a framework of strong commitment to universal rights. David Engel and Frank Munger illustrate this through the perspective of "Jill Golding," a nurse with a disability who they interviewed regarding her experiences: "Throughout the narration of her life story, she links the themes of caring and of individual rights assertion" (Engel & Munger, 30). Contrasting her experiences before and after the implementation of the Americans with Disabilities Act (ADA), Jill observes that "in the past, 'nobody cared;'" today, "by asserting rights, she can ensure that employers and others will care for her" (*Id.*).

As ideas of rights and care are often framed, the concept of a right to be cared for might seem contradictory. Rights-holding emphasizes our individuality, our separation from one another, while care is relational. Rights are abstract; care is particular. In practice, however, all human interactions depend on the interplay of separation and connection, and on the application of abstract goals or commitments to particular contexts. A mother overcomes her exhaustion to

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[9] Theorists of care do vary on this point. Tronto herself has consistently insisted that "the relationship between justice and care can be a relationship of compatibility rather than hostility" (Tronto [1994], 167) – an intuition this discussion aims to elaborate.

feed an infant because she can recognize needs arising outside of herself and internalize their importance; she makes decisions about what to feed a toddler based both on her overarching interest in promoting the child's health and on her immediate understanding of the child's physical condition and recent nutritional intake. A court adjudicating the rights of two civil litigants considers the effects their actions have on one another, and applies general principles of entitlement to the "facts of the case." In either set of interactions, the issue is not *whether* we acknowledge separation or connection, or think in abstractions or particularities, but *how* we engage separation and connection, abstraction and particularity.

The idea of caring between rights-holders, of a right to care, is an idea of a relation between political subjects, whose interests are of their own defining and carry the weight of political entitlement – a relation in which participants must listen to one another, and can be held to account for failure to meet their obligations to one another. It entails a commitment to abstract principles of right – to universal inclusion, and the equal dignity of all persons, among others – alongside an imperative of attentiveness and responsiveness to the particularity of persons and circumstances. It recognizes that we are connected to specific others, but it gives political significance to what transpires across those connections.

This conception is distinct from any notion of care as a social right, that is, a concrete good to be provided by the state through socialist or welfare-state mechanisms. In the first place, to insist that people in relationship to one another treat each other in caring ways – acknowledging particular needs and accepting mutual responsibility for meeting them – does not confine itself to needs that can or should be met through the sorts of services typically associated with caregiving. In an employment context like Jill's, it is more likely to pertain, for example, to a need for modifications of spaces or tools used in a person's work. Furthermore, care as a social right largely dispenses with a framework of relationality; Joan Tronto points out that it "presumes a one-sided relationship" between citizen and state and indeed suggests supplanting caring relationships with state provision of services (Tronto [2013], 153-154). Tronto suggests instead that our concern should be with "the state's role in supporting or hindering ongoing activities of care" (*Id*. at 154). Just this sort of supporting role is suggested by Jill Golding's account; the law incentivizes a more caring orientation within the existing employer-employee relationship.

Jill's insights invite us to consider the ADA's considerable potential – far from perfectly realized in practice – for constructing employment relationships on caring terms. The idea of "reasonable accommodation" is inherently context-sensitive; it envisions not simply a standardized set of modifications to environments or procedures, but a process in which the capacities and needs of the employee and the resources and needs of the employer set the parameters for determining how, under those circumstances, the employee can be enabled to contribute their effort and abilities toward achieving the employer's business objectives. It equips employees to assert their needs not in terms of weakness and vulnerability, but as conditions of strength – to say "If I have this, I can do that." It brings the interests of employer and employee into partial alignment – both benefit when the employee has the opportunity to work productively – but also recognizes that each has distinct needs to which the other must be attentive, and for the sake of which some compromise may be necessary. At its best, it invokes a backdrop of legal rights to provoke mutual dialogue and creative problem-solving oriented toward the construction of stronger and more mutually rewarding employer-employee relationships.

In practice, there are many limitations to this ideal. Medical gatekeeping continues to substitute the voices of experts for disabled people's own. Rights-holding mitigates but does not remove power imbalances between employers and employees. Bureaucratized accommodations policies substitute for dialogue and particularized problem-solving, resulting in arrangements that may fall short of providing what people with disabilities need, even where they are no less cumbersome for employers than better-fitting accommodations might be. Some of these practical shortcomings simply reflect the typical limitations of large institutions, compounded by a legal culture in which open-ended dialogue and problem-solving may be seen as a liability hazard, but stigma and paternalism also undercut the practice of care in setting accommodations. Those with whom disabled persons work most closely feel more comfortable letting human resources offices "deal with that," or they distrust unconventional means of performing certain tasks, or they simply persist in perceiving people with disabilities as objects of policy rather than subjects of rights. These implementation failures, however, are not failures of the paradigm itself; they point, rather, to the incompleteness with which the paradigm Jill envisions, the blending of rights and care in pursuit of disability justice, has caught hold. As she puts it, "We're the front line in this battle… [T]here's going to be a gap before everyone meets, and how long that gap is I don't know. But I think it's going to be shorter than we might have thought it would be years ago…"

V. Rights and Relationships

As Engel and Munger observe, a significant body of literature tends to figure rights-based and relational interpersonal contexts in opposition to one another (Engel & Munger, 84-86). These scholars observe that "where social relationships are stronger, more interconnected, and intimate," rights-claiming is rare (Engel & Munger, 84); some also suggest that individuals risk "disrupting such relationships through the assertion of rights" (Engel & Munger, 86). Engel and Munger, however, cite other studies from the law-and-society literature, along with the experiences of their own subjects, to suggest that the express invocation of rights can take place in relational contexts, and can benefit the relationships involved (Engel & Munger, 86). In considering the possibility of care between rights-holders, moreover, two other points about the function of rights in relational contexts merit note. First, as Engel and Munger's observations help to illustrate, individuals' awareness of one another as rights-holders may be an important foundation of a caring relationship even where rights are never expressly invoked between those individuals. Second, it is a misreading of care theory to presume that "disruption" of relationships is always undesirable; rather, persons mired in unhealthy relational contexts may need to disrupt established relationships in order to improve those relationships or transition into others.

Engel and Munger show that rights, even when never expressly invoked, contribute significantly to the construction of their subjects' individual identities, and I argue that they can play an equally key role in in constituting relationships on cooperative, mutually respectful terms. Frequently this role may go unnoticed because the relevant understandings are so well internalized as to operate largely unconsciously; however, the degree of depth with which they are ingrained is likely to render their impact more, not less, potent.

Patricia Williams offers an anecdote in which both she and a white male colleague had recently rented apartments in Manhattan. She says, "Peter had handed over a $900 deposit in cash, with no lease, no exchange of keys, and no receipt . . . I signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm's length transactor" (Williams, 146-147). Both of them, she observes, were concerned with "establishi[ng] enduring relationships . . . we both wanted to enhance trust and allow whatever closeness was possible" (Williams, 147). Williams, for whom rights-holding remains a contingent and often poorly recognized status, sought to affirm her fitness as a tenant by illustrating her capacity for the very formalities her colleague's confidence in his social status and legal entitlements – and in others' awareness of them – allowed him to eschew (Williams, 147-148).

It would be an easy mistake to suppose that Williams's colleague's experience exemplifies a relational context in which rights are simply irrelevant, but the contrast with Williams's own experience belies this interpretation. Rather, the anecdote suggests that rights can most easily be treated as irrelevant precisely where they can most reliably be depended upon. To the extent that an established context of rights – such as those of landlord and tenant, or employer and employee – makes clear a set of baseline expectations within a relationship, and to the extent that the parties to the relationship can take for granted their mutual understanding of each person's entitlement to respect for their own rights and capacity to respect the other's, trust can be readily established and numerous potential conflicts bypassed.

Moreover, the awareness that rights can be expressly invoked – and enforced – as necessary, even where the necessity is rare, creates institutional contexts that promote positive relationships by encouraging individual actors' routine attention to one another's needs and interests. This is especially significant where power imbalances make it easy for one party to the relationship, despite genuinely good intentions, to unwittingly disregard the other's well-being. In the workplace, for example, even well-intentioned supervisors, focused on their own productivity objectives, may easily become inattentive to the burdens they impose on their employees. Under those circumstances, routine reminders from upper management about employee entitlements such as meal breaks and compensation for overtime may simply make those supervisors more mindful about adhering to practices to which they are already committed in principle – encouraging the caring behavior toward the employee toward which they may be naturally disposed, but from which other pressures can too easily distract. Engel and Munger cite an account by "Sara Lane" of how the passage of the ADA promoted shifts not only in her access to workplace accommodations, but, as a result of increased attention to the issue, in the attitudes of those she worked with toward the importance of accommodating her. "[S]omebody actually said to me, 'We treated you terribly . . .' Yeah, it really took that law to get them to realize it" (Engel & Munger, 26).

Apart from specific entitlements, the status of the rights-holder, as one possessing a distinct subjectivity and deserving of dignity and respect, can play a constitutive role in even the most intimate relationships. The typical nature of spousal relationships has certainly transformed along with changes in wives' legal status, from the property or wards of their husbands, whose public identities were subsumed under their husbands' via the institution of coverture, to formally equal partners within the relationship and participants in the world beyond it. Turning wives into rights-holders has certainly not precluded husbands' caring for their wives, but has transformed the usual nature of that care into something less paternalistic and more attentive to a conception of well-being that goes beyond the meeting of mere material needs.

For people with disabilities, of course, the rejection of paternalism and promotion of broader conceptions of flourishing than the purely material have been key priorities, whether in workplaces, families, or other social relationships. Equally important has been the rejection of pity as a foundation of nondisabled persons' relationships with disabled persons, and here, too, the status associated with rights-holding is key to reconstituting these relationships on more acceptable terms. "Pity oppresses," observes Cyndi Jones, a former "poster child" for the

Muscular Dystrophy Association and one of Shapiro's interviewees (Shapiro, 12), and the point is reiterated by numerous others, in both Shapiro's research and Engel and Munger's interviews. In addition to pity's paternalistic overtones, it reinforces devaluation and even fear of the difference to which it is addressed, and motivates the concealment – and therefore exclusion – of its object. Jones rejects narratives of tragedy attached to her life, and suggests that pity-based advocacy draws on its audience's desire to make "the disabled children . . . go away" (Shapiro, 14).

In relationships with caregivers, the distinction between empathy, or compassion, and pity is especially important, and the frequent inability of caregivers to achieve the former may be one reason so many disability activists have so emphatically rejected care. Silvers argues that compassion requires a sense of one's own commonality with the other that pity does not; compassion "precludes denying that one's own possibilities are similar to the sufferer's" (Silvers 45). However deep the caregiver's affective bond to the care recipient, and however devoted the commitment to the labor of caring, a sense of unequal status will tend to undermine that awareness of underlying commonality on which compassion depends. Thus, to the extent that the care recipient's status as a rights holder constructs her as the caregiver's equal – even, or perhaps especially, if this status is well understood without being explicitly invoked – it reinforces the possibility of compassion, and enhances the quality of caring relationships.

Meanwhile, even where explicit rights-claiming does produce disruption within a relationship, this may be a positive outcome from the perspective of care ethics. A relational understanding of the person recognizes that some relationships may be damaging to those in them. Here, the difference between an ethic of care and a more individualist paradigm is in how thinkers conceive of the alternatives to maintaining a harmful relationship. Care theory emphasizes our fundamental embeddedness in relational contexts, and therefore focuses on how we navigate that context by modifying particular relationships or exchanging them for others, rather than simply assuming that a choice to remain in or exit a particular relationship occurs independently of broader context. However, it does not deny that the possibility and sometimes the necessity of making such changes exists (see, *e.g.*, Held 48-50). Indeed, care theory's emphasis on the centrality of relationships to our lives demands particular concern with the consequences to the individual of sustaining either a specific relationship or a network of communal ties on unhealthy terms.

Furthermore, the health of particular relational ties and their harmoniousness are not necessarily equivalent. Where the established terms of a relationship are oppressive in nature, maintaining harmony in the relationship may be tantamount to continuing to tolerate oppression. By contrast, "disruption" can be a necessary catalyst to positive change. In his "Letter From Birmingham Jail," Martin Luther King responds to critics who accuse civil rights activists of disrupting their communities by observing, "I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth," and insisting that it is necessary "to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood" (King). Far from rejecting the value of community in favor of the rights of atomistic individuals, King aspires to strengthen communities, and to shore up oppressed persons' inclusion within them, through the creation of a "such a crisis . . . that [the community] is forced to confront the issue" (King). He insists that only through disruptive tactics, the intentional creation of disharmony, can powerful community members be forced to face, and to renegotiate, the terms of their relations with the less powerful.

Likewise, the disruptive nature of rights-claiming within a relational context does not render it inherently harmful in that setting. Rather, it may be a potent tool, when other approaches fail, for introducing the "constructive tension" that can trigger crucial transformations in those relationships. Notably, even Engel and Munger's most rights-conscious interviewees perceive the express invocation of legal rights in their workplaces as an extreme measure, preferring where possible to rely on less formal negotiation and a spirit of mutual goodwill – but they also express a willingness to fight for their rights within the legal system where especially egregious treatment demands it, with the ultimate goal not of dismantling their relationships with their employers, but of refiguring those relationships on more acceptable terms (Engel & Munger, 34-35). As Jill Golding states, "I would fight back . . . I need you to work with me" (Engel & Munger 35).

VI. Analysis and Conclusions: Rights, Care, and Recognition

The relationship I posit between rights and care turns, at a theoretical level, on the idea of recognition. Although much contemporary scholarship on recognition, most notably the work of Axel Honneth, figures robust forms of recognition as a normative end of democratic politics, recognition is also and importantly a precondition to democratic discourse: Claims cannot be heard, deliberated upon, and fulfilled unless those asserting them are recognized as speaking subjects participating legitimately in the discursive arena. This recursive character to the pursuit of recognition, in which the political "struggle for recognition" (Honneth) is possible only under prior conditions of mutual recognition, highlights the way in which rudimentary, highly limited forms of recognition function as building blocks for the development of deeper mutual awareness, understanding, and appreciation. In this discussion, however, I suggest a shift away from the Hegelian "three stage" model of recognition on which Honneth's work is based, in which distinct forms of recognition build neatly atop one another, and toward a sense of distinct foundations for recognition as existing in more dynamic ongoing relation to one another. Accordingly, I figure rights and care as differently-based practices of recognition that coexist in perpetual, but productive, tension.

My argument is based on the awareness that recognition itself is an inherently paradoxical concept, hinging simultaneously on conditions of both alterity and identity between subjects. Absent some overlap in the nature of our consciousness and experience, we would be purely unintelligible to one another, with no ability to communicate our awareness of the other – an awareness which, further, would necessarily be void of content or meaning – nor to perceive their awareness of ourselves. The degree of our intelligibility to one another determines the depth of what we can recognize in one another, and the effectiveness with which we can communicate our perception. And yet, the greater the overlap in our subjectivities, the less we can speak of intersubjectivity at all, and we risk identifying not a separate consciousness, but merely ourselves reflected back to us.

The relationship I suggest between rights and care responds to this paradox by suggesting that the foundations of recognition are dynamic, continually shifting in ways that create a space for their different facets to supplement, check, and complicate one another, so as to build new forms of intelligibility even while reinforcing relations of alterity. Paradigms of care and rights, in effect, constitute distinct ways of knowing each other, of bridging what divides us, and yet each paradigm problematizes the approach suggested by the other, precluding the tendency of either in isolation to create the illusion of such perfect identification with the other that the sense of alterity collapses into solipsism. A model rooted in the perpetual (productive) tensions between distinct forms of recognition shares Honneth's aspirational orientation, anticipating the possibility of ever-deepening practices of recognition and ever-widening circles of inclusion in those practices, but it sees perfect recognition as a "horizon" ideal – a direction in which societies might progress indefinitely, rather than a destination at which to arrive. Our grappling with recognition's foundational paradox is infinitely subject to refinement, but the paradox itself is not subject to resolution without dissolving the entire framework. From this perspective, I highlight rights and care as involving distinct practices of recognition, each of which can serve to create deeper intersubjective understandings, but each of which also poses distinct threats to the maintenance of meaningful intersubjectivity.

The three-stage Hegelian model, as Honneth reconstructs it, situates the form of recognition associated with rights as an intermediate development between primitive relations of "love" and a perfected framework of societal "solidarity" (see generally, Honneth at 95-130). The latter both involve subjects' acknowledging one another in their particularity within a relational context – first, through emotion-driven individual bonds, and later, as members of a society knitted together through a shared "ethical life," a framework of common values that support different subjects' esteem for one another. The form of recognition that rights support, however, contrasts with both these forms even as it bridges them, eschewing relationships and acknowledgment of particularity in favor of abstract universalism. In the Hegelian model, the abstract universalist frame enables us to transcend personal relationships with particular individuals in order to build more inclusive, if rudimentary, practices of intersubjectivity, and it is through these practices that a society develops a robust collective value-life, the "symbolically articulate – yet always open and porous – framework of orientation, in which those ethical values and goals are formulated that, taken together, comprise the cultural self-understanding of a society" (122). This space of commonly constructed and articulated understandings and values constitutes the foundation on which solidarity – an inclusive framework of subjects' substantive appreciation for one another's particularity – can develop.

Honneth's account of rights, however, hints at the difficulty of seeing the movement among forms as a simple linear progression. Commitments to abstract universalism obscure the role of "situation-specific application [as] an inviolable component of the structure of legal recognition": the necessity of case-by-case determination of "whether, in the case of a given concrete other, we are dealing with an entity possessed of the quality that makes these obligations applicable" (Honneth 113).[10] Honneth observes that "the essential indeterminacy as to what constitutes the status of a responsible person [*i.e.*, a subject of law and rights] leads to a structural openness on the part of modern law to a gradual increase in inclusivity and precision" (Honneth 110). In other words, legal recognition does not simply exist as a distinct phenomenon developed subsequent to one relational/particularist form of recognition ("love") and prior to the other ("solidarity"); rather, it iterates upon these encounters with particularity, its substance elaborated through repeated acts of particularized recognition – that is, through repeated acknowledgment of and principled engagement with the concrete needs, capacities, and experiences of particular others.

Meanwhile, although Honneth, interpreting Hegel, suggests that the engagement with particularity associated with the solidaristic form of recognition can develop only out of a

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[10] This question of who, exactly, is a rights-holder has seemed simple in principle since early articulations of the "rights of man," and yet Honneth's claim that it is rarely so easily answered in the actual practice of politics is borne out through historical and present-day observation. The extent to which the "rights of man" extended meaningfully to women and people of color was called into question even by some of the most effective early advocates of the principles of universalism – *e.g.*, Thomas Jefferson's doubt that African Americans could be full members, rather than wards, of a democratic state (*Notes on the State of Virginia*) – whereas today debates exist, on the one side, as to the applicability of human rights, as a moral or legal matter, to fetuses or to some persons with severe disabilities, and on the other, as to whether the concept of "human rights" itself warrants expansion to give adequate weight to rights inhering in animals, or even in plants or the natural environment.

legalistic frame, care theorists highlight more direct linkages between intimate "love" relationships and expansive practices of care that closely resemble Hegelian solidarity. Honneth identifies Hegelian love relationships as "constituted by strong emotional attachments among a small number of people" (95). In these relationships, caring, and security in the other's caring, is driven by "liking and attraction, which," Honneth notes, "are out of individuals' control" (107). As such, he maintains that "the love relationship cannot be extended at will, beyond the social circle of primary relationships" (*Id.*).

However, care ethicists point out, based on a deeper scrutiny of the actual lived experiences of caregivers – rather than mere idealized constructions of such – that the sense of moral obligation is foundational to these most intimate relationships, and moreover, that they provide a template through which moral obligation more broadly can be understood. Held, for example, highlights "the compelling moral salience of attending to and meeting the needs of the particular others for whom we take responsibility," observing that "[c]aring for one's child…may well and defensibly be at the forefront of a person's moral concerns" (Held 10). Care ethicists do not dispute the place of strong emotional affinity in the parent/child relationship, but observe that it is often an outgrowth of, as much as an inducement to, the practice of care.[11] They thus further anticipate that the adoption of a caring moral orientation toward larger relational communities – extended families, neighborhoods, nations, even the global human community – will have significant implications for the affective dimensions of our engagement with these expanded circles. Within this framework, our capacity to esteem the distant other in their particularity – i.e., to participate in relations of solidarity at a societal level –

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[11] Kittay potently illustrates this point in describing how Sesha's full-time caregiver for over two decades, Peggy, came into their lives:

> [S]he wouldn't take the job. Peggy feared the intensity of the involvement she knew was inevitable … [T]he agency…urged her to do a trial week. At the end of the week, it was already too late to quit. Sesha had worked her way into Peggy's heart (Kittay, 156-57).

has direct roots in the practices of recognition between intimates.

I present this point from care ethics not to deny the importance of legal recognition, but to resituate it: not as an intermediate phase between distinct forms of particularistic recognition, but as an important counterpoint to and pillar of support for care-based recognition, at both the intimate and the societal levels. As illustrated above in the case of disability experience, legal recognition, the awareness of one another as rights holders in an abstract universalist sense, is an essential backdrop to healthy practices of care between individuals and in collective politics. At the same time, it also sustains functioning practices of care-based recognition by precluding the collapse of alterity toward which the caring relationship otherwise tends. An ethic of care's emphasis on relationality constitutes a powerful call to practice recognition of those whose lives touch ours, and its cultivation of empathy deepens our ability to recognize another person in all their particularity. However, its breaking down of boundaries between subjects threatens robust intersubjectivity; legal recognition reasserts these boundaries and thus sustains the balance of alterity with intelligibility.

Kittay's concept of the "transparent self" highlights the dissolution of a caregiver's self-consciousness through her internalization of the needs of her charge (Kittay, 51). The greater the degree of transparency, the diminution of the caregiver's own conscious subjectivity, the less able she is to be recognized as a separate individual, either by her charge or by others – to be identified as more, for example, than simply "So-and-so's mother." At the same time, her loss of perception of herself and her charge as distinct subjects compromises her ability to confer meaningful recognition on her charge, depriving that person of the experience of recognition within what is likely one of their most significant relationships. Further, in contrast to Kittay's idealized conception of the truly "transparent" self, I add that the caregiver's sense that she has internalized her charge's subjectivity also produces a serious risk of misrecognition, making her less able to perceive and acknowledge that what she has internalized is not the real other before her, but her own illusory construction. People with disabilities have often struggled against caregivers' inability to perceive who their charge actually is and what they might actually be capable of, where it fails to match the images – of their charge and of themselves – that they have constructed around their perception of disabled people's dependency (e.g., Silvers, 18-19). When care is constructed around unilateral dependence, it also risks becoming a relation of dominance and objectification, in which the care recipient no longer possesses the status as an (at least partly) autonomous subject on which recognition depends.

Rights, meanwhile, offer a framework for maintaining the separation of subjects, and, as Robert Williams observes in his account of Hegel's thought, for sustaining the balance of status and power between individuals that enables them to relate to one another as subjects capable of mutual recognition (R. Williams, 59-63). A framework of rights also provides a means of bridging alterity to produce mutual intelligibility, without threatening intersubjectivity, by establishing a sort of dualism within our identities: an abstract, universalist conception of civic personhood that overlays our distinct, particular identities. Our collective participation in a discourse of rights anchors those separate identities in a common status, as fellow rights-holders, that is intelligible to each of us. The danger here, however, is that the form of recognition constructed is distorted to exclude our individuality from, rather than incorporate it into, the public sphere. In this case, our civic identities become masks laid over our faces; instead of channeling the substance of our personhood into a shared discourse, they substitute for and obscure it. This danger is especially great in the presence of structural oppression, where those masks tend to incorporate the particularities shared by members of dominant classes, and thus produce a form of not merely non-recognition, but affirmative misrecognition, when imposed on subordinated others. This is why a disability rights discourse rooted in independence as the essence of human flourishing proves exclusionary; even as it refigures dominant conceptions of civic personhood only far enough to incorporate some, it reinforces their dominance to the detriment of others.

An ethic of care integrated with a framework of rights, then, can support recognition more effectively than either in isolation. Incorporating rights' assertion of our equal status and separate subjectivities configures care on terms of greater mutuality, and ensures that we develop empathy through exchange between subjectivities, rather than via the imposition of one subjectivity upon another. Meanwhile, the obligation to care is an obligation to look beyond abstractions, and to build understandings that develop upon, and where necessary correct, the content of our civic status, so as to recognize the person underneath. Each paradigm simultaneously reinforces and troubles the other, creating a strong and yet dynamic framework in which the ability to shift among different registers of mutual understanding and individual self-assertion figures alterity and intelligibility in dialogue with, rather than simple opposition to, one another.

Judith Butler observes that the very act of seeking recognition – indeed, the condition of desiring it – reconstitutes the seeker. "To ask for recognition, or to offer it," she argues, "is to solicit a becoming, to instigate a transformation" (Butler, 44). Butler highlights the element of need, observing that the recognition-seeking subject relies upon the other to fulfill a need for validation, and thus internalizes a tie to that other as a condition of selfhood. Butler's concern is with how we make ourselves vulnerable to one another, but equally true is that to ask for and offer recognition, is simultaneously an act of individuation and self-assertion – of holding oneself out as separate from the other, and capable of perception and comprehension of, and communication with, that other – and thus, depending on one's starting position, may be a matter of diminishing vulnerability as much as of establishing it. The act of recognition produces subjects for whom neither independence nor dependence is absolute.

For the disability community, the demand for recognition as rights-bearers, as political subjects rather than objects of policy, functioned as a counter-narrative to the subsumption of individual identity in passive dependence on caregivers and technocratic scrutiny by experts. It laid claim to the dominant ideal of independent, autonomous selfhood, with all the promise and ultimately, all the limitations thereof; and in so doing, exchanged a form of second-class status for a share in the paradoxes of liberal citizenship. At the same time, however, it produced subjects uniquely positioned to rearticulate this citizenship as one that must attend to, rather than abstract away from, the significance and variability of embodied experience; one that must acknowledge the necessity of our interactions with one another within a shared world. Moreover, as disabled people like "Jill Golding" have deployed the status of rights-bearers to demand recognition of their particularity and attention to their needs, they have reconstructed rather than displaced dominant discourses of care for people with disabilities, envisioning themselves as deserving of being cared about as equals, rather than in need of being cared for as dependents. The radical potential of these shifts lies not simply in new forms of disabled identity, or new paradigms of disability justice, but new accounts of democratic ethics – a vision of a public sphere populated by rights-bearing subjects engaged in reciprocal practices of care.

CHAPTER TWO
CARING ABOUT RIGHTS:
PERSONIFICATION AND ABSTRACTION IN THE SAME-SEX MARRIAGE DEBATE

I. Introduction: The "Logic of Rights"

The exercise of reason is often supposed to be the driving engine behind progress in the protection and promotion of fundamental rights. For example, in tracing the history of human rights, Lynn Hunt argues that once societies recognize basic principles of right as abstract matters, the "logic of rights" demands the persistent expansion of their application into new contexts and on behalf of new groups of people. Policies that might seem distasteful or outlandish when taken solely on their own terms become more compelling when seen as the necessary consequences of ideals to which the polity has already pledged itself. In Hunt's example, legislators in revolutionary France, having announced a general principle of religious liberty, were quickly confronted by its sweeping implications: not merely, as some had initially imagined, that Protestant worship might be tolerated rather than suppressed; but that Protestants might be entitled to equal political participation; and moreover, that Jews as well might claim both freedom of worship and political inclusion. The legislative debates pitted legislators' discomfort with these outcomes against arguments from established principle; the latter proving difficult to refute, legislators were left with a choice between embracing the unnerving implications of their commitments and facing their own hypocrisy in refusing to do so. Sufficient numbers opted for adherence to principle that freedom of worship and political inclusion for religious minorities became well established in French law.

However, Hunt also observes that the logic of rights is not always compelling, or at least, that the time it takes to operate may long exceed the lifespans of those who aim to deploy it. In particular, the logic that extended political rights to religious minorities in revolutionary France did not succeed in securing them for women. Hunt emphasizes the significance of the mere fact that women's rights came under discussion in such a time and place, and these early discussions no doubt laid the groundwork for concrete policy changes in the future – but it would take over a century from those early discussions before established ways of thinking about women's status could be made to yield to principle.

The difficulty, as Hunt describes it, rested on the lack of "conceivability," or intelligibility, of claims on behalf of women, within existing habits of thought (Hunt, 168). Among those who debated the extension of political rights to religious minorities, the basic contours of the argument were already well-understood. Hunt observes that women, however, "did not constitute a clearly separate and distinguishable *political* category" (Hunt, 169). Transferring the logic applied to religious minorities to this group required much more than simple syllogisms. Women were not, Hunt points out, a numerical minority – nor had they been subjected to persecution aimed at forcible assimilation into the dominant class. The forms of oppression they experienced were not well-understood as oppression. Naming the harms that women experienced by virtue of their sex, and identifying these harms as having political rather than merely private significance, would require a far deeper understanding of women's experiences, as well as new ways of thinking about the nature of the political. These new insights could not be reached by logic alone, and so principles articulated as universal nonetheless remained particular in their application. Expanding their reach would take many decades of persistent debate and societal evolution.

II. How the Logic of Rights Failed the Same-Sex Marriage Movement

The case of same-sex marriage in the United States provides a contemporary example in which the invocation of abstract principle alone failed to yield an expansive understanding of established rights. In 2008, the California Supreme Court found that limitation of the institution of marriage to opposite-sex couples violated the equality rights of gay and lesbian individuals[12] under the state constitution. Later in the same year, a voter referendum, titled "Proposition 8," overturned this judicial ruling, rewriting the constitution to expressly renounce same-sex marriage. In the course of the public debate over Proposition 8, proponents of same-sex marriage made the strategic decision to emphasize arguments from abstract principle in their appeals to voters, invoking the logic of rights rather than engaging voters with the more concrete implications of their choice. Later, some community leaders concluded that this approach had been a mistake, and questioned whether it may have been responsible for the failure of their efforts.

Prior to the vote, the California electorate seemed a promising audience for arguments on behalf of same-sex couples' right to marry. A socially liberal state with a large and visible queer community, and a long history of queer activism, California offered some of the strongest legal protections in the country for queer individuals and same-sex couples, including extensive protections against private discrimination and a particularly robust "domestic partnership" law. The prior judicial ruling on same-sex marriage also positioned advocates for same-sex marriage in defense of, rather than opposition to, the status quo – roughly 18,000 same-sex couples had already married in California by the time of the November vote – and laid the groundwork for an argument from principle by putting an authoritative stamp on advocates' interpretation of established constitutional rights.

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[12] The court did not expressly reference other sexual identities, such as bisexuality, that might also contribute to the constitution of the relevant minority group. In this paper, I use "queer" as an umbrella term intended to include the full range of non-heterosexual and gender non-conforming identities.

However, some advocates saw the political landscape less optimistically. California was one of the 33 states that, in the aftermath of the federal Defense of Marriage Act, had amended its laws to explicitly deny recognition to same-sex marriages. Moreover, one community leader later observed that "support for same-sex marriage dropped 14 points after couples started getting married" (Szymanski[13]) – a statistic that suggested disparities between voters' support for the abstract idea of same-sex marriage and their comfort levels with it as a concrete reality. This steered campaign leaders toward a public-relations strategy that acknowledged the pro-marriage-equality status quo only in abstract terms (e.g., with the slogan "Don't eliminate marriage for anyone"), and largely avoided depicting same-sex couples or their families. The only widely-distributed commercial depicting individuals who acknowledged a personal tie to the issue featured an opposite-sex married couple; they described themselves as having been married for 46 years and having raised three adult children, and made a single reference to a "gay daughter" (who was not identified in any of the family photos displayed briefly on-screen). Other ads talked only in general terms about those affected ("stop[ping] thousands of couples who love each other from getting married") or addressed marriage equality for same-sex couples as a matter of the broadest principles possible. This last type of message said little about marriage, and less about same-sex marriage, while focusing on generic claims about equality ("No person should suffer discrimination … it's wrong to treat people differently under the law") or suggesting that rolling back rights protections via voter initiative entailed a threat to the basic framework of constitutional rights ("Elections should give us new rights, not take rights away").

This strategy is largely consistent with an understanding of how the logic of rights can operate. Voters' principled commitments – to equality under the law, to the universality of rights, to the framework of constitutional democracy – could be relied on, at least as a general

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[13] Quoting Kate Kendell, executive director, National Center for Lesbian Rights.

matter. Their comfort level with the specific implications of the commitments under discussion was much less certain. Thus, a campaign that forced voters to confront the issue of same-sex marriage not primarily as a concrete matter, but through the lens of the broader principles at stake, could draw on voters' desire to maintain consistent adherence to their principles while minimizing the discomfort that might tempt them to set principle aside.

However, the approach saw significant criticism during the campaign, and still more once it proved unsuccessful in winning over a majority of voters. In the *Los Angeles Times*, a week prior to the election, Jonathan Rauch wrote, "Whatever the tactical considerations, the absence of gay couples and gay marriages from California's gay-marriage debate makes for an oddly hollow discussion," and suggested that the campaign's advertisements had failed to "show how gay marriage directly affects the couples and communities that need it most" (Rauch). After the election, San Francisco activist Michael Petrelis told the Associated Press that "We [gay couples] were seen more as a liability," and described the campaign in his own weblog as "offensively closeted" (Leff). Kate Kendell, executive director of the National Center for Lesbian Rights and one of the leaders of the campaign, expressed regret over the strategy: "I'm not a campaign expert, so you end up listening to what your campaign experts tell you … That would be just one example where, you just know, instinctually, it doesn't seem right" (Szymanski). Although Kendell was doubtful that different messaging would have changed the outcome of the 2008 vote, she acknowledged that in the longer term, countering mainstream homophobia would require making same-sex couples more – not less – visible (*Id.*).

Indeed, the invisibility of queer individuals and same-sex couples within the "No on 8" campaign tended to undercut the campaign's own logical arguments. For example, the basic foundation of equal protection rights, the idea that it is "wrong to treat people differently under the law," presumes comparisons between those who are analogously situated. However, the analogy between same-sex and opposite-sex couples, put forth by activists, affirmed by the California (and later federal) courts, and taken as given by "No on 8" campaign rhetoric, was less than self-evident to opponents of same-sex marriage. Instead, persistent questions about the meaning of gender – precisely what thwarted application of the logic of rights in Hunt's example – fed genuine doubts about whether same-sex relationships had enough in common with opposite-sex relationships to require recognition within the same institutional framework.[14]

The power of the logic of rights, however, is in its sheer inescapability. It cuts to the core of an issue, lays bare what is at stake, and invokes settled principle in terms so straightforward as to be undeniable. Decision-makers accept what they dislike because they cannot avoid understanding that it is what their principles demand. Where, due to conceptual nuance or empirical uncertainty, the analysis is not so straightforward, the space allowed for uncertainty, for the continued perception that there may be credible arguments on either side of the question, leaves decision-makers considerable freedom to decide as they wish, rather than being driven to decide as they conclude they must. This reflects not decision-makers' hostility toward or overt rejection of the principles of right, but rather the essential inadequacy of that framework to the task at hand.

III. Care as a Foundation for Expanding Rights

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[14] For example, one high-profile commentator, novelist Orson Scott Card, argued to mass audiences that the unique significance of heterosexual relationships, underlying the need for legal institutions tailored to their support, is the profound gulf they must bridge between male and female natures: "[A] man and a woman come together as strangers and their natural impulses remain at odds throughout their lives, requiring constant compromise, suppression of natural desires, and an unending effort to learn how to get through the intersexual swamp" (Card). It is easy for proponents of same-sex marriage who view gender through more progressive lenses to assume that their fellow citizens do likewise, and thus to see any claim that the basic character of a relationship is determined by the genders of its participants as a mere smokescreen for animus. I believe this is a naive underestimation of the persistence of patriarchal norms and the complexity of their contribution to heteronormativity/homophobia.

What rights could not accomplish in 2008 in California, however, they have since achieved nationwide. The 2015 United States Supreme Court decision in favor of the right of same-sex couples to marry accompanied a large-scale shift in public opinion in favor of same-sex marriage rights; some polls suggest that by the time of the court's decision, the outcome had the support of a majority of Americans. Surveys have consistently suggested that a key contributor to individual opinions is personal acquaintance, and especially a close friendship or familial relationship, with someone who is queer (*e.g.*, Pew Research Center). For many people, the "logic of rights" alone proves less persuasive than does a sense of personal connection and investment in the well-being of someone who is queer, along with firsthand observation of the particularities of their relationships and life experiences.[15] These encounters produce the conclusions on which arguments about rights rely – that same-sex relationships are substantially similar to opposite-sex relationships in the ways that matter most, and/or that fixating on whatever differences might exist between them has insupportable personal costs to queer people.

The dynamics in play here reflect the idea of a political ethic of care, as put forth by a prominent strand of feminist scholarship. Authors such as Joan Tronto and Virginia Held argue that the perspectives, practices, and dispositions associated with caring labor provide a valuable framework for political morality. Care begins with relationships between individuals, and with a sense of responsibility for one another's well-being between parties to a relationship, with a particular emphasis on responsibility to those whose characteristics or circumstances make them

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[15] Even for those without personal connections to queer individuals, many commentators have suggested that increasing queer visibility in popular media has functioned similarly, cultivating viewers' sense of connection to and concrete understanding of the lives of queer television and movie characters. In this vein, Vice President Joe Biden once suggested that the program *Will and Grace*, which ran on network television from 1998 to 2006, "had done more to advance the cause of the gay population of America than anything else" (J. Myers). Although early seasons of the show treated gay protagonist Will's sexuality only in very general terms, as viewer comfort with and attachment to the character grew over the years, storylines about his romantic life became more detailed, culminating in an on-again/off-again serious relationship in late seasons and a series finale in which he and his partner are seen raising a son together.

especially vulnerable. It entails attending to one another's particularity in order to identify and respond to specific needs as they arise, and it cultivates affective ties as both a stimulus to and outgrowth of these other-oriented practices. Brought into the political sphere, care theorists argue, these modes of thinking and acting have profound transformative potential.

The evolution of individual attitudes toward same-sex marriage draws on these foundations of relationality and attention to particularity; however, this is not to say that principles of right are simply bypassed in individual judgments about same-sex couples' legal entitlements. Although care theorists often treat care ethics and rights politics as disjoint or even opposing means of approaching difficult policy questions, the case of same-sex marriage suggests instead that caring foundations work to reinforce reasoning about rights. A comment quoted in a 2013 Pew Research Center survey report shows how particularistic, relational analysis informs, rather than replaces, rights discourse for one respondent. When asked why he or she was in favor of same-sex marriage, the respondent said, "My best friend from high school is a gay man and he deserves the same rights; they are in a committed relationship" (Pew Research Center). The comment echoes the "No on 8" campaign's emphasis on the ideal of equal treatment under the law, even as firsthand experience provides the context against which application of that concept to the question of same-sex marriage has become intelligible for this respondent. Rights, meanwhile, provide the framework through which the respondent asserts the high school friend's interest as a matter not merely of one policy's desirability over another, but of the friend's moral and political entitlement. The rights paradigm also gives the claim its generality: Not merely that the respondent's friend deserves the respondent's recognition of his relationship, but that he deserves the same recognition from society as a whole, and that the respondent therefore also supports extending this recognition to all same-sex couples.

It is easy to suppose that what transpires here involves the substitution of emotion for reason in political decision-making. It is true that care ethics emphasize affective bonds and take these seriously as influences on our actions, and it is further true that the idea of a pure "logic of rights" suggests the dominance of reason. However, in practice, both frameworks operate to engage reason and emotion in subtler ways, and to take advantage of the benefits of both. Rights discourses frequently appeal to reason, but our basic commitments to rights frameworks draw heavily on what we might think of as moral instincts: the "self-evident" value of goods such as freedom and equality, and our sense of outrage when these are denied. The "logic of rights," as Hunt describes its operation, also makes use of our basic drive to feel good about ourselves and our actions; reason tells us what our principles demand, but our capacity for shame fuels our effort to adhere to those principles. Meanwhile, an ethic of care embraces the role of empathy and emotional attachment in reinforcing our awareness of one another's need and our commitment to exerting our own effort to meet that need, but like the practice of caring labor on which it is based, it joins these with observation and reason rather than seeking to supplant them.

Indeed, to think of political decision-making in terms of the primacy of either reason or emotion is to demand too little of decision-makers. Clinical psychologists refer to the concept of the "wise mind" to describe the psychological state in which reason and emotion inform and integrate with one another, rather than pulling us in opposite directions (see, *e.g.*, Linehan), and a political wise mind should be our decision-making ideal – a level of understanding in which we have attended to both our rational conclusions and our emotional inclinations sufficiently to resolve conflicts between them and bring them into alignment with one another. Just as the application of reason can help to neutralize ill-considered emotional reactions, the pull of emotion can attune us to flaws in our reasoning. In the present case, empathy for queer friends or family members does not simply induce individuals to ignore previous rational assessments of the social costs of recognizing same-sex marriages. Rather, it prompts them to question those assessments, offering an alternative lens through which to reconsider – or more fully consider – the information available to them, and it acts as a counterweight to other emotions that may have influenced their earlier exercises of reason, with the ultimate result that a different conclusion begins to seem both more emotionally satisfying and more reasonable.

Psychologist Paul Bloom argues that empathy breeds bad policies; that it biases us toward the interests of those we find "attractive" or most similar to ourselves, and that, "insensitive to numerical differences and statistical data," it leads us to privilege the well-being of particular individuals with whom we have established empathetic bonds over the good of the unknown many (Bloom). Bloom differentiates empathy from compassion, "a more distanced love and kindness and concern for others," and favors the latter as an influence on our judgment (*Id.*). However, as Lynn E. O'Connor and Jack W. Berry note in a response to Bloom, "empathy isn't something we choose; it is wired into the neurobiology of social animals, ourselves included" (O'Connor & Berry). Moreover, at least some degree of it is a necessary prerequisite to the capacity for compassion; "[o]nly if we have the capacity to feel empathy toward loved ones can this sentiment be generalized by the imagination and extended to strangers" (*Id.*) They observe that empathy "is only a problem when our cognitive response fails" (*Id.*). Thus the pertinent question is not whether our judgment ought to be affected by empathy, but how to most constructively direct our cognitive responses to the experience of empathy. In the example from the Pew Research Study, we see rights performing precisely this function of structuring cognition, transforming empathy for a friend into a policy position that accounts for the interests of a broad array of others.

This approach to care, as a foundation rather than a substitute for an effective politics of rights, has significant implications for democratic theory. Some of these can be elucidated through engagement with two feminist elaborations on the foundations of democratic discourse: Gretchen Ritter's discussion of the "politics of presence," and Iris Young's account of the contributions to democratic discussion of key non-deliberative communicative practices. In the next two sections, I highlight the value of a care-theory lens in understanding both authors' insights, as applied to the accomplishments of the queer liberation movement up to and through the battle over same-sex marriage.

IV. Care, Rights, and the Politics of Presence

Outside of and in marked contrast with the "No on 8" campaign, queer activists have often embraced what might be characterized as a popular "politics of presence." Anne Phillips articulates the politics of presence with an emphasis on the diversity of representative bodies, focusing on arguments "that regard the gender, race, or ethnicity of the representatives as an important part of what makes them representative, and seek some guarantee of equal or proportionate presence" (Phillips, 13). Phillips suggests that "the range of political ideas and preferences is significantly constrained by the characteristics of the people who convey them," and that "[w]hen policies are worked out *for* rather than *with* a politically excluded constituency, they are unlikely to engage with all relevant concerns" (*Id.*).

In queer politics, however, the prior struggle has been for presence not in the institutions of government, but in the sphere of public discourse itself; and the question has been not simply what distinctive perspectives queer voices might contribute to that discourse, but how the consciousness of queerness, when produced through the visible, embodied presence of queer persons in the discursive sphere, contours the conceptual landscape for all discursive participants. The emergence of a queer subject, whose identity as such is rooted in ways of being and behaving that are at odds with the surrounding culture's norms, itself reflects the disturbance of those norms so far as to make intelligible their contingent nature, the very possibility of their violation or displacement. This subject's entry into the public sphere is thus a disruptive act, not because of any policy proposals it puts forth or reasons it gives for them – though these may have their own disruptive content – but because its presence asserts the existence of possibilities that shake the very foundations of the dialogue. Thus, the longtime rallying cry of activists, "We're here, we're queer,"[16] states a claim – to recognition as a non-normative subject, to the reconfiguring of foundational understandings that makes non-normativity thinkable – that comes prior to the exchanges of narrative and argument by which deeper understanding and agreement might be pursued.

Gretchen Ritter captures some of this transformative potential of presence in her articulation of "embodied civic membership" as an ideal for women's public lives. She argues for "a range of ways of being present in the world" through which women's public identities might not be limited to "either the autonomous, unfeatured individual or the ascriptively defined member of a specific group" (Ritter, 308). In other words, Ritter seeks space for the assertion of particularity outside of predetermined, essentialist categories, allowing the emergence of "woman" as an identity whose content is substantive and yet both contextualized and dynamic, reflecting rather than imposing the traits and experiences that produce it. This is a promising account, offering the possibility that forms of public presence that admit particularity as it happens to present itself, rather than either excluding it under the rubric of "neutral" civic

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[16] Often, "We're here, we're queer; get used to it," but *c.f.* a 1990 leafleting campaign: "We're here, we're queer and we'd like to say hello!" Whether the tone is combative or congenial, the challenge to the listener contained in the bare assertion of presence retains its potency.

identities or attempting to regulate its meaning through ascriptive identity categories, can permit the emergence of more inclusive understandings and ideals and can facilitate forms of group-based organizing and group-oriented policies that respond to emergent commonality rather than impose it.

Ritter's conception of presence emphasizes embodiment, the physicality of presence and with it an enhanced consciousness of the political significance of bodily experience. Ritter observes that the acknowledgment of bodily experience in liberal political orders typically operates oppressively. The embodied subject is tied to and shaped by particular forms of need/desire and vulnerability, by particularized relationships to other bodies, by the structuring of consciousness through situated perceptions and specific life activities. The intrusion of bodily experience may mark one as "dependent," "irrational," "diseased," "unvirtuous," "unbounded" – set apart, in other words, from the liberal ideal of neutral, rational, independent subjectivity, and consequently subject to the imposition of legal disabilities (*Id*. at 309). Queer bodies, she observes, are perceived as "transgressive or excessive in their physicality, too sexual," and thus set apart from the ideal of rational, virtuous subjectivity; the perception of queer individuals as "sexually open" may even suggest "contigu[ity] or continu[ity]" with other bodies, the lack of an independent self (*Id*.).

However, Ritter insists that the answer to oppressive constructions of some bodies is not an anti-oppression politics that distances itself from bodily experience, for to obscure embodiment is often to render politically invisible the traits that mark one out for oppression, the forms that oppression takes, and the specific harms it inflicts. Instead, she argues that the incorporation of bodily experience in politics must be accompanied by a critical orientation, focused on "the concurrence of social institutions as they produce, regulate, and discriminate among civic embodiments" (*Id*. at 314). Importantly, this means rejecting discourses that figure bodily experience as the exclusive experience of oppressed classes, in which "the civic embodiment of some serves to elide the civic embodiment of others" (*Id*. at 311). An effective politics of presence inserts oppressed bodies into the public sphere, but in so doing it transforms that sphere more broadly into a space of encounters among embodied – not merely abstract – subjects, and it illuminates the processes by which varied forms of privilege and oppression are inscribed on each.

Left open in Ritter's discussion are the mechanisms by which embodied presence might take on this empowering/liberatory character. One can surmise that the insertion into the public sphere of the embodied subject must be in some sense disruptive – of a character too unexpected, or asserted too forcefully, to be capable of regulation through the established conceptual frames Ritter identifies – and yet there is little reason to presume that disruption alone yields expanded understandings, or an expanded frame of democratic inclusion. Instead, publics may and often do react to disruptive presences in their midst merely through more vigorous embrace of discourses that justify forcible suppression and expulsion – resorting, for example, to the language of criminality or pathology, and going so far as to imprison or institutionalize individual agents of disruption. Queer experience illustrates this potential amply; the intrusion of the very idea of homosexuality into mainstream public discourse in the late 1940s, a result of attention given to Alfred Kinsey's studies of human sexuality, was followed by an era of brutal suppression, including anti-sodomy laws carrying sentences of life imprisonment, as well as involuntary psychiatric commitments to hospitals employing "cruel and inhumane treatments, including castrations, torture drugs, shock therapy, and lobotomies" (Scot).

I suggest that whether publics engage the challenges posed by a politics of embodied presence within a democratic frame, rather than responding with suppression, may hinge on the conceptual frameworks for intersubjective recognition and understanding that activists are able to invoke. The terms on which the embodied encounter attains intelligibility are crucial – and here, I return to the idea of an ethic of care. Importantly, Ritter herself distances her account of the politics of presence from care theory, writing that her "advocacy of civic embodiment should not be linked to cultural feminism or an ethics of care" (Ritter, 313). However, she appears to intend this statement quite narrowly – in particular, simply to differentiate her position from those that advocate for women's presence in the public sphere on the grounds that women's supposedly distinctive "caring" dispositions contribute something valuable to politics. For Ritter, it is not necessary "to suggest … that women are naturally nurturing" (*Id.*) and that their presence matters as a result; instead, presence is important precisely because it enables us to acknowledge the ways in which bodily differences become the foundation for distinctive social experiences, and to open up possibilities for alternative constructions. It is indeed essential to her argument that the substance of these alternatives is open to political resolution, rather than pre-emptively ascribed. I read this, therefore, not as a rejection of advocacy for a political ethic of care, but simply an acknowledgment, with which I agree, that women's traditional association with the ethics of care is a contingent political fact, and that while advocacy for the political inclusion of women and the recognition of care ethics as politically significant are intertwined as a matter of (present, contingent) fact, neither depends on the other for its core justification.

Meanwhile, however, there are significant natural resonances between care and the politics of presence. Care is rooted in encounters among embodied subjects; it is an ethical system that elaborates on intuitions that arise, in the first instance, from the experience of physical labor oriented to meeting the bodily need of another. It entails a deep attunement to individual particularity, one that bypasses the twin pulls of abstraction/generalization and ascriptive group difference. It acknowledges the materiality of the encounter itself – the fact that discourse consists in particular subjects' coming into contact with particular other subjects, generating a public sphere that is not merely an amorphous intermingling of subjectivities, but rather a complex network of specific instances of mutual recognition and mutual understanding, a space to which we bring and in which we are continually forming relationships to concrete others, and through these forging connections to persons more distant. And, of course, it imbues these encounters with a sense of positive but indeterminate obligation – a consciousness that it is not sufficient merely to regulate the content of a novel encounter through the detached application of pre-existing rules of discourse, but rather that the particular circumstances of the encounter, and the particular needs and characteristics of the subjects who encounter one another, are *a priori* foundations for identifying morally compelling terms of interaction.

An ethic of care, therefore, offers a framework of intelligibility via which a politics of embodied presence might operate, an alternative to the glossing over of embodied encounters within discourses that can deal only in abstraction, or their categorization as apolitical spectacle or anti-political threat. It operates not as a replacement for a deliberative politics of rights and justice, conceived in accordance with liberal principles, but as a means of establishing its starting conditions, the inclusion of all relevant perspectives through the incorporation of diverse subjects, and the breaking down of presuppositions – the denial or ascriptive distortion of bodily experience – that might undercut a full and fair hearing of some individuals' particular claims. It supplies a means of being together and recognizing one another from which discourse can proceed. It is capable, in other words, of performing the meaning-making role described above, on which the effectiveness of a politics of presence must be founded.

The politics of presence have been central to queer political organizing for most of its history, and take a variety of forms for the purpose of making queer individuals visible and making the realities of their particular experience intelligible. These include a variety of public "visibility actions," from rallies and parades to merely gathering in public spaces to engage in low-key social activity. Queer Nation New York describes its "inaugural action" as a gathering in a public bar, intended "to make clear to patrons that queers [would] not be restricted to gay bars for socializing and for public displays of affection" (Queer Nation NY). A series of similar actions, dubbed "Nights Out" by the group, followed. The simple act of socializing in a public space was politically potent because it inserted a visible queer presence into a space where heteronormative conduct had theretofore been an unacknowledged and unquestioned standard. Some public actions also heavily feature the use of ostentatious and transgressive costuming – drag, fetish gear, etc. – in order, among other reasons, to broadly challenge the conventional organizing of gender identity and sexual practice into narrow frameworks of acceptability and even intelligibility, by presenting participants in guises that subvert the established order.

These public visibility actions operate hand-in-hand with the cultivation of a more intimate politics of presence, through a systematic emphasis on "coming out" to one's acquaintances – family, friends, neighbors, co-workers, and others. The latter has functioned to make more heterosexual individuals conscious of queer presence in their immediate circles, and is a central means by which care ethics contribute to the structuring of heterosexual encounters with queer presence at the societal level. Coming out as a political act draws deeply on the power of relationality, making individuals conscious of their personal ties to the queer community; it is also particularly conducive to the cultivation of deep understandings of individuals' particular experiences and perspectives.

These direct encounters lay key foundations for a larger-scale politics of presence – the accumulation of individual contacts and relationships reshapes the overall social context in which more confrontational and arm's-length visibility actions take place. The existence of a critical mass of citizens who have some pre-existing consciousness of queerness as personified by concrete individuals, and who understand these individuals as existing in relationship to themselves, structures the space of thinkable responses to the determined, large-scale assertion of embodied queer presence within the political sphere. This does not preclude hostility or highly conflictual responses to any challenge to dominant heterornormativity; it does, however, make the "otherness" of the challenging presence less than absolute, creating the possibility that those asserting their presence will be recognized as legitimate interlocutors with whom conflict might take place within a democratic frame.

V. Beyond Deliberation: Discursive Foundations of Caring Politics

The subsequent question that necessarily arises is the form democratic engagement might take, and here I turn to Iris Young's work on inclusive democratic practice. Although she does not overtly identify her expansive account of democratic communication with care theory, the communicative practices on whose legitimacy she insists do much to emphasize relationality, facilitate empathy, and give due weight to the concrete experiences and interests of individual participants. Young's work draws on deliberative democratic theory, but she argues that an emphasis on pure deliberation devalues, and often denies legitimacy to, forms of communication that lay necessary groundwork for informed and inclusive deliberation. Greeting and narrative are two of her examples of other forms of communication important to democratic practice (Young [2003], 56-57), and her accounts of both of these highlight their contributions to a political ethic of care and to the development of the political "wise mind."

Greeting is the practice through which participants in political dialogue acknowledge one another's presence in the conversation, recognize one another's particularity, and affirm the relationship between them. It creates an explicit bridge between presence and discourse, implicitly accepting the legitimacy of the former and committing to the latter. Young suggests that practices of greeting lay the foundation for inclusive deliberative processes; by greeting our co-participants, we convey that we are prepared to hear their points of view, even as we assert our own presence and right to speak. It is also, I claim, an essential foundation for a politics of care, insofar as it invokes the particularity of individual participants, and the ties among them – as well as the responsibilities that arise from those ties – to inform and motivate the exercise of political judgment.

In a purely abstracted, reason-driven deliberative process, the acknowledgment of individual participants might not be necessary; contributions to the discussion serve their purpose of introducing information and advancing inferential processes regardless of who offers them. However, the act of acknowledging that discursive contributions come from specific individuals, combined with the process of recognizing those individuals in their particularity and welcoming them into the discussion, adds another layer that reinforces our efforts at rational deliberation. Our awareness of contributors to the discussion as particular individuals, situated in particular contexts, enriches our understanding of the facts that they present and the values that they invoke – shortcutting lengthy elaborations in more abstract terms – and it invites our empathy for them as a counterweight to the all-too-human tendency to filter information excessively through the lens of our own experiences and interests. Meanwhile, by situating ourselves in relationship to one another through the act of greeting, participants in discussion recognize our relationships to one another as common members of a political community, and acknowledge our mutual accountability to one another. In so doing, we reinforce our commitments to the process of working together to reach a decision, balancing the impulse toward selfishness – or simply laziness – that might otherwise preclude our thorough engagement with the arguments presented. This processes buttresses the operation of the "logic of rights," spurring us to draw not only those conclusions that are so straightforward that we cannot avoid them, but also those that follow our willingness to expend greater effort on critical thought.

The role of greeting as a practice of recognition may be especially important in debates over rights, which – unlike general policy questions – are essentially linked to the interests of specific individuals. They thus lose their meaning when abstracted too far from a consciousness of those individuals as distinct presences in the community, with distinct perspectives and interests – when, in other words, we think about the composition of the polity too much in terms of generality and collectivity. Greeting reminds us that the collective is composed of individuals, each of whose rights must be separately accounted for in our process of political judgment.

Activists who called for the visibility of same-sex couples in "No on 8" advertising were asking, at a first level, for the campaign to admit them as embodied presences in the debate, calling for leaders not merely to offer abstract arguments presented by disembodied narrators or heterosexual allies, but to allow those on whose behalf the arguments were made an opportunity to assert their presence in the political community and articulate their ownership of their claims. They sought the ritual of greeting on a large scale, an opportunity to identify themselves while addressing voters "face-to-face" on their TV screens, as a means of reminding those voters to hold themselves accountable not only to logic for its own sake, or to abstract political principles, but to the individuals whose rights hinged on the voters' sound use of logic and rigorous adherence to principles.

Narrative, like greeting, is a form of political communication that reinforces awareness of the particularity of individuals, while also highlighting and reinforcing the ties that connect us. At its core, narrative is a means of communicating facts to which rational analysis can be applied. However, it simultaneously contextualizes and personalizes those facts, shaping the way in which we incorporate them into our interpretations of the issues at hand. It elaborates the individual stories on which general understandings are based, providing a richness of detail that illuminates the meanings others' experiences have for them and enhances our ability to make sense of the points of view they express. It expands the scope of our imaginations, suggesting new ways of considering similar situations and opening up lines of inquiry that must be explored before we fall back on comfortable assumptions. It also reminds us that abstract data are rooted in the experience of persons, enabling us to internalize the awareness that every instance of suffering or pleasure, frustration or aspiration, about which we might reason in the abstract, is felt by someone, no less deeply than we ourselves feel – and that the lives shaped by our decisions are no less real than our own. This becomes the foundation for empathy, which gives us the will to uphold a principled stance – easy to acknowledge as a rational matter, but potentially painful to adhere to in practice – that others' rights matter just as much as our own.

In the Proposition 8 debate, opponents of same-sex marriage (i.e., "Yes on 8" advocates) made more effective use of narrative than did the "No on 8" campaign. For example, television commercials depicted public school students witnessing a same-sex wedding during a school field trip, presenting the incident as a concrete example of how upholding same-sex marriage rights might inhibit parents' opportunity to shield children from awareness of diverse sexualities, prompting conversations uncomfortable for parents or diminishing their ability to pass their own views about gender, sexuality, and family on to their children. These possibilities were real, and not undeserving of discussion, but had the "No on 8" campaign responded equally concretely, voters might have had more substantive countervailing considerations against which to weigh them – from gay teenagers, many victims of bullying in school or subjected to hostility by their families, for whom exclusion from the institution of marriage reinforced fears of permanent social ostracism, to aging same-sex couples whose lifelong relationships profoundly illustrated many voters' most cherished ideals for the institution of marriage. Instead, the "No on 8" campaign took the opposite approach, abstracting away from queer experience and from the impacts voters' choice would have upon it, and missing the opportunity to build voters' reasoning about rights upon a foundation of care.

A contrasting turn in the national dialogue began in 2010, with the "It Gets Better" project. Initiated to communicate to queer youth at risk of suicide, the campaign solicited personal narratives from queer adults willing talk frankly about the challenges they had overcome and the ways in which their lives had changed for the better in adulthood. Participants submitted thousands of videos for public Internet distribution (Fagan). Although the intent behind the campaign was to reach out to young people in the LGBTQ community, the publicity it attracted resulted in attention from much broader audiences, and the archive of diverse narratives offered by contributors ultimately drew over 50 million total views. As contributions to the mainstream dialogue about LGBT rights, these videos largely did not argue on behalf of specific public policy change, and yet they exemplified the use of greeting and narrative to lay groundwork for such arguments taking place elsewhere in the public sphere.[17]

VI. Conclusions: The Radical Potential of a Caring Politics of Rights

The focus on same-sex marriage within the LGBT rights movement has elicited significant criticisms from within the queer community by commentators who suggest that the "assimilative" nature of the marriage campaign undercuts a more sweeping approach to sexual and gender-expressive liberation. For example, in 1999, Michael Warner described the "isolation" and "silent inequalities" associated with the political imposition of sexual shame, and put forth a vision of queer activism as relentlessly dedicated to dismantling "the hierarchy of shame" (Warner, 49) by "[fighting] the stigmatization of sex, in all the ramifications that stigma has for people, from queer youth to sex workers and single mothers" (*Id*. at 80). Warner argues that the institution of marriage, by contrast, functions precisely to regulate sexuality, marking boundaries between societally approved and stigmatized spaces of sexual expression; inherently, it "sanctifies some couples at the expense of others" (*Id*. at 82). "As long as people marry," he insists, "the state will continue to regulate the sexual lives of those who do not marry" (*Id*. at 96). To the extent, therefore, that the LGBT movement has embraced access to marriage as an aim, Warner claims that it has made itself complicit in the very hierarchical organization of sexuality that it once sought to dismantle.

However, contemporary research suggests that some LGBT activists, including many of younger generations who came of age amidst the marriage debate, experience advocacy for marriage as compatible with, or even a foundation for, more radical commitments. In a 2015

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[17] *E.g.*, the "We Got Your Back" project, which explicitly sought to "supplement" the It Gets Better project by, among other efforts, "mobilizing the LGBTQIA community in support of anti-bullying and anti-violence legislation" (Doyle).

study, Shannon Weber profiles three activist groups founded in the aftermath of Proposition 8's passage who have rejected assimilationist tactics while taking up the fight for marriage as an element of, not a substitute for, farther-reaching visions of queer liberation. Weber argues that these activists see their invocation of marriage as disruptive to, rather than supportive of, its role in constructing social hierarchies – that they "take up marriage in ways that challenge both heteronormativity and homonormativity"[18] (Weber, 1151). Weber notes that "individuals enter into and experience marriage in diverse ways," and that "marriage has the potential to change as an institution," insisting that a "range of meanings [is] available to the institution of marriage in the 21st century" as "traditional assumptions [are] taken up, embodied, and potentially resignified by same-sex spouses" (*Id*. at 1167).

A politics of rights rooted in the cultivation of care – in embodied presence, greeting, and narrative, within a relational public sphere – is uniquely suited to this process of disruption and resignification. Whereas a pure logic of rights tends toward the assimilative – operating most effectively where the closest analogies can be made between the accepted and the novel – a politics that begins with the development of individualized understanding of, and concern for, particular others allows those individuals, and their goals and ideals, to be understood first and foremost on their own terms. This paradigm shift opens up space not only to see how many same-sex relationships are indifferentiable in substance from opposite-sex relationships, but also to recognize the value to some individuals of ways of being that map less neatly onto established frameworks, and to motivate the conceptual work of expanding those frameworks in more inclusive directions. In so doing, it also invites us to envision the institutions we build, and the

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[18] Lisa Duggan defines "homonormativity" as "a politics that does not contest dominant heteronormative assumptions and institutions, but upholds and sustains them, while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption" (Duggan, 50) – *i.e.*, an explicitly anti-radical politics that privileges those members of the queer community most capable and desirous of assimilation into the dominant heterosexual culture.

lines we draw around them, not as delimiters of legitimacy or inherent worth, but as contingent and evolving efforts to provide particular types of goods to as many who might benefit from them as possible, without disregard for the presence and importance of others who may seek to meet different needs in different ways.

Caring foundations, therefore, make possible a politics of rights in which established and well-understood commitments function as opportunities rather than constraints, leaving room for individual lived and embodied experience to establish the case for novel, even radical, understandings of what more we may owe each other. In effect, they ensure that recourse is always possible to the most foundational principles of right – that we sustain the capacity to recognize the uniqueness and individual moral worth of each member of a diverse public, and to expand our thinking as needed so that we can be sure of giving real substance to our commitment to their essential human dignity.

CHAPTER THREE
THE NEGLECTED SUBJECTS OF CIVIL RIGHTS: A RADICAL REREADING OF PATRICIA WILLIAMS

I. Introduction: *U.S. v. Hall*

United States v. Hall is one of a plethora of federal appellate opinions arising out of school desegregation projects in the 1970s. The circumstances that gave rise to the opinion are familiar:

> On June 23, 1971, the district court entered a "Memorandum Opinion and Final Judgment" in the case of *Mims v. Duval County School Board*. … Among the schools marked for desegregation under the plan approved by the district court was Ribault Senior High School, a predominantly white school. … After the desegregation order was put into effect racial unrest and violence developed at Ribault, necessitating on one occasion the temporary closing of the school. On March 5, 1972, the superintendent of schools and the sheriff of Jacksonville filed a petition for injunctive relief in the *Mims* case with the district court (*U.S. v. Hall*, 261).

The court continues, explaining that the petition "alleged that certain . . . adult 'outsiders' had caused or abetted the unrest and violence" and had identified in particular one Eric Hall as a key figure among those "who, in combination with … students and parents, were attempting to prevent the normal operation of Ribault through student boycotts and other activities" (*Id.*) The school district sought, and received, an injunction restraining these activities; Hall's appeal arose out of his violation of the injunction and subsequent conviction for criminal contempt, for which he received a sixty-day imprisonment sentence. The Fifth Circuit panel that heard his appeal upheld the conviction.

Hall's case is not widely regarded as a particularly important moment in the history of school desegregation. In law schools, it is taught to remedies students to illustrate a procedural point regarding injunctions: The Fifth Circuit panel, headed by Judge John Minor Wisdom, upheld the injunction despite considerable sloppiness on the part of the issuing judge in failing to make Hall a party to the issuance of the injunction. One textbook in which the case appears explains, "[T]hose who have not had due process usually are not barred from collaterally attacking the order for improperly purporting to bind them. *Hall*, in contrast, allows the trial court order to bind a wider group without advance notice …" (Levine *et al*.).

The unusual procedural result can best be understood as reflecting the substantive commitments of the judges involved to the project of desegregation. Judge Wisdom was a dedicated champion of desegregation efforts throughout his career (see, *e.g.*, Friedman), and one commentator likewise describes the district court judge, Gerald Bard Tjoflat, as an "unlikely hero" for his decisive handling of the "Jacksonville desegregation crisis" (Jung). This analysis, however, overlooks what is truly extraordinary about *Hall*, and what sets it apart from more famous incidents of federal suppression of protests in places like Little Rock and the University of Alabama. Hall, and the students and parents who collaborated with him, were not white supremacist segregationists. According to Judge Wisdom's opinion, Hall was "allegedly a member of a militant organization known as the 'Black Front'" (*U.S. v. Hall*, 261): He, and the other protestors, were black nationalists.

The procedural origins of Hall's case, therefore, were distinct from those of other instances in which federal action suppressed anti-desegregation protests. The injunction that Hall violated was not an order sought by the plaintiffs to a civil rights case, against third parties who aimed to preserve the status quo. It was an injunction sought by the defendant school district – the party found liable for a violation of black students' civil rights, in a case brought on behalf of those students – that suppressed collective political action by members of the aggrieved plaintiff class. The importance of desegregation, the weight of the students' own rights, was the weapon that the school board, with Judge Tjoflat's and Judge Wisdom's aid, wielded against the students themselves.

This result seems startling and perhaps anomalous, but I will argue that it is no anomaly; it is only the less-observed side of a common coin. The dominant contemporary conception of rights, built on a particularly legalistic interpretation of liberal democratic values, demands, from time to time, results like the one in *Hall*. In such cases, it demands, in effect, that rights-holders be stripped of political agency; it robs them of their political voices. However humane the ends to which it may aspire, I will argue that the essence of this conception of rights is the denial of the individual rights-holder as a political subject, and that it is this essence which reveals itself in *Hall*. However, I do not suggest that the ideal of rights should be abandoned. Rather, I turn to the work of Patricia J. Williams to show why rights remain essential for black empowerment, and how they must be reimagined in order to fulfill this promise.

II. The History Behind *Hall*

Little more of Eric Hall's own story appears in Judge Wisdom's opinion. Despite the substantive commitments of its own that likely underlay the unusual procedural result, the court saw fit neither to examine nor to answer the substantive claims of Hall and the other protestors before permitting their forcible silencing. However, closer examination of the events leading up to the court's decision suggests the significance of the protestors' claims within broader national debates over the meanings of equality, civil rights, and racial justice.

At the time of the protests, conflicts over educational opportunities for black students in Jacksonville had persisted for years. The response to these conflicts included the establishment in 1965 of No. 165, later renamed William Raines High School, to which 1305 black students were assigned (Poppell, 92). Though not an integrated school, No. 165 represented a large investment in facilities, which duplicated those of a new nearby all-white high school (*Id*. at 93).

It was staffed by an Ivy League educated black principal, Dr. Andrew A. Robinson, and "one hundred of the best black faculty that he could find" (*Id*. [quoting Dr. Ezekiel Bryant]). The curriculum "included a wide variety of courses in the academic subjects as well as in elective offerings" (*Id*. at 100), and the school cultivated "[a]n academic climate that challenged students to reach their potential...in an atmosphere of care and concern for the individual student" (*Id*. at 101). Academic rigor was matched by accomplishments and accolades in athletics and the arts (*Id*. at 99). Later accounts by students and faculty also recall tremendous pride in the school and a strong sense of community (*Id*. at 93-99), an observation echoed by the official report of a visiting accreditation committee (*Id*. at 104).

As legal proceedings over desegregation persisted, along with continued conflict over conditions for black students elsewhere in Duval County, Raines High School's experiment in well-resourced, community-based, and black-controlled education for black students became a casualty of broader commitments to desegregation as the sole route to equal educational opportunity. In 1970, court orders dictated that the racial balance of faculty be consistent across all schools in the district, resulting in the scattering of Raines High School's all-black faculty and the imposition of majority-white faculties, reflecting the overall 70-30 white-black faculty composition of the district as a whole, at each individual school (*Id*. at 111-116). The order took effect in the middle of the school year, where the mid-year turnover of 70% of the faculty had significant disruptive effects for students' studies and for the sense of community cohesion at the school (*Id*. at 117-118).

In the 1971-72 school year, Raines High School also became subject to the court's order mandating even distribution of the county's black and white student populations throughout the district. This policy, implemented primarily by bussing black students into majority-white neighborhoods, resulted in the imposition of a disproportionate burden on those students relative to their white peers (*Id*. at 7). Raines High School was paired, for desegregation purposes, with neighboring all-white Ribault High School, and groups of students from each school were involuntarily transferred to the other in order to balance enrollments. In that year, 53% of Ribault's students were black students who had previously attended or expected to attend Raines High School (*Id*. at 171).

The protests that took place in the spring of 1972 reflected the accumulation of frustration among these black students over their experiences at Ribault High School. Despite constituting a numerical majority, they apparently remained relatively peripheral members of the school community – an experience exemplified by the selection of no black students at all among that year's "senior superlatives" (*Id*. at 172). It is surely not coincidence that Black History Week, shortly thereafter, became the occasion for the protests (*Id*. at 171).

Black student dissatisfaction with the effects of the court-ordered desegregation plan reflected the still-contested nature, within the black community, of priorities in education reform and of visions of racial justice more broadly. While desegregation had become the law of the land in 1954, reflecting the efforts of "established, elite civil rights organizations," other activists – especially "grassroots parents' organizations" saw this as a secondary consideration, or even a hindrance, to goals of exercising increased control over, and accessing adequate resources for, their children's education (Weiner, 89-119 [quotations at 89]). Meanwhile, activism continued to reflect the legacies of both Martin Luther King, Jr.'s assimilative, integrationist vision for the black community, and Malcolm X's emphasis on cultural pride and community empowerment. The transfer of black students to formerly all-white Ribault High School reflected the pursuit of the assimilationist conception of racial justice, but from a perspective of community-building and collective empowerment, it may have seemed a step backwards relative to students' experiences at William Raines High School. Meanwhile, students may well have been dissatisfied with what their experiences at Ribault suggested for the prospects of fulfilling an assimilative vision of justice, to the extent that segregation simply became social rather than spatial, while underlying dynamics of white domination and black marginalization persisted uninterrupted.

In this context, the students' silencing suggests the court's disregard for their input into these ongoing debates and the foreclosure of political processes in which marginalized individuals might have played a more active role in informing interpretations of their own rights. Judge Tjoflat effectively acknowledged his prioritization of order over inclusive discourse: "In response to a courtroom charge by an attorney representing various black groups that he was attempting to 'restrain the world,' Judge Tjoflat reportedly leaned across the bench and retorted, 'that’s exactly what I’m trying to do. Nobody is going to interfere with the schools and that means nobody'" (Jung).

At one level, the courts’ single-minded commitment to desegregation is understandable; Brown v. Board of Education, with its mandate to achieve school desegregation, was the law of the land, and lower courts are tasked with implementing, not second-guessing, Supreme Court rulings. However, courts, unlike executives, are not tasked with acting at their own initiative to put the law into practice; rather, their function is to resolve disputes brought to them by aggrieved parties, and to respond to those parties’ grievances by implementing the remedies the parties seek, to the extent that the law justifies such action. It should be startling, therefore, to see courts so committed to specific public policies – whatever the clarity of the governing law – that they proceed full-scale and full-speed-ahead with the implementation of these policies over and above the objections of those same plaintiffs whose initiative provides the court's grounds for acting.

Here, with members of the plaintiff class themselves objecting to the course desegregation was taking, Judge Tjoflat might have justified closer attention to the Supreme Court's emphasis in *Brown* on proceeding with "all deliberate speed," recognizing that implementation of desegregation mandates would take time and that close attention would be required to conflicts and logistical challenges rising along the way. Often enough in desegregation proceedings, this language justified delays that served to placate segregationists or to reduce implementation costs for local school districts. Tolerating some delay to grant a fuller hearing to concerns arising within the black community would surely be no less justifiable under the court's constitutional mandates and might have allowed it to devise measures that, without abandoning desegregation as a goal, might have addressed protestors' concerns relating to diminished quality of education and persistent subordination and marginalization within the newly "integrated" school environment – looking beyond *Brown* to additional dimensions of racial justice in education that were not addressed within that case and thus were neither clearly mandated nor decisively precluded by established precedent.

Had conflicts among members of the black community, between integrationist and separatist visions of racial justice, proved truly intractable, the court might have found that no remedy would satisfy all members of the plaintiff class, and it might have been forced to choose between conflicting remedies requested by different groups within the class. However, any such ruling would at least have addressed separatist claims on their merits, offering grounds for further appeal and for continued public debate over *Brown*'s integrationist approach to equality. Instead, by dismissing protestors simply as a source of "interference" with the orderly operations of the schools, the court showed itself to be more interested in quelling dissent than in channeling it into productive political dialogue, and more committed to the project of desegregation than to the very individuals on whose behalf desegregation was required. In effect, its commitment to desegregation policy "trumped" its responsiveness to the same plaintiffs whose own grievances – and own rights – underlay its authority to act, while the appellate court's equally strong commitment led it to ratify this result.

III. Patricia Williams on Rights and Political Voice

In her essay "The Pain of Word Bondage," Patricia J. Williams argues that rights are necessary for black empowerment. A response to Critical Legal Studies (CLS) skepticism about rights, Williams's piece takes on CLS assessments of formality and informality, distance and solidarity, and the distinction between "right" and "need." Conceptually and rhetorically, she insists, rights are a powerful tool for responding to racial oppression.

Williams's critique of the CLS perspective is multi-pronged, but the essence of her argument is that CLS scholars fail to account adequately for black experience, and particularly, for the history of black chattelhood. She writes,

> It must be remembered that *from the experiential perspective of blacks,* there was no such thing as "slave law." The legal system did not provide blacks, even freed blacks, with structured expectations, promises, or reasonable reliances of any sort. … [W]here one's experience is rooted not just in a sense of illegitimacy but in *being* illegitimate, in being raped, and in the fear of being murdered, then the black adherence to a scheme of both positive and negative rights – to the self, to the sanctity of one's own personal boundaries – makes sense (P. Williams at 154).

The CLS preference for informality, Williams observes, seeks to dissolve these firm boundaries even as black Americans still struggle to assert them at all. CLS scholars aim to reframe right as need, "overlook[ing] that blacks have been describing their needs for generations" and "overlook[ing] a long history of legislating *against* the self-described needs of black people" (*Id.* at 151). Black Americans have learned, Williams tells us, that when the law makes people into chattel, their needs have no political force. Their claims have thus "succeeded only as a literary achievement," "compartmentalized by the larger culture as something other than political expression" (*Id.*).

Needs discourses, Williams suggests, only perpetuate the oppression of those who have not been constructed as political subjects. For the powerless, "the experience of poverty and need is fraught with the terrible realization that they are dependent 'on the uncertain and fitful protection of a world conscience,' which has forgotten them as individuals" (*Id.* at 153 [quoting Michael Ignatieff, *The Needs of Strangers* 53 (1984)]). They have no claims of their own. Reflecting on her own legal studies, Williams tells us "that the best way to give voice to those whose voice had been suppressed was to argue that they have no voice" (*Id.* at 156). Recalling her effort to "rationalize and rescue" her great-great-grandmother's fate as a slave by thinking through the arguments she might have presented to a court of the time on her great-grandmother's behalf, she observes "that it helped to appeal to the court's humanity, not to stress the fullness of hers" (*Id.* at 158). Without a politics that recognizes the distinct subjectivity of the oppressed, that insists upon their claims as inelidable and irreducible, oppressive frameworks cannot be dismantled, and oppression's hardships cannot be effectively resisted.

For Williams, rights answer this requirement. "For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being" (*Id.* at 153). For black Americans, "[t]he concept of rights, both positive and negative, is the marker of our citizenship, our relation to others" (*Id.* at 164). In this framing, rights signify social membership, and social membership is then the foundation for political subjectivity.

Williams's discussion echoes Orlando Patterson's construction of the essential differences between slavery and freedom. Patterson, drawing conclusions from an examination of slaveholding systems across the world and throughout history, writes, "What was universal in the master-slave relationship was the strong sense of honor the experience of mastership generated, and conversely, the dishonoring of the slave condition" (Patterson at 11). Patterson argues that a slave "could have no honor because he had no power and no independent social existence, hence no public worth" (*Id*. at 10). Patterson's description of the slave's status resonates with Williams's discussion of the political non-impact of black subjects' "needs" claims. According to Patterson, the slave "had no name of his own to defend. He could only defend his master's worth and his master's name" (*Id*. at 10-11). The claims of the slave carry no weight – and the freedman whose claims are without weight is not yet free.[19] As Williams depicts them, then, rights are the foundation of freedom.

III. Contrasting Williams and *Hall*: Rights as Denial of Voice

If political subjectivity is the promise of rights, what went wrong in *Hall*? One could argue that the black protestors were forcibly silenced because they had too few rights, and yet the case for silencing them was built upon the rights that they had. Their own right to integrated public education, itself formally recognized only after decades of struggle by their predecessors,

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[19] The parallels between Williams's and Patterson's depictions of slaves' status are more extensive than what I focus on here. For example, in another passage, Williams identifies the history of black Americans with the denial and disparagement of black family relationships (P. Williams, 161-163). In particular, she describes "slavery as a structure of denial -- a denial of the generative independence of black people" (*Id*. at 163). She elaborates, "A substitution occurred: instead of black motherhood as the generative source for black people, master-cloaked white manhood became the generative source for black people" (*Id*.). This discussion is highly reminiscent of Patterson's depiction of the role of "natal alienation" in slaveholding systems. For a short summary of Patterson's findings on this point, see Patterson at 5-8.

provided the justification for squelching these protestors' struggle to assert claims of their own. Rights of which they were ostensibly the holders had become a political structure built up around them, not as a conduit for their voices but as a wall that blocked those voices from entering the political sphere. While the concept of a rights "holder" suggests subjectivity – suggests that one wields one's rights, the active voice – the *Hall* protestors' rights are wielded against them.

In fact, much as Williams's construction may resonate with contemporary liberal intuitions about the emancipatory character of rights, it is the *Hall* result that better reflects their common meaning within mainstream legalistic rights discourses. At the same time that "holding" rights makes one's interests politically cognizable, in a way that Williams suggests black Americans' "needs" have not been, it also denies one's authority to define those interests. The rights-holder is distinct from the chattel slave, insofar as the former is recognized to have interests that must be accounted for – but this is at best only a partial conferral of political subjectivity, and at worst, as in *Hall*, an outright refutation of it.

What we see in *Hall* is a right with no subject, a political form that the court treats as an end in itself – and as a "right," this end necessarily takes precedence over conflicting claims. Had the representatives of the plaintiff class played a more visible role in the Hall opinion, it might be possible to read the case differently. We might identify other members of the plaintiff class – those black students who supported the court's desegregation project -- as the subjects of the enforced right. Then we could interpret the case's resolution as a product of contestation between two groups of recognized political subjects who asserted legitimate but conflicting claims. However, the opinion offers little evidence that the court itself understands its actions in these terms. The court tells us that the school district sought the injunction against the protestors; it does not tell us whether the plaintiffs' counsel supported that motion, merely acquiesced in it, or even opposed it. That point might be relatively unimportant to the procedural question the appellate court was ostensibly addressing – whether Hall himself had been entitled to representation in the issuance of the injunction – but if the court's procedural lenience was indeed motivated by its substantive commitments, it matters a great deal whether those commitments were to the plaintiffs who had sought desegregation, or to desegregation as an abstract policy matter.

Moreover, the grounds on which the appellate court settles the procedural question – the district court's power to protect its own earlier adjudication of constitutional rights and duties – are highly suggestive of a more general indifference to those whose subjectivity has already been reduced to an articulation of fixed rights. In this instance, moreover, those so disregarded are not merely those who have already had the chance to speak for themselves in the establishment of the relevant political forms, but any who might later seek to challenge those forms. The court says, "By deciding *Mims* and retaining jurisdiction the district court had, in effect, adjudicated the rights of the entire community with respect to the racial controversy surrounding the school system" (*Hall* at 261). Hall and the other black protestors were no longer chattel who lacked rights – and yet they were still entitled to no political voice, because now their rights had already been determined. Acquiring rights had not made black Americans into political subjects; it had established a new justification for their subjection.

IV. Rights and Voice in the “Liberal-Legalist” Tradition

This result, though troubling, is only a straightforward reflection of the way the liberal-legalist framework constructs rights, as particular guarantees that are judicially enforceable and politically nonnegotiable.[20] For present purposes, it matters little whether these are endowed by a creator, dictated by natural law, derived from some universalist moral philosophy, or established with the constitution of the polity. In one fashion or another, they have been preordained, and their content is determined by objective third parties engaged in an exercise of pure reason. There is, then, no place for one's own subjectivity in the construction of one's rights – and indeed, because the most important rights are inalienable,[21] there may be little room even for resisting a right that one does not want, so as to pursue some alternative arrangement.[22] The legitimate domain of participatory politics – the space in which political subjectivity may assert itself – is only that which is not already occupied by matters of right.

To be sure, interpretation of supposedly predetermined rights is a perpetual process, but the conventional assumption is that such a process must be overwhelmingly guided by what is already determinate, even though it may as yet be unarticulated. Contestation among political subjects can inform the deductive process, but the claims of those subjects are not themselves the origin of what is "right." Once a question has been correctly settled, therefore, the answer cannot change merely because different subjects would have it otherwise. Even when interpretation in

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[20] This conception is not necessarily native to the liberal rights paradigm; see, *e.g.*, Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, arguing that liberal constitutionalism had its roots in a tradition and presumption of popular politics as the ultimate interpreter and guarantor of rights; but its has become hegemonic in American political consciousness. *C.f.* Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, describing the contemporary potency of the "myth of rights" as belonging to a legal domain distinct from and superior to politics.

[21] The language of inalienability, featured so prominently in the U.S. Declaration of Independence, is more recently echoed in the preamble to the Universal Declaration of Human Rights, reflecting the concept's continued significance within legalistic rights paradigms.

[22] Ronald Dworkin's "rights as trumps" framework, an important contemporary articulation of the legalist view, specifies that rights are interests that individuals "are entitled to protect *if they so wish*" (Dworkin, 176 [emphasis mine]. This understanding would seem to preclude the imposition of the right against the right holder, as against the black student protestors in *Hall*. However, where the possibility of the right's assertion creates potential obligations for others, the matter cannot be so simple, for those others then have an interest in securing arrangements that would permit them to satisfy such an assertion. The *Hall* court found that along with the school board's "constitutional obligation" to provide integrated schools, it also had "a right to be free from interference with the performance of that duty." One can imagine that even if no black student by then preferred desegregation to separatism, the mere possibility that one might later assert such a claim would have given a recalcitrant school board substantial justification for opposing separatist demands -- and if the right to integrated schools were deemed inalienable, no alternative settlement of the existing litigation could have ruled out such a possibility.

practice allows room for the assertion of a claimant's political subjectivity, it does so only under cover of the express disavowal of both subjectivity and politics. Moreover, the ever-growing emphasis on judicial constitutionalism within contemporary democratic politics[23] constructs claimants not even as potentially authoritative interpretive voices, but as mere petitioners to authority -- a point effectively illustrated by the *Hall* court's conclusive emphasis not on the rights of any of the various parties to the case, but on the district court's own entitlement to give force to its adjudication of those rights.

The extent to which legalist conceptions of rights deny recognition of their holders as political subjects is illustrated still more starkly by a common instrumentalist justification of determinate rights that "trump" politics: "reassuring heterogeneous citizens that the losers in the political contest will not lose everything" (Mayerfeld). Here, rights are neither the fruits of successful political self-assertion nor the means to it, but only the consolation prize of those who fail in the attempt to speak for themselves -- those who find themselves abandoned or ignored in the political sphere. On this account, rights matter precisely when one has no effective voice of one's own. Far from conferring subjectivity, they substitute for it. Again, the rights-holder enjoys greater recognition than the slave, for the slave's denial as a political subject requires no amelioration. Still, the status of the rights-holder evidently leaves much to be desired.

Of course, rights in *Hall* go still farther than this in denying their holders as political subjects. The student protestors' position as rights-holders does not simply accompany the silencing of their voices; it provides the justification for silencing them. And their judicially secured consolation prize for this defeat, the undisrupted continuation of the desegregation process, is precisely that which they had sought to contest. The line between rights-holding and chattelhood is blurrier here. The imposed arrangement is a far more humane one than slavery,

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[23] See, *e.g.*, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*.

and imposed with substantially more genuine regard for the well-being of those subjected to it – and yet it is imposed, perhaps, with little more regard for their wills. In *Hall*, the political forms expressed through "rights," like those of property law, unapologetically circumvent black political subjectivity.

And yet, this is not a corruption of the liberal-legalist rights paradigm but its fulfillment, for the priority of rights to politics – the idea of rights as extra-political guarantees – is inherently a priority of the judgment of those who determine rights' content over the subjectivity of political participants. The presumption that we can determine, without politics, what goods are so important that they must be protected from politics is by implication a presumption that we can identify other possible goods as *less* important – that the distinction between what is and is not "fundamental" is not itself a political distinction. Claims originating with the political subject are necessarily of a subordinate character; sovereignty resides in the "objectively" ordained forms prioritized as matters of right.

Suppose, then, that we did read *Hall* not as a forcible imposition on the black student protestors of their own rights – a vindication of the power of judicial interpretation over individual claims-making – but as an adjudication between the rights of those black students whose goal was to attend integrated schools, and the rights of those who envisioned racial justice in other terms. This reading does not restore political contestation between subjects, because the only cognizable claims seem to be those rooted in judicially-established right. Hall can assert his procedural due process rights, but not the substance of his or his fellow protestors' racial justice claims – the latter are simply missing from the opinion. The contest among rights consists only in a judicial elaboration of previously articulated forms. Political claims not included within this framework cannot challenge it. Whatever the judges' commitments to school desegregation – to black Americans' *rights* – these are not commitments to black Americans' political inclusion. Indeed, as I have argued, a commitment to a legalist account of rights is not a commitment to participatory politics at all.

Perhaps this conclusion points to a tension within the liberal democratic paradigm, or perhaps it simply indicates legalism's distortion of that paradigm. While I have argued that the legalist framing of liberal rights paradigms is at odds with the assertion of political subjectivity, one might insist that this must be a mischaracterization, given liberalism's adherence to an ideal of autonomy. Rights are meant to protect that autonomy, not to squelch it; surely it is an error, therefore, to interpret them in a way that would tend to effect the latter.

I submit, however, that liberal autonomy must be more carefully – and more restrictively – understood. Liberalism can too easily be interpreted to construct individuals who are autonomous only in a strictly private sense. In this common (though not universally embraced[24]) approach, the autonomy of the liberal subject consists not in a meaningful role within collective decision-making, but in an absence of collective politics within precisely those spheres delineated by the construction of "right." Liberal thinkers have incorporated democracy into their visions, to be certain, acknowledging some value in inclusive political participation – and yet the sphere of such politics is so confined as to render its importance mostly negligible within founding treatises of liberal thought.[25] Meanwhile, autonomy in "private" spheres is structured through rights of property and contract, and of family life. The individual may do as he likes so long as what he likes is to exercise his own rights and refrain from impinging on those of others.

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[24] *See*, *e.g.*, Jeremy Waldron, *The Dignity of Legislation* and *Law and Disagreement*. My intent is not to insist that liberal thought must be read through a legalist lens, only that the legalist approach finds more than sufficient support within that tradition to defend itself as a legitimate branch thereof, rather than an obvious distortion.

[25] Locke's brief derivation of the majority decision rule within the *Second Treatise of Government* presents an example. While Rousseau goes to lengths in *The Social Contract* to give normative force, through the device of the general will, to his construction of the authority of the majority to bind the individual, Locke's *Second Treatise* simply devotes a few words to pragmatic considerations, having already gone to lengths to contain the scope of the collective power of which he thus disposes.

Collective renegotiation of these parameters is out of the question. Liberal autonomy is not the autonomy of the free political subject, but of the carefully constructed and regulated *apolitical* subject. The invocation of a legalistic framework for this process of construction and regulation need not be seen as a betrayal of the underlying liberal ideal.

V. The Radical Implications of Williams's Account of Rights

It is easy to read Williams's critique of CLS as a conservative position, more oriented toward seeking black inclusion within the status quo than changing that status quo. While CLS seeks an alternative to liberal rights hegemony, does Williams simply insist on the value of rights in a setting where their hegemony is already taken as given? Wendy Brown suggests that Williams's response to CLS is well-founded within its political context, but that it falls short of a substantial critical engagement with that context:

> None of this is to suggest that those without rights in a rights-governed universe should abandon the effort to acquire and use them. Williams and others make clear enough that such counsel, especially from white middle-class academics, is at once strategically naive and a disavowal of cultural prerogatives. But to argue for the importance of having rights where rights are currency is not yet an assessment of how they operate politically nor of the political culture they create. Rather, that argument underscores both the foolishness of walking into a pitched battle unarmed and the crippling force of being deemed unworthy of whatever a given culture uses to designate humanity (Brown, 124).

Brown accurately summarizes the most straightforward reading of Williams's argument, but she misses its more radical significance. The previous section argued that rights have not equated, in prevailing constructions of the liberal tradition, with political subjectivity. Williams's articulation of them in these terms is neither mistake nor conceptual incoherence – it is an act of appropriation and reinvention that subverts precisely those characteristics of a rights-based political culture on which Brown herself dwells in the above-quoted discussion.

"Rights in liberal capitalist orders," Brown, drawing on Marx, argues, "are bits of discursive power that quintessentially privatize and depoliticize;" they "analytically abstract individuals from social and political context;" they "discursively mask stratifying social powers through their constitution of sovereign subjects rendered formally equal before the law" (*Id*. at 123-124). It seems doubtful that Williams would seriously dispute Brown on any of these points, and yet this is precisely the framework that Williams problematizes with her construction of rights.

The expansiveness of Williams's approach is key here. She suggests society must "[u]nlock [rights] from reification by giving them to slaves. Give them to trees. Give them to cows. Give them to rivers and rocks. Give [rights] to all of society's objects and untouchables …" (P. Williams, 165). Brown wonders whether this vision "might not abet the phenomenon [Williams] calls privatization, the encroachment of 'a completely owned earth,' the disintegration of public obligations and a political culture of responsibility" (Brown, 124-125).

Perhaps, if Williams's vision were a bit *less* expansive, it might. If existing frameworks of privacy and property bring us dangerously close to a completely owned earth, a modest expansion of the sphere of "rights" might finish the job. But the immodesty of Williams's expansive vision is precisely its point. If slave owner and slave alike are rights holders, what does this do to the notion of ownership? What would it mean to own the earth, if the trees and rivers and rocks had politically cognizable interests of their own?

A vision of extending rights to rocks and trees may seem to call into question the ideas of personhood and “human dignity” long at the core of rights discourses. Other commentators have written at length on the ways in which the idea of universal human dignity can serve not as an exclusionary ideal, precluding, for example, conceptualizations of “animal rights,” but rather as a foundation on which we begin broader projects of building respect across difference, of recognizing the inherent worth of that which is unlike ourselves, and of asserting our own dignity through our treatment of those around us, fellow citizen (or species member) and stranger alike. Williams's account of her great-great-grandmother's rightslessness, and the history of African slavery more broadly, remind us that the duty of ruling classes is not merely to extend rights where the dignity of their would-be holders is already apparent to us – our vision is far too limited for this to suffice – but to presume the dignity of others and to extend rights so that dignity may have the chance to assert itself to us on its own terms. In what might the dignity of a rock consist, and how might it be like or unlike the dignity of a human, or that of a non-human animal? An *a priori* answer is necessarily incomplete, but its essence surely emerges in the increasing discomfort, felt within modern societies, over treating the natural world as a mere instrumentality for human ends. The idea of rights has always had at its core the acknowledgment of persons as ends in themselves, whose value cannot be assessed and whose fates cannot be determined simply by their places in others' designs. To encounter not just one another, but all the world around us, on such terms, is at once a simple and natural extension of our idealism and a revolutionary act.

Of course, if rights offer only the illusion of subjectivity, a language audible just when it invokes established forms, perhaps expansion in who "holds" them means little. The only rights allotted to the slave might be those she would never claim, if the forms they expressed remained unchanged, so that the right of one to own was mirrored merely in the "right" of the other to be owned. This, of course, is essentially the Marxist critique of "free" labor: The worker's right to sell himself into exploitation is in no sense to his advantage, or a source of real power; it connotes status without carrying substance.

But Williams's reimagining of rights goes deeper than this, and empowering political subjects is a central concern. She grants CLS's point that "rights mythology in liberal America" is "the source of much powerlessness masquerading as strength," but emphasizes the need to reinvent rather than simply discarding (P. Williams, 164). Her claim is that it is "impossible to destroy the mask without destroying the balance of things, without destroying empowerment itself," and that instead, the mask must "be donned by the acquiring shaman and put to good ends" (*Id.*). If the "mask" denotes rights' appearance as a conduit for their holders' political subjectivity, the end Williams seeks is the fulfillment of that promise. Her call "to see through them or past them" is a call to reckon honestly with the claims that underlie them, "so that privacy is turned from exclusion based on self-regard into regard for another's fragile, mysterious autonomy; and so that property regains its ancient connotation of being a reflection of the universal self" (*Id.*).

This vision constructs rights as the basis not for regulating the individual away into an apolitical private sphere, but for acknowledgment of and engagement with one another *as subjects*. When Williams articulates privacy as "regard for another's fragile, mysterious autonomy," she is far from envisioning a liberal non-interference with regulated, privatized forms of autonomy. Instead, she demands mutual recognition and mutual commitment; an awareness that we speak in different – autonomous – voices, even as we acknowledge the need for care in preserving the delicate conditions under which these can persist. Rights on this account oblige us neither to leave one another alone nor to assimilate the other into predetermined frameworks, but to acknowledge and make space for one another's self-assertions. Far from inviting "the disintegration of public obligations and a political culture of responsibility," as Brown suggests, Williams demands their revitalization.

In this context, expansiveness does not threaten to destroy the last vestiges of the political, but rather offers to unshackle politics from the narrow liberal-legalist conception. If rights claims are no longer confined either within neatly specified forms or to a narrow set of claimants, but instead express the voices and self-articulated interests of a limitless field of subjects, the result is not the orderly relegation of all of life to the private sphere. Instead, we must confront a cacophony of conflicting visions, empowered rather than silenced by "right," particular and indeterminate rather than reducible to prior universalist judgment. In such a setting, the only means by which we can hope to navigate the common territory of our existence is a robust practice of politics.

To claim as much is not to reject the existence of absolute truths about right and wrong, but rather to insist that whatever such truths might exist, we cannot know them in the absence of vigorous, inclusive, and ongoing political debate. Our prior determinations of an individual's right must always be open to revision as we hear that individual's own voice regarding his needs, interests, and conceptions of the good. To do otherwise, to insist that we know from abstract reason or by comparison to others what is right for a particular individual, is to deny individuality itself – to reject the very principle underlying the idea of rights, that each of us must be the author of our own identity and destiny, on our own unique terms. It is impossible that every claim can be granted, and so at times we may acknowledge the individual's vision, and yet be persuaded that some conflicting good of others is more compelling – and yet it is a gross distortion of the idea of right to dismiss an individual's claim because we prefer some other claim that we ourselves have assigned to them, purportedly on their own behalf. This latter is the essence of the court's action in *Hall*, and is what Williams's commitment to open-ended inclusion and her emphasis on individual subjectivity would avoid.

Williams's defense of rights, then, seems closer to an effort not to throw out the baby with the bathwater than – as Brown would have it – any sort of "wounded attachment" to bathwater.[26] Given the extent to which she reconstructs the concept, though, what exactly about rights is she concerned to retain? On my reading, the answer is that rights discourses are agonistic, and thus convey, if not one's own political subjectivity, at least the distinctive existence and power of one's particular claims. Their formality maintains the boundaries that CLS "needs" discourses seek to collapse, and Williams persuasively asserts the importance to oppressed people of the opportunity to assert boundaries – not to dominate, as do the boundaries asserted by the powerful when the powerless have no boundaries, but simply to maintain a place of presence. CLS forgets that presence cannot be taken for granted by all; that the informality and blurring of boundaries enjoyed by the white man in Williams's opening anecdote (P. Williams, 146-148)[27] are safe only because his personal power and distinctiveness are fundamentally secure. For those without such security, the CLS rejection of agonistic claims-making invites only invasion and erasure. The challenge is for rights, as the alternative to erasure, to become foremost the presence of freely self-asserting subjects, and not only of those political forms that may on occasion serve their aims – else, as we have seen, they need not provide an alternative to erasure at all, but simply a more formalistic mechanism for it.

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[26] Brown's critique of Williams is flawed in other regards as well, less pertinent here but still interesting to note. Brown suggests, "heeding a Foucaultian appreciation of subject formation," that Williams's self-revelatory writing style is motivated by "a complex form of desire" based in black women's experience of a "choice between humiliating exposure and desperate hiding" (Brown, 125). "How else," Brown asks, "to explain her production of our *intrusion* … ?" (*Id*.). One straightforward explanation might be that Williams's insistent insertion of body and self into her writing is a pointed rejection of the claim to disembodied objectivity made by most legal and academic prose, and that her fluid integration of the personal and the theoretical within her own narrative is a conscious move to problematize that distinction. To be sure, even deliberate choices reflect unconscious as well as conscious influences, but the former are rarely straightforwardly identified in the individual case. And of course, it can also be noted that Brown's imputation to Williams of a *desire for invasion* has resonances of its own in the master-slave narrative, into which one might or might not wish to read too much significance.

[27] Williams describes her and her colleague's contrasting experiences of renting an apartment, in which she embraces the formality of a lease, and he the informality of doing without one, both in the name of trust and relationship. For her colleague, these are best realized by transcending legal formality. For Williams, meanwhile, the mere achievement of legal formality is fragile and contingent, and she cannot transcend what she has not decisively *reached*. I discuss this point from Williams in more detail in chapter 1, *supra*.

VI. Conclusions: Eric Hall and the Unfulfilled Promise of Freedom

Erasure is Eric Hall's fate. The opinion of the Fifth Circuit Court of Appeals preserves only the barest facts of his political self-assertion and renders his failure twofold: Not only was he jailed and forcibly silenced in 1972, but a historical record was created in which his silencing persists. Scarcely does the court acknowledge that he ever made a claim, much less take note of its substance. He is punished simply as a law-breaker, for the production of disorder that interfered with the rights of others. That the disorder in question was an effort at political contestation, on matters in which his voice had never been effectively heard, was beside the point, for the claims he sought to make had no place within the court's framework of rights.

But in 1972, black Americans had rights, a point the court makes clear. Hall was not, like Williams's great-great-grandmother, a slave. He had the necessary status to insist that his claims be recognized. He simply did not have the appropriate claims. Like the slave in Patterson's account, "he could defend only his master's worth and his master's name" – now, however, his master was not a person but an ideal. He still had no power, no status, to defend what was genuinely his – to defend his own rights as he imagined them. Black Americans had rights, but Eric Hall was not free.

The answer to this lack of freedom is not a different form of erasure, the dissolving of Hall's claims into an argument about needs that, as Williams observed, could and would be ignored when made by one whose underlying standing *to make a claim* could not be taken as given. Perhaps the holders of power and privilege are free with or without rights, however rights are understood. Perhaps for some, political subjectivity is so much a given that it transcends rights as mere political forms, and it likewise resists dissolution even when its formal boundaries are no longer intact. But for others, who most depend on such boundaries, a legalistic construction of rights is as likely to slice through or crush political subjectivity as to preserve it intact. This is precisely what happened to Hall.

The history of Williams's great-great-grandmother, then, may demand the preservation of rights, but Eric Hall's history demands just as urgently their reimagination. They must be fit to express political subjectivity – in all its variation, its unpredictability, its *freedom* – and not to destroy it. This may require, for many critics as well as supporters of rights, letting go of established conceptions – whether idealized or condemned – of what rights are. Williams's defense of them cannot be read simply, either by those who would embrace the legalist paradigm or by those who would reject it wholesale. Instead, it must guide its audience toward an understanding that permits and requires that Eric Hall's claims be heard and answered, rather than suppressed and forgotten – and guide us, thereby, toward freedom.

CHAPTER FOUR
RECOGNITION AND THE CONSENSUS HORIZON IN DEMOCRATIC POLITICS

I. Introduction: Chantal Mouffe on Consensus and Exclusion

In her 2000 book, *The Democratic Paradox*, Chantal Mouffe critiques the rhetoric of "consensus" that characterized both UK and US politics throughout much of the 1990s. Mouffe shows how centrist political movements presented themselves as resolving conflicts between disparate ideologies and aims, but she observes that they in fact merely tended to obscure or delegitimize dissent – and to draw on the normative language of deliberative democratic theory to produce and justify these exclusions. Mouffe's discussion takes her to the heart of liberal democratic theory, where she identifies a fundamental paradox arising from the blending of republican democratic and liberal universalist ideals. In a system built on these disparate foundations, she argues, basic questions about our identities and aims are not subject to philosophical closure; there can be no decisively "correct" answers of the sort that consensus-oriented political actors claim to offer. Instead, these actors can only give their positions the appearance of universality by denying normative weight and political visibility to differing points of view.

The aim of this chapter is to argue, notwithstanding the weight of Mouffe's critique, both that a consensus orientation is necessary to democracy and that it can avoid the exclusions that Mouffe identifies. My first claim draws on the normative underpinnings of liberal democracy – engaging both its liberal and its democratic heritage – and on consideration of how the political environment in the United States has developed in the decades since the publication of Mouffe's book. I argue that this more recent experience shows that, without a normative commitment to the pursuit of consensus, Mouffe's own ideal of "agonistic" politics is unsustainable. Meanwhile, I claim that a non-exclusionary consensus orientation is possible, first, if we reconfigure consensus as a “horizon ideal,” meaning that we commit ourselves to struggling toward it without harboring the illusion that we will ever arrive; and, second, if our political processes incorporate an ethic of care, alongside a politicized understanding of rights, as the foundation for democratic communication.

My approach highlights, as counterpoints to the democratic theorists Mouffe takes on, the work of Iris Young and Danielle Allen. Both of these theorists champion pragmatic and inclusive approaches to the pursuit of broad agreement, with emphases on hearing and acknowledging, rather than eliminating, dissent. Young’s focus on avoiding internal exclusions within democratic discourse seeks to facilitate the expression of dissent, so that it might be engaged rather than marginalized, while Allen’s emphasis on the preservation of trust in the face of disagreement aims to maintain the bonds within the polity that enable continued agonistic struggle rather than deterioration into antagonism. Neither writer suggests that their recommendations will produce universal agreement within pluralistic democratic communities – indeed, Allen follows Mouffe in suggesting that much democratic theory is too concerned with how we might reach consensus, rather than how we ought to function in its absence.[28] However, both go beyond Mouffe in calling for our engagement of those with whom we disagree as not merely (legitimate) adversaries, but friends and potential allies with whom we can and should strive to reach agreement in the future. I argue that an ethic of care, and the communicative practices it produces among a community of rights-holding democratic citizens, is essential to realizing this ideal.

II. Contemporary Antagonism and the Continuing Importance of the Consensus Ideal

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[28] “The real project of democracy is neither to perfect agreement nor to find some proxy for it, but to *maximize agreement while also attending to its dissonant remainders:* disagreement, disappointment, resentment, and all the other byproducts of political loss” (Allen, 63).

Mouffe offers, as an alternative to the "consensus" politics of the 1990s and the exclusions and resulting antagonism surrounding it, the idea of "agonistic pluralism," suggesting that "the aim of democratic politics should be to provide the framework through which conflicts can take the form of an agonistic confrontation between adversaries instead of manifesting themselves as an antagonistic struggle between enemies" (Mouffe, 116). In subsequent years, however, the United States has seen a sharp decline in the rhetoric of consensus accompanied not by a renewed spirit of agonism, but by the deepening of antagonism between competing political movements and leaders. Partisan competition over the past decade has been intense even where the major parties have largely agreed on core substantive issues – such as the supremacy of capitalist economics, and "national security" as a rationale for surveillance at home and aggression overseas – and public discourse frequently fixates not on matters of principle or policy, but on commentary regarding the competence and character, or even the weight or the birthplace, of national leaders. Observers bemoan the proliferation – for which contemporary Internet technology is often blamed – of "echo chambers" in which members of the public seek out media tailored to their own political orientations and engage in conversation almost exclusively with those who share their views. Meanwhile, leaders can elicit zeal (and donations) from their supporters not by promising to "reach across the aisle," but by emphasizing their loyalty to and exclusive commitment to the interests of their core constituencies.[29] Long-time "moderate" elected officials have increasingly faced strong (and sometimes successful) challenges in party primaries from candidates emphasizing their own ideological purity, while

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[29] In 2012, the media treated as scandalous a leaked video of candidate Mitt Romney's speech at a private fundraiser, in which he suggested it was not his intent to govern on behalf of all Americans, but rather that he was "not going to worry about" the "47% of the people" who were not taxpayers, and whom he identified as "dependent on government" and unlikely to "take personal responsibility for their lives." Romney himself acknowledged after the election that the comments "did real damage to [his] campaign" (Cilizza); and yet, a mere four years later, such bare contempt and "us vs. them" thinking toward large segments of the public was a routine element of successful candidate Donald Trump's campaign.

others, such as Olympia Snowe and Evan Bayh, cited frustration with the difficulty of governing at all in an increasingly polarized environment as a reason for retiring from government. Meanwhile, a "win at all costs" mentality has often provoked the suppression of genuine ideological dissent through an overbearing emphasis on unity within parties and coalitions, so that the prevalent form of polarization may actually reinforce rather than challenge hegemony.

This environment is more exemplary of simple antagonism than of Mouffe's ideal of agonistic democracy. Mouffe recognizes the value of sustained argument, which collapses as easily in an environment of pure antagonism as of false consensus, and she thus demands that political opponents approach one another as "adversaries." Each must recognize the legitimacy of the other's opposition and must engage that opposition in substantive terms, seeking to defeat without suppressing or destroying. This spirit, which Mouffe labels "agonism," demands that we respect one another as fellow adherents to a set of common principles over whose interpretation we legitimately disagree.

Mouffe observes that the emergence of a politics of antagonism is a necessary consequence of the earlier "consensus" environment, as voters alienated from a so-called consensus, and denied the rhetorical space to express this alienation in substantive terms, instead vent it through personal attacks and facile extremism. What we see today is evidence, indeed, of how prophetic was her critique of the distorted consensus ideal that prevailed when she wrote her book. However, in the presence of these full-blown antagonistic dynamics, the renunciation of the consensus ideal cannot now inspire a spirit of agonistic engagement. Instead, to reject consensus as a value merely legitimizes a single-minded emphasis on winning, by whatever means necessary. The agonistic spirit requires cultivation, and my claim is that this is possible only through a return to our democratic ideals – which demand a revitalized, though reconfigured, commitment to the goal of consensus. Furthermore, I claim, *contra* Mouffe, that this commitment need not necessarily drive us to engage in the obfuscating tactics that she identifies with the New Left and the deliberative tradition. Rather, an underlying framework of intersubjective recognition built on dual commitments to political ethics of rights and care may be robust enough to allow the dynamic, case-by-case pursuit of agreement – rather than philosophical closure – without obscuring our underlying differences. Thus, despite the accuracy of Mouffe's warnings regarding the *way* in which consensus was invoked in the 1990s, I reject her conclusion that the consensus ideal itself is anything less than indispensable.

The concept of consensus that I will defend is as a "horizon" ideal for democracy: One that incorporates an awareness of its own impossibility, setting a direction in which to orient ourselves without inviting us to imagine that we have arrived. Rather than focusing on substantive policy outcomes, it emphasizes the practices in which leaders and citizens engage while pursuing these outcomes and the contingency and moral accountability associated with actions based on imperfect consensus. This is consistent with Allen's account of the ideal "Aristotelian rhetorician," who "aims not merely at a victory at the polls and a majority vote for her arguments, but rather at wholly persuading her entire audience," and yet, recognizing that the likely result is "not perfect consensus but maximal agreement," simultaneously commits to the "satisfactory treatment of residual disagreement and those emotions in which it is often registered" (Allen, 91).

III. The Case for a Consensus Horizon

The normative intuitions at the heart of modern democratic theory are that all ought to rule, and that no one ought to be ruled by another. In the republican tradition, this expresses itself in the idea of a community's collective self-rule; power rests in the hands of the people themselves, rather than with a monarchy or oligarchy that rules over the people. In the liberal tradition, the focus is on the protection of personal rather than collective autonomy. This personal right of self-rule may as easily be threatened by the acts of the "self"-governing community as by those of a smaller ruling class. Liberalism thus adds the elements of universalism, to protect those outside the community who are affected by its actions, and individualism, to protect dissenters within it. Of course, as Mouffe observes, both of these innovations have the potential to chip away at the republican ideal of popular sovereignty, challenging in the first place the ability of the populace to constitute itself at all, and in the second, its space to take positive action to effect a common goal.

Both traditions accept the majoritarian principle as a practical necessity, but neither roots that acceptance in a compelling normative defense. John Locke, laying out the essentials of the liberal framework, simply observes that some decision rule is necessary in the event of disagreement and notes that it seems more reasonable to satisfy the many than to satisfy the few. His successors, recognizing that what is practically necessary may nonetheless be normatively repugnant, emphasize institutional frameworks that constrain the capacity of the majority to act, along with elaborating the principles of natural, or human, rights that constrain the legitimate domain of political action. The goal is to prevent democratic majorities from acting in spheres where the potential for harm to others is significant; instead, important interests are secured for all as matters of right, and majoritarian decision-making takes place only at the margins.

Civic republican accounts, on the other hand, attempt to maintain the idea of collective sovereignty – rather than the sovereignty of the many over the few – by attributing the will of the many to the whole. Jean-Jacques Rousseau's concept of the "general will" makes this most explicit. As Rousseau envisions a healthy democracy, members of the community share an interest in the common good, and the decisions that will promote this good are a matter of common will. Disagreement may exist, he allows, but he attributes this not to genuinely conflicting wills, but to delusion and mistake – and among sufficiently virtuous citizens, he maintains that it will be only the few, rather than the many, who express preferences contrary to the authentic will of the community. Rousseau's successors refine but largely maintain this perspective, pointing to the common values and collective identity within a community that contain the depth of disagreement, and arguing that the majority's exercise of its will necessarily furthers the fundamental interest, shared by all, in belonging to a strong, sovereign community. The individual, they observe, is constituted through membership in the collectivity, and the individual's will cannot exist without the social fabric in which it is rooted. From this perspective, individuals are not denied autonomy when they are subjected to democratic decisions with which they disagree, but only when outside interference with those decisions threatens the health of the community.

Each of these perspectives highlights the essential weakness of the other. The liberal approach, with its bright line between individual and collective life, understates our interconnectedness, not only as members of a civic community, but as inhabitants of a shared physical world, on whose resources we all depend. Drawn to protect an expansive conception of individual sovereignty, the line between permissible and impermissible collective action instead risks destroying sovereignty, rendering uncontestable the basic terms of our coexistence. Property rights guarantee their holders' access to shelter and physical security, to sustenance, to private life; they simultaneously narrow the space in which others might aspire to enjoy these same goods, so that every effort to place a property interest beyond democratic debate – or to expose it thereto – threatens the same fundamental interests it protects. In a natural environment poised on the edge of catastrophe, exercises of the most basic autonomy – decisions about the types of homes we live in, the professions we pursue, whether and how we travel from place to place, even whether to bear children – have collective impacts that jeopardize the human rights to food, water, and health of millions of people half the world away. In such circumstances, which demand that the deeply-felt interests of some be compromised in order to secure the most vital interests of all, the idea that collective politics can simply avoid impinging on matters of profound individual importance proves untenable.[30]

Meanwhile, however, the republican ideal goes too far in presuming that the "common good" is the only good that matters politically. The terms on which the community organizes its collective life affect individual as well as collective interests. An ideal of collective politics in which those individual interests are left wholly aside – a vision put forth by Hannah Arendt, among others[31] – is alluring, and yet ultimately inadequate to accomplish those tasks for which our shared world of resources, and our common society, demand a practice of politics. Instead, as the liberal tradition insists, individuals must be able to assert themselves *as* individuals within the political arena in order to secure to themselves the most basic preconditions of a good life.

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[30] The conflicts over school desegregation that I discuss in chapter 3, *supra*, provide another example of the limitations of a "rights" approach in containing the sphere of collective decision-making. In that case, while the essential right in question – to be free of subordination on the basis of race – is straightforward within the liberal paradigm, it was also beyond the capability of courts or other political actors to implement perfectly and immediately. The pressing question thus became what route to take toward that goal, and which tradeoffs to tolerate along the way. Desegregation, the strategy favored by courts and movement elites, eliminated the stigma of segregated schools, but it subjected black students to day-to-day marginalization and microaggressions, and it reduced many lower-income black parents' influence over their children's education. The alternative sought by some activists – improved allocation of resources to and increased community control over existing all-black schools – would have entailed a different set of compromises. A paradigm that simply presumes that rights can be protected absolutely from the consequences of political decision-making provides little guidance as to how to resolve these disputes.

[31] Allen highlights Arendt's critique of the civil rights movement of the 1960s, which "criticized [movement participants] for using political institutions … and the public sphere generally to effect what she considered not a political program but self-interested social advancement" (Allen, 25). "In Arendt's view, only nonheroic economic and 'vital' interests were at stake," rather than collective goods, and thus activists' actions were "nonpolitical" and "failures of citizenship" (*Id*. at 26).

That the survival of our collective bonds may, as republican thinkers assert, be one such precondition, cannot be allowed to overshadow our attention to other equally necessary goods less easily rendered in collectivist terms.

In effect, the democratic paradox itself demands the consensus ideal: Only when consensus is achieved do the ideals of collective sovereignty and individual freedom from domination align, and the neglect of either ideal can be only imperfectly democratic. Importantly, this does not mean that, absent consensus, democratic majorities ought simply to refrain from acting – not to act, and thus implicitly to validate and maintain the status quo, is as much a democratic decision as to take any specific positive action. What it does mean is that those who carry the day in a democracy – whether through majoritarian action, counter-majoritarian enforcement of a rights claim, or any other mechanism – must recognize the imperfectly democratic character of their actions, and they must accept moral responsibility for the choice to impose their will on others. It means that we must acknowledge the contingency and partiality of decisions thus taken, admitting that political judgment is an ongoing process – that, as Mouffe says, "no victory can be final" (Mouffe, 15).

The consensus horizon also sets normative standards for the behavior of democratic actors whose wills oppose one another. Attempting to "win" by gathering support to one's side through a depiction of the opponent as an undesirable or dangerous other – a common strategy of contemporary antagonistic politics – is unacceptable. Equally so, however, is the rhetoric of false consensus, in which opposition is obscured and disregarded. Both of these strategies entail talking past one's opponents rather than recognizing and engaging them directly. Both, by dismissing or denying the other's will, attempt to subordinate it to one's own. Instead, the genuine pursuit of consensus, consistent with Mouffe's ideal of agonistic democracy, demands direct recognition of and engagement with the other.

More specifically, orientation toward a consensus horizon demands, as does the practice of agonism, that we argue with one another rather than ignoring one another. This argument must consist not merely in an attempt to score "points" with onlookers, but in the pursuit of a genuine "meeting of the minds" – in an effort to understand one another, to make ourselves persuasive to one another, and to open ourselves to the possibility, however remote we estimate it, of being persuaded. It does not guarantee – indeed, it doubts – that we will ultimately agree. Moreover, it recognizes that even where we do succeed in reaching agreement, not only will we surely find another opponent standing by with whom we must continue discussion, but we must be prepared to actively seek out that opponent, in order to make sure that we have undergone every effort to fulfill our democratic obligations as thoroughly as possible. In understanding consensus as an orientation rather than a destination, we shift the focus of normative evaluation away from claims about what agreements have been achieved and toward the observable and ongoing practice of engagement with disagreement.

Orientation toward a consensus horizon also demands that, in the case of particular actions taken without consensus, we act to preserve the possibility of future agreements by attending to the maintenance of the bonds of political community, or what Allen terms "political friendship." This, again, demands acknowledgment of the existence dissent first and foremost, and understanding of dissenters' subjective experience of loss when they are subjected to decisions running counter to their preferences.[32] Again, therefore, recognition and communicative engagement are essential, and normative evaluations of political conduct must begin with the extent to which actors are visibly engaged not in denying dissent's existence, but

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[32] Allen argues persuasively that these subjective experiences are "politically significant" and must be attended to even when they reflect "apparent" rather than "real" loss (Allen, 151).

in directing attention to and responding to it.

To say this much is not to deny Mouffe's observation that political actors are often tempted to manipulate ideals and appearances in order to claim success on their own terms. Once we allow ourselves to speak of consensus at all, there is no guarantee that skillful argumentation cannot transform the idea of a horizon into the illusion of a destination, re-establishing the very tendencies toward exclusion with which Mouffe is concerned. Rather, any revised understanding of consensus as an orientation, and of its pursuit as perpetual, must be reinforced by ethical commitments to forms of day-to-day democratic practice, oriented toward recognition and inclusion, that enhance ordinary citizens' capacity to hear dissent even through leaders' efforts to obscure it.

In the next two sections, I therefore go on to consider how communicative norms can better promote inclusion. Section IV elaborates Young's critique of normative limitations on "legitimate" deliberation that may prevent some voices or arguments from being heard. In particular, I relate Young's arguments on Rawlsian "reasonableness" norms to the exclusionary tendencies that Mouffe identifies with a consensus orientation and suggest that adoption of Young's revised conception of reasonableness better resists exclusivity. Section V draws on feminist care ethics to argue for a communicative ethic rooted in care as a foundation for democratic discourse.

IV. Challenging Exclusionary Deliberative Norms

In the previous chapter I presented a vision of rights as deeply bound with political voice – of rights-holding as signifying, first and foremost, the entitlement to assert an interest and to hold the polity answerable for its satisfaction or neglect. Exclusions from "consensus" processes often involve a failure to recognize the voices of those who are excluded from rights-holding. In the case of United States "welfare reform" that Mouffe highlights, for example, policy-makers had much to say about how welfare-to-work policies would address the hypothetical needs of hypothetical welfare recipients, with the chosen construction of welfare recipients' interests facilitating politicians' claims that the policies ultimately adopted were a matter of "consensus" on which all could reasonably agree. Meanwhile, however, the individuals actually relying on these programs were rarely offered meaningful opportunities to participate in the discussion. Legal constructions dismissive of the idea of "rights" to economic security instead facilitated accounts of welfare recipients as – if not "cheats" undeserving of consideration – wards whose interests must be cared for,[33] and thus as objects of policy rather than subjects of political claims. These constructions, in turn, naturalized the absence of welfare recipients' voices from "consensus" processes, permitting the exclusions that Mouffe identifies.

However, the opportunity to make rights claims does not alone secure political subjects against exclusions from false consensus. While entitlements to speak are necessary foundations of inclusive democratic communication, they are not sufficient when the norms of debate allow some contributions to be heard and yet dismissed as less than legitimate. One key implication of this point is that, in real-world political environments, inclusive pursuit of consensus demands an approach to communication that goes far beyond mere deliberation. Deliberation as a foundation for democratic decision-making is defined in intentionally narrow terms. Participation demands a particular disposition – often termed "reasonableness" – and consists of objective, rational argumentation. As a theoretical matter, these constraints are tailored to safeguard the integrity of decision-making processes, while allowing all those exchanges that might appropriately

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[33] The discourses around welfare recipients as wards/objects parallel those applied to people with disabilities in the political arena prior to the disability rights era, as discussed in chapter 1, *supra*.

influence outcomes. In practice, however, they can as easily provide cover for regrettable exclusions, such as those Mouffe describes – not necessarily because those with the power to exclude set out to abuse that power, but because of the difficulty of maintaining perfect objectivity given the limited information we typically begin with when addressing complex real-world scenarios, combined with the natural tendency toward self-interested bias.

In these situations, as discussed in chapter 2, entirely rational deliberation may be beyond our abilities. Sound arguments may fail to persuade us because we evaluate them with reference to imperfect assumptions. Meanwhile, our own imperfect capacity for reasonableness may lead us to too readily perceive others as unreasonable when they resist what seem to us to be indisputable conclusions. The result is that we dismiss "difficult" participants and perspectives and construct agreement from what remains. Those who have the power to impose their wills on others can then do so while claiming they do no more than carry out the results of fair deliberative processes.

Mouffe traces this tendency across a variety of distinct approaches to the deliberative model, with particular emphasis on John Rawls, Jurgen Habermas, and Anthony Giddens. She argues that all three attempt to show the possibility of overcoming dissent by first narrowing the space of "legitimate" dissent to which their discussions apply.[34] They thereby provide normative justification for political actors' disregard for and dismissal of those whose claims might undermine the illusion that consensus has been reached.

However, Iris Young here provides a crucial counterpoint to the viewpoints that Mouffe critiques. In *Inclusion and Democracy*, Young explicitly acknowledges Mouffe, claiming to follow the latter (among others) "in endorsing a more 'agonistic' model of democratic process"

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[34] For a contradictory reading of Habermas himself, see Patchen Markell, "Contesting Consensus: Rereading Habermas on the Public Sphere."

(Young [2003], 49). Meanwhile, however, she "retains deliberative democracy's account both of communicative orientation towards normative reason and of the transformation of private, self-regarding desire into public appeals to justice" (*Id*. at 51). Her conception of "democratic struggle" is one in which "citizens engage with others in the attempt to win their hearts and minds, that is, their assent" (*Id*.) – and, she emphasizes, are open to being won over themselves (*Id*. at 24-25). Young avoids majoritarian forms of exclusion by maintaining the obligation for democratic majorities to seek consensus, but she simultaneously seeks to dodge the critique that Mouffe has directed at others by insisting that a consensus orientation demands engagement with disagreement rather than its exclusion. Within this framework, one's sense of accomplishment must come not from imagined success at reaching an ideal consensus, but from a sustained practice of pursuing it – with no illusions about the unavoidably perpetual nature of one's task.

Young's emphasis on inclusivity is central to her approach, and she does much to avoid Mouffe's concerns about exclusionary tendencies within Rawls's and Habermas's work. Of course, neither of those theorists rejects inclusivity as a democratic value, and indeed, both seek in their work to advance such inclusive democratic ideals as universal equal citizenship. However, Young's careful attention to the topic permits her to go farther in recognizing and challenging a variety of potential barriers to inclusion, including those that the other theorists' approaches to consensus may seem to reinforce. For example, her invocation of a norm of reasonableness appears to owe much to Rawls, but unlike Rawls, Young applies the norm solely to the dispositions of political participants, rather than to the ideas that participants hold or seek to advance: "Reasonable people often have crazy ideas; what makes them reasonable is their willingness to listen to others who want to explain to them why their ideas are incorrect or inappropriate" (Young [2003], 24). Where Rawls's references to unreasonable beliefs or doctrines might invite political participants to adopt classifications of others' beliefs that foreclose their willingness to listen to those others, Young's emphasis on reasonableness as a behavioral orientation tends toward the opposite effect, encouraging participants' self-questioning and their attention to even initially unpromising arguments – thus creating rather than minimizing opportunities for marginal perspectives to have their merits recognized and considered.[35]

Similarly, Young's approach to inclusive communication owes an explicit debt to Habermasian discourse ethics (Young [2003], 53), but it challenges forms of exclusion that may claim a foundation in the latter. Most importantly, she departs from Habermas's emphasis on argument to suggest a valuable role for other forms of communication. "The epistemic function of political discussion," she claims, "cannot be served unless participants question one another, test one another's claims and opinions through discussion, and have an account of why they assent. Arguments require shared premisses, however, which are not always present in a situation of political conflict" (*Id*. at 56). She thus develops an account of several forms of communication through which such premises might be established, and insists on the legitimacy of these forms within "political" discourse. In particular, she highlights the roles of greeting, rhetoric, and narrative in promoting recognition and understanding among political

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[35] A contemporary example of this distinction is illustrated by responses to the Black Lives Matter (BLM) movement. Critics, interpreting the phrase “black lives matter” to imply that *only* black lives matter to BLM activists, or that the activists intend to claim black lives are worth more than others, have a *prima facie* plausible case that activists’ views fail to meet a Rawlsian reasonableness standard, and that their arguments therefore do not merit democratic engagement. Of course, “black lives matter” does not mean what the critics presume – rather, it is a reminder that black lives matter as much as any others, issued in a context where they are routinely treated as mattering less – but the discourse through which this meaning might be clarified will not occur if a Rawlsian reasonableness standard is too hastily applied to activists’ speech; critics can all too easily exclude activists’ voices while claiming a moral high ground. Young’s focus on the reasonableness of the listener rather than that of the speaker, on the other hand, focuses our attention on the unreasonableness of the critic who characterizes and dismisses activists’ beliefs without a full and fair hearing.

participants.[36]

These moves challenge precisely the sorts of hegemonic exclusions that Mouffe suggests consensus ideals are likely to promote. Both Mouffe and Young are concerned with what Young terms "internal" exclusion: "those forms of exclusion that sometimes occur even when individuals and groups are nominally included in the discussion and decision-making process" (*Id*. at 53). These, like more overt forms of disenfranchisement, can promote the illusion of consensus by limiting the expression of dissent, or by channeling it out of "political" discourse, so that it may be deemed irrelevant to normative assessment of political processes themselves. In doing so, they spare democratic actors the responsibility of acknowledging that disagreement exists and of expressly defending choices to take actions that disregard the wishes of dissenters.[37] Unlike overt disenfranchisement, however, they operate subtly and insidiously, and may therefore be more difficult to challenge directly. However, rather than dismissing, as Mouffe would, the aspiration to consensus that ostensibly gives rise to these exclusions, Young illustrates the possibility and necessity of direct challenges to internal exclusions. Here, the pursuits of inclusivity and agreement are not incompatible, but indeed, deeply entangled and mutually reinforcing.

V. Inclusive Communication and the Ethics of Care

Although Young's examples of communicative practices to reduce internal exclusions provide a useful starting point, a broad approach to the inclusive pursuit of consensus requires

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[36] I have further highlighted the contributions of greeting and narrative to inclusive democratic politics in chapter 2, *supra*, and I give additional attention to Young's account of rhetoric below.

[37] As Allen describes, acknowledgment of the sacrifices imposed by collective actions upon those who dissent to them is an important part of maintaining trust within the polity. At times, the majority may judge it worthwhile to explicitly break trust and dissolve community with dissenters – as may occur when the latter will not be dissuaded from policies of violent extremism, for example – but even here, trust within what remains of the polity benefits more from explicit denunciation than from mere avoidance.

not simply an expanded list of "legitimate" dispositions or forms of discourse, but a distinct ethical approach to the communicative arena – one rooted in a politics of care. If rights are what make space for their holders' speech in political discussion, an ethic of care transforms that speech into communication by introducing the relational, particularity-oriented, and "world maintaining" dimensions that create and sustain intelligibility among diverse political subjects.

Speech is the act of an individual – it is released into the world at its author's sole initiative, and whether it is heard or understood by others does not condition the speech act itself. Communication, however, is relational; it takes place when speech is both produced and received and, in the process, creates some understanding among those who participate. It is possible only given a pre-existing context of shared linguistic and conceptual space, and it develops that space through the incorporation of the speaker's particular ideas and understandings into the listener's frame of reference – whether to create agreement or to illuminate the existence and nature of disagreement. Whereas speech is an act of creation, communication is also, importantly, a matter of world maintenance, building intersubjective understanding so as to perpetuate the ties that make understanding possible.

This orientation toward world maintenance resonates with the idea of a political ethic of care. In its broadest sense, Joan Tronto argues that care consists in "everything that we do to maintain, continue, and repair our 'world' so that we can live in it as well as possible" (Tronto [1994], 103 [quoting Berenice Fisher and Joan C. Tronto, "Toward a Feminist Theory of Care" in *Circles of Care*, Emily Abel & Margaret Nelson, eds.]). Although some other commentators argue that Tronto's definition overlaps only imperfectly with specific activities that ought to be identified as care,[38] it captures a key dimension of care as an ethic that can guide us in political,

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[38] See, *e.g.*, Held, 31-32. Held argues that Tronto's definition is too broad insofar as it includes much activity not oriented toward meeting another's needs and not involving deep engagement with the other, and simultaneously too

as well as more intimate, spaces and relationships. The practice of politics cannot consist exclusively in often-idealized moments of "founding," but must concern itself with sustaining the conditions for those moments, what Linda M.G. Zerrilli describes as "the tangible and intangible political relations that Arendt calls a worldly in-between: that which at once relates us and separates us" and in which "the newly thinkable … appears" (Zerrilli, 181). A political ethic of care demands our attention to that work of maintenance – the stewardship of material resources, of economic systems and social structures, and of the linguistic/conceptual underpinnings of community, for the benefit of all who share them.[39] It insists that our practice of politics not be merely self-serving – whether in pursuit of material gain or of a solipsistic

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narrow insofar as it fails to recognize the creative/productive elements that should inhere in, for example, much child care. I would interpret Tronto's definition somewhat more narrowly than Held does, out of doubt that the "[v]ast amounts of economic activity" Held claims Tronto's definition would include are genuinely oriented toward promoting our ability to "live as well as possible" in a shared world. I do agree with Held that the example of raising children highlights the impossibility of a sharp differentiation between "maintenance" and creation/transformation, and I have suggested above that the work of tending our shared world of ideas is likewise simultaneously sustaining and generative of that world, but I think it is also possible to read Tronto consistently with this understanding. Her argument as I understand it is not that caring labor may not also have creative dimensions, but that it is distinguished from purely creative endeavors by the primacy of its concern with promoting the survival and well-being of that which already exists.

[39] Ella Myers argues that this practice of world-maintenance is the essential project of democracy, and that a caring orientation toward the world should be our core animating ethos. In Myers's account, our obligations to one another as individuals arise from our common situation relative to the world; it is home to all of us as well as the mediating "in-between" among us that establishes "distance between selves as well as a bond between them" (E. Myers, 123). She argues that an appropriately caring orientation toward the world ought to cultivate within us a sense of commitment to one another's material well-being ("one way of honoring the world's commonality, of tending to it properly, as common, is by working with others to make the world…more hospitable for every human being" [*Id*. at 115]) and political inclusion ("[t]he world's richness and complexity are diminished in the absence of opportunities for it to become an 'object of discourse' among diverse equals" [*Id*. at 125]).

Myers distances her conception of care for the world from a relational ethic of care, arguing that the latter is inadequate as a foundation for politics, although she focuses this argument on a Levinasian account of dyadic care while giving relatively little attention to the vision of feminist writers, such as Held, Kittay, and Tronto, who seek to politicize care (see also, Luxon). Her essential criticism of dyadic care as a political ethos is that it lacks the inherent outward-looking character from which political engagement arises and therefore cannot be relied upon as a foundation for politics; however, this sits in awkward juxtaposition with her own acknowledgment that the "worldly" orientation she champions requires fairly particular normative underpinnings (in particular, the aforementioned account of the world's commonality and the obligations to which that gives rise) in order to do the work she demands of it. Relational care ethicists, meanwhile, rarely claim that mere participation in dyadic care relationships is generative of a caring politics absent a better-elaborated normative framework to illuminate connections between the intimate and the political. In each case, the proffered ethos is best understood as a robust philosophical system, not a simple value-orientation. Where my own argument of course departs from both Myers and much feminist care theory is in the embrace of democratic practice rooted in multiple, overlapping but mutually irreducible, ethical orientations, the interactions among which are generative both of more elaborate normative frameworks and of the vantage points from which those frameworks may be subject to critique.

exercise of freedom. At the level of political discourse, this means we must seek not only to speak but to communicate.

Beginning from the idea of communication as relational and world-maintaining invites us to consider how specific practices suggested by an ethic of care, on the parts of both speakers and listeners, can enhance the inclusivity and effectiveness of communication. Caring listening entails an orientation to recognizing and meeting the speaker's need to be heard and understood, and a willingness to extend oneself in order to help them achieve this end. It thus demands that prior to evaluating the acceptability or appropriateness of what the speaker has to say – whether, for example, it meets our standards for rational deliberation – we work to understand it and to identify what value it might contribute to the discussion despite any shortcomings. It counsels against disregarding, or treating as "low value," speech whose presentation makes it difficult or uncomfortable for us to engage with. Instead, it encourages us to consider that "problems" such as poor articulation or "excessive" emotion – especially emotions more challenging for us to face, such as anger – may in fact signal the depth of the speaker's need to be heard.

Caring listening affects not just who or what we listen to, however, but how we listen. Virginia Held observes, drawing on Nel Noddings, that "Close attention to the feelings, needs, desires, and thoughts of those cared for, and a skill in understanding a situation from that person's point of view, are central to caring for someone" (Held, 31). Although political communication aims at reaching political decisions – which in turn entails evaluating arguments and making judgments – caring listening temporarily sets aside judgment. Instead, it focuses first on seeing through the other's eyes, becoming as deeply aware as possible of their feelings and concerns, and cultivating empathy for their perspective – acknowledging and immersing itself in the particularity of the speaker. To engage in this process is not to bias our eventual judgment in the speaker's favor, but rather to mitigate bias in our own. It allows that we already possess a deep understanding of and emotional attachment to our own perspective, and it aims to bring the other's onto as nearly equal a footing as possible.

Meanwhile, speakers also can engage in caring communicative practices. Just as speakers need to be heard and understood, listeners need to hear and understand those around them – not only so that they will be able to participate effectively in decision-making processes, but so that they can share in the space of ideas that communication maintains, and thus obtain or sustain membership in the community to which that space belongs. This need is compelling whether or not sharing in collective understandings and decision-making processes leads to agreement. Equally important, as Allen emphasizes, is the mitigation of loss and maintenance of trust where agreement proves impossible. Deterioration of mutual understanding, however, compounds loss, and it necessarily leads to the deterioration of trust. The listener's need to understand may therefore be most compelling precisely where disagreement is intractable.

Caring speech, like caring listening, involves close attention to the particularity of one's audience and an effort to identify with its perspective, so as to frame one's ideas in a way that engages them as effectively as possible with the listener's existing understandings. This is the mode of communication that Young characterizes as rhetoric: "affective, embodied, and stylistic aspects of communication [that] involve attention to the particular audience of one's communication, and orienting one's claims and arguments to the particular assumptions, history, and idioms of that audience" (Young [2003], 65). It identifies and works along the common threads that relate the speaker's and listener's points of view, using affect and imagery not to displace the information and logical argumentation we wish to convey, but to make them more accessible.

Allen describes thinking rhetorically as, essentially, "with an attention to audiences" (Allen, 95), and her account of the ideal rhetorician's speech has deep resonances with an ethic of care. She tasks the speaker with the presentation of information and argumentation in a manner intended to convey the speaker's trustworthiness, to assuage negative emotional responses on the part of the listener, and to express and elicit goodwill. In other words, effective rhetoric concerns itself with affect as well as reason and with the cultivation of a positive relationship between speaker and listener. It involves the speaker's efforts to understand the listener more deeply, so as to anticipate how their speech will appear through the listener's eyes, and it engages the speaker in caring about and attending to the impacts of their speech upon others. It aims to sustain the bonds of community across disagreement. Allen emphasizes the importance of demonstrations of respect and reciprocity; the speaker honors the sacrifices of those who experience loss as a form of symbolic compensation for the imposition of that loss.

The concept of communication put forth in this discussion, and in particular the idea of the shared world of understandings that it creates and maintains, may challenge the Arendtian ideal of publicity, which to Arendt is the essence of political speech. For her, the principal value of speech lies in the possibility of its being understood across deep difference; intersubjective validation affirms the objective reality of our experiences and perceptions (Arendt, 50). To the extent, however, that our mutual understanding is conditioned on our inhabiting overlapping worlds of symbols and ideas, our communication is not truly intersubjective – and if, through speaking and listening, we build a more robust space of mutual understandings, we erode the "public" character of that space. This is the basis for Arendt's delineation between the political and the merely "social;" politics entails meeting as strangers, while society is that space in which individuals, through shared practices of day-to-day life, come to know the same reality and become known to one another. From this perspective, the very experiences and attitudes that underlie communication are anathema to speech.

However, if publicity is incompatible with the existence of a common world, Arendt's ideal of intersubjective understanding is patently impossible to achieve. Our shared occupation of those very spaces in which we might speak and understand each other – whether physical or linguistic – undermines radical alterity. Language, in particular, conditions and is conditioned on our existence in that common social realm that Arendt positions as a threat to the political. The apparent contradiction is indeed intractable, for the paradox at the core of the ideal of publicity is no less than a reiteration of the paradoxical character of recognition itself.

And yet, although this paradox means that the conditions of publicity are always imperfect, understanding the tensions in which it is rooted – between intelligibility and alterity, which are the essential and essentially conflicting foundations of recognition – creates the possibility for a more nuanced and more substantive account of intersubjective validation. Here, we can imagine intersubjectivity not as one moment of perfect understanding between perfect strangers, but as a varied and ongoing series of "imperfect" encounters in which the character of validation depends on the degree of alterity bridged but also the depth of understanding achieved at any given moment.

Caring communication creates and sustains the possibility of deeper validation; of having our perspectives understood more thoroughly; of eliciting our listener's affective as well as cognitive response; indeed, of transforming listeners' identities and ideals. And yet, it does not promise consensus, and as such, it does not threaten the collapse of intersubjectivity: However well we understand each other, our persistence in disagreement with one another reaffirms the differentiation of our subjectivities. Being heard, acknowledged, understood, and empathized with, by those who nonetheless draw conclusions opposed to ours, becomes the ultimate validator of our own concrete and separate existence.

VI. Conclusions: Resuscitating Agonism

Communication, rooted in care ethics, is what enables us to, in Allen's words, "talk to strangers" – or, more precisely for present purposes, converse *with* strangers – and thus is essential to Mouffe's ideal of agonistic pluralism. Speech without care, issued into the world with no consideration for a particular listener and received by an audience indifferent to the particular speaker, is not incapable of persuasion, but it is most likely to persuade only those already best disposed to agree – typically those whose established attitudes and experiences happen to best match the speaker's. It reinforces, rather than transcending, pre-existing divisions within the polity, deepening the shared space of understandings within a particular grouping while further distancing it from others. It feeds the diminution of trust across coalition lines, the loss of that overlapping space of normative commitments that enables us to recognize our adversary's opposition as legitimate, and thus the devolution of agonism into antagonism. Only when our speech incorporates care – engagement of one another's particularity so as to understand and empathize with viewpoints distinct from our own – is it likely to function instead to bridge what divides us.

Communication, indeed, has the potential to transform these divisions. The experience of understanding and empathizing with others' situated perspectives reconstitutes our own identities, shaping the beliefs, dispositions, and preferences on which we base political claims. The experience of caring for others can create what Eva Kittay calls a transparency of selfhood (Kittay, 52) in which we internalize their interests, so far as we can understand them, as our own.

Communicative practices that broaden the space of perspectives accessible to us, and that orient us toward concern for others' needs for political inclusion, create the possibility for new points of identification and new sites of genuine transparency. The result can be a continuous redrawing of the lines among us, leading to ever-shifting communities of understanding and interest and to more dynamic political coalitions.

"Ex-conservative" writer Marybeth Glenn has emerged in the aftermath of the 2016 United States presidential election as a prominent advocate of communication across political lines. As a blogger, Twitter personality, and frequent guest on political podcasts, Glenn first made her reputation as a passionate and eloquent defender of conservatism and critic of the left. However, her opposition to the Republican Party's choice of Donald Trump as its 2016 presidential nominee drove a wedge between her and her party, and after "go[ing] viral" with a series of tweets denouncing the then-candidate, she encountered a new, inter-party audience (Tang). Glenn describes her transformation, from intentionally courting an ideologically uniform audience – "the more close-minded I was, the more they applauded" (Glenn) – to advocating for dialogue and cooperation across difference, as resulting from a shift in focus away from simply seeking an audience, with the pressures toward partisan political alignment this entailed, and toward listening to others instead. She writes, "I felt I had been given two options and I had to pick one if I wanted to be heard. When I began listening to the other side, I realized that I agreed with a lot of what they said … [Now] I refuse to be another piece of the political machine that creates a hostile environment for differing thoughts and opinions" (*Id.*).

Glenn's account of her evolving communicative ethics resonates with Iris Young's conception of reasonableness; while previously she "wasn't prepared to have a conversation because [she] had zero interest in listening," she now insists that "[t]he best conversations happen between two people who know they can be wrong, who listen instead of waiting to interrupt, and who want their positions to be challenged" (*Id*.). She adds that "[g]etting over the fear of being wrong is key" (*Id*.). Glenn does not suggest that effective communication across difference leads to deep, universal agreement; however, she emphasizes the existence of political opportunities "where we have differing opinions, but find common ground" (*Id*.). For example, as a pro-life feminist, she recognizes deeply entrenched and possibly intractable divisions over the issue of abortion, and yet speaks optimistically about what pro-life and pro-choice women can achieve in coalition, "focused on helping women, educating girls, and just loving women and their children and doing everything we can to be their advocate in whatever capacity" (*Id*.).

In an era of bitter partisan polarization, Glenn and others like her represent a small but fertile grassroots alternative. In contrast to the often-cited tendencies of social media to insulate us from disagreement while surrounding us with those who reinforce our views, Glenn's Twitter orbit – the voices she often promotes, and who promote her to their own audiences – includes self-proclaimed classical conservatives, progressives, neoconservatives, neoliberals, socialists, libertarians, center-leftists, and many like Glenn who are no longer willing to proclaim a distinct ideological or movement affiliation. What appears more broadly to characterize them are a common distaste for the contemporary antagonistic climate of partisan politics, a commitment to respectful discourse over partisan sniping, and a genuine interest in listening to other points of view. Many, though not all, are millennials like Glenn, inheritors more than authors of contemporary political ills, intent on building something different for their own futures – and determined, it seems, to do so together.

And yet, it bears repeating that, as Glenn acknowledges, a renewed spirit of political dialogue is not a roadmap to universal convergence on a single point of view – i.e., to consensus.

Understanding one another better will produce some agreements that might not otherwise have existed, but it will also, at times, produce a deeper awareness of the intractability of our disagreements and reinforce our commitments to the values or interests that situate us in opposition to one another on certain questions. Ideological pluralism inheres in human diversity,[40] and the reality of limited material resources gives rise to power dynamics surrounding their distribution, which will and must be continuously challenged. This is Mouffe's original argument against the possibility of consensus, and more inclusive communicative frameworks illuminate but do not eliminate these underlying constraints. However, crucially, the fact that communication may clarify and deepen disagreement rather than overcoming it is not a failure. Instead, its potential to impose upon us a fuller consciousness of our disagreements is one of its greatest virtues, for this is what ultimately serves to safeguard us against the obscuring and exclusion of dissent – and thus to maintain a genuinely, rather than merely illusorily, inclusionary orientation toward a consensus horizon.

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[40] Even if one embraces a Marxian understanding of ideology as epiphenomenal to materiality, the fact of our embodied experience, in bodies with varying needs and capacities, gives rise to a plurality of material experiences, and thus to a plurality of interpretations of and responses to those experiences.

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