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The Subject of Human Rights: From the Unencumbered Self to the Relational Self

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ABSTRACT


The divisive character of a large part of identity politics creates enormous challenges which have yet to be satisfactorily engaged with from within human rights circles. This article addresses an area of human rights theory and practice that is in urgent need of critical attention: the prevailing human-rights-based response to identity politics, namely recognition rights that eschew social class. I shall argue that human rights has vitally important contributions to make to protecting those who are vulnerable because of their self-affirmed or imposed identities. However, I shall also argue that human rights' engagement with identity politics is significantly limited in key areas. Human rights remains deeply influenced by an overly individualist ideal of the individual rights holder, which limits its ability to effectively engage with what I see as a key challenge of our age: identity politics wielded in divisive ways. I shall argue that what is largely missing from human rights' engagement with identity politics is an understanding of the subject of rights as relational. I will consider specific aspects of this failure to engage with the constitutive relationality of human agency and identity, before proceeding to outline three areas in which an acknowledgement of relationality can contribute to human rights incorporating identity politics in a more effective way. My article asks the human rights community to radically rethink and begin to reshape its efforts to engage with the challenge of identity.

KEYWORDS

individualism; relational agency; recognition rights; identity politics

The asocial individual

Human rights is indebted to individualism. Alongside liberalism and capitalism, human rights can be seen as one of the most transformative manifestations of the wider individualist project, which first emerged with the 15th-century intellectuals of Renaissance Italy. From these European origins, individualism arguably proceeded to transform and revolutionize much of the world. Beginning in the 17th century, the idea of rights exerted increasing influence upon the development of individualism. For example, the writings of English political theorists John Locke and Thomas Paine are said to have directly influenced and

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inspired the 18th-century US revolutionaries. Jean-Jacques Rousseau's deliberations on inequality and the grounds of legitimate political authority have been repeatedly credited as influencing many of the key theorists of the 1789 French Revolution.¹ Many members of the early bourgeoisie derived religious and moral legitimacy from the ideal of the entrepreneurial individual who, so it was claimed, had an inalienable, God-given right to acquire private property and enrich himself.² In these and many other instances, the idea and the developing reality of individual moral and legal rights came to provide powerful normative impetus for the epochal changes which individualism wrought across Europe, North America and, with the spread of European colonization, much of the globe.

For advocates of the ideal of the individual, it provides an essential foundation for the human rights project. The principal, if not sole, legitimate bearer of human rights is routinely said to be the individual, even in cases where the human rights in question concern the cultural attributes of minority communities.³ True, there exists a body of scholarly literature in support of collective human rights, but this remains a largely Sisyphean labour, yet to exert any transformative influence upon the thinking and practices of most human rights legal bodies and institutions.⁴ Similarly, while human rights instruments and documents occasionally refer to the possibility that individuals may possess human-rights-based responsibilities towards other individuals, human rights theory and practice typically treat the core relationship as consisting of that between the state (as principal duty-bearer) and the separate, morally sovereign individuals to whom the state owes a human-rights-based duty of legal care and responsibility.⁵

The collective habitus of the human rights project, as developed historically, thus draws concertedly upon an individualist philosophical depiction of the subject, in whose abstract name human rights exists. Representations of the individual subject have been shaped and molded over centuries by theorists and philosophers such as John Locke, Gottfried Wilhelm Leibniz, Adam Smith, Immanuel Kant, John Stuart Mill, Ronald Dworkin, John Rawls, and Alan Gewirth. While there are significant differences between their respective philosophical visions and arguments, they all share a broad adherence to a particular conception of the individual subject—a conception that continues to profoundly influence the contemporary theory and practice of human rights.

Committed to the idea that humankind can be normatively defined by a universal and thus necessarily abstract set of distinguishing characteristics or attributes, these eight philosophers all reduce humankind to a single, allegedly exemplary monadic subject. To cite arguably the most representative example of this philosophical tradition, Kant reasoned in the 18th century that the essence of humanity can be inferred from our capacity for rational autonomy encapsulated within a single universal moral law.⁶ The exemplar of humanity is the sovereign rational individual, uniquely capable of identifying and

¹Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, (University of California Press 2008).

²Crawford Brough MacPherson, *The Possessive Theory of Individualism: From Hobbes to Locke* (Clarendon Press 1962).

³See CCPR General Comment No. 23: Article 27 (Rights of Minorities), CCPR/C/21/Rev.1/Add.5.

⁴Miodrag A. Jovanovic, *Collective Rights: A Legal Theory* (University of Belgrade Press 2012).

⁵For an attempt to formulate a set of human rights-based responsibilities see the Inter-Action Council, *A Universal Declaration of Human Responsibilities* (1997): <https://www.interactioncouncil.org/publications/universal-declaration-human-responsibilities>. Accessed 22 October 2023.

⁶Immanuel Kant, *The Moral Law: Kant's Groundwork of the Metaphysics of Morals*. (H J. Paton, tr, Hutchinson University Library 1956).

enshrining a profoundly formal, inherently abstract set of principles and maxims. This radically individual subject provides a key constituent from which universalizing legal, moral, and political systems have been constructed and legitimized. Abstracted from the phenomenal realm, the distinguishing characteristics of the idealized individual rational subject can be applied to other such subjects on the principle of formal and abstract equality. While significant advances were made by 20th-century deontological philosophers, such as Ronald Dworkin, Alan Gewirth and John Rawls, none fundamentally called into question the vision of the separate, sovereign individual subject which Kant and before him, in a slightly different way, Locke envisioned.⁷

Other scholars, such as Robert Nozick and Thomas Franck,⁸ documented and celebrated how this conception of the individual subject had shaped the design and validation of the economic, political, and legal systems which form the liberal rights-based order. In their view, the instrument of human or constitutional rights provides an essential construct for practically establishing and reinforcing the separateness and moral sovereignty of individual persons which this vision of the subject entails. This yields what might be referred to as a presumption in favour of certain second-order principles, which law and politics serve to uphold and implement. Most significantly for my purposes here, the separateness and sovereignty of the individual leans heavily towards a conception of individual liberty as best secured through the possession of rights against the incursions of others into an individual's 'sovereign' space. Non-interference thereby comes to shape philosophical and legal formulations of what is fundamentally required for securing an individual's core rights. In turn, this vision profoundly shapes our understanding of the morally individualist principles which many argue should underlie all forms of legitimate political association with others. As I shall argue here, this function of rights continues to significantly shape and constrain how human rights has incorporated identity politics.

Another version of this wider perspective, deriving from Thomas Hobbes and John Locke, and adopted and developed by 20th-century libertarian thinkers such as Friedrich Hayek and Robert Nozick, also draws heavily upon individual rights to private property as invalidating any attempt by the state to redistribute wealth and opportunity across populations, since to do so violates the separateness of persons, by treating some (wealthy) individuals as means to the ends of other (poorer) individuals, and falsely, so they argue, presumes the existence of collective normative and ethical goods and principles. From this perspective, those who argue that social and economic rights are human rights are guilty of fundamentally misunderstanding how rights connect to the individual subject from which the human rights project emerged. The equality ideal, on this reading, is purposefully blind to the significant differences in identity that persist in contemporary societies.⁹

The ideal of the sovereign individual subject has fundamentally shaped our world, the development of human history, and the theory and practice of human rights. Legions of theorists have refined and defended the Lockean and Kantian ideal of the rational individual subject as a bearer of rights. Yet some have resisted its appeal and questioned its

⁷Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Alan Gewirth, 'The Basis and Content of Human Rights' (1981) 23 *Nomos: Human Rights* 119; John Rawls, *Political Liberalism* (Columbia University Press 1993).

⁸Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974); Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (OUP1999).

⁹Christian Tomuschat, *Human Rights: Between Idealism and Realism*. (2nd ed. OUP 2014).

claims to global legitimacy. From beyond the ideal's European origins, African and Asian writers have repeatedly argued that individualism rests upon an ontological depiction of the self that is largely normatively alien to the more communal and relational ways of being and believing said to characterize significant parts of the populations of those continents.¹⁰ The cultural partiality of the prevailing understanding of the sovereign individual bearer of human rights, as alleged by such writers, raise serious challenges for the globalization of the human rights project.¹¹

Within a 'Western' framework, other critics have similarly discerned a deeply damaging normative or ideological partiality lurking within the ostensibly abstract individual subject on which human rights rests. From Marxist and Neo-Marxist perspectives, generations of thinkers have argued that the continuing influence of this understanding of the subject derives less from the presumed merits of the philosophical arguments offered in its defense, and far more from the normative justification it seeks to provide for various manifestations of capitalism, most recently the neoliberalism in the shadow of which we all live.¹² Another established body of philosophical literature calls into question the very idea of a subject which constitutes itself. This literature spans post-structuralism, various forms of radical feminism, the work of discourse theorists, radical environmentalists, and those who espouse post-humanism. After centuries of hegemonic dominance, the conventional subject of the liberal rights tradition has been increasingly called into question from the 1980s onwards and from many different quarters.¹³

If the narrowly individualist conception of agency, which spawned and profoundly shapes the theory and practice of human rights, has attracted concerted and powerful criticism from both 'Western' and 'non-Western' perspectives, the denial of the possible significance of identity for the normativity of human rights is also, and perhaps more powerfully, being challenged by the increased importance of identity in so many peoples' strivings for justice and equality. The rise of identity politics has forced a significant shift in human rights' engagement with injustice and inequality; many scholars and practitioners have pivoted towards identity in recent decades. Identity politics entails a departure from the identity-blind dogmatism which characterized earlier liberal individualist understandings of agency.¹⁴

A significant section of our daily news items, spanning questions of religion, gender, nationality and ideological beliefs demonstrates that the specific and distinct identities of people across the globe have become profoundly important in ways that demand the attention of human rights scholars and practitioners. Human rights theory and practice has acknowledged this ongoing development and seeks to take identity seriously in ways which contrast with the dogmatic ideal of the sovereign individual, devoid of identifying characteristics.

¹⁰See Yash Ghai, 'Asian Perspectives on Human Rights' (1993) 23 *Hong Kong Law Journal* 342; Mutuma Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 589. For an interesting and very recent attempt to formulate human rights within the relational and non-individualist perspective of the Maori, see the New Zealand Human Rights Commission, 'Aratohu tika tangata ki te whai whare rawaka i Aotearoa: Framework Guidelines on the right to a decent home in Aotearoa.' (August 2021).

¹¹Andrew Fagan, *Human Rights and Cultural Diversity* (Edinburgh University Press 2017).

¹²Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press 1995); Nancy Fraser and Rahi Jaeggi, *Capitalism: A Conversation in Critical Theory* (Polity 2018).

¹³John Christman, *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (CUP 2009).

¹⁴Linda Alcoff, *Visible Identities: Race, Gender and the Self* (OUP 2007); Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2011).

Rights, identity politics, and the vulnerable subject

Academic interest in identity and its effects upon politics, law, and rights predates our culture-war afflicted age and emerges most noticeably from the early 1980s onwards. The scholarly turn towards the importance of identity was primarily characterized by a concern for the human rights violations and wider forms of injustice suffered by many marginalized minority communities.¹⁵ While all human beings bear identities, the human-rights-based response to the increased importance of identity necessarily focuses upon many of those whose identities are the subject of discrimination, marginalization, or violent and systemic assault. Indeed, the demand for the legal recognition of minority and marginalized identities has become a key concern for many human rights theorists and practitioners. This reflects the wider turn towards identity politics and, more specifically, the so-called politics of recognition, within many culturally diverse societies over the past four or five decades.¹⁶

The scholarly focus upon identity has been underpinned by a separate scholarly critique of the Lockean and Kantian derived conception of the deontological unencumbered subject, with its profound influence upon human rights thinking and morally individualist liberal philosophy more broadly.¹⁷ While this approach encompasses several perspectives, the critique generally shares a rejection of the unencumbered individual subject as capable of grounding an ethical response to the systemic discrimination and inequalities suffered by so many because of their ascribed identities.¹⁸ Being purposefully and principally blind to such attributes as race, gender, sexuality, religion, indigeneity, and social origin has proven largely ineffective in the face of identity-targeting harms. After all, when has anyone ever been ridiculed, insulted, or physically attacked for being an embodiment of the purely rational, noumenal subject beloved by centuries worth of Kantian philosophers? Countless millions of people across the globe face systemic human rights violations as a direct consequence of being or seeking to be who they are, or who they are seen to be by others. As the world's foremost normative vehicle for the protection and promotion of equality and non-discrimination, human rights cannot afford to ignore these harms.

While some jurisdictions, such as France, remain resolutely committed to upholding an identity-blind constitutional order, the human rights project more broadly has sought to develop a comprehensive body of rights-based protections for a diverse range of ascribed identities.¹⁹ The human rights project is no longer entirely blind to identity. Beginning most obviously with the 1948 Genocide Convention and culminating most recently in the 2006 UN Convention on the Rights of Persons with Disabilities, international human rights law has repeatedly sought to provide legal recognition to the distinct identities of a vast swathe of humankind, including on the grounds of ethnicity, nationality, race, religion, indigeneity, disability, childhood, gender identity and sexual

¹⁵Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (OUP 2008).

¹⁶Axel Honneth, *The Struggle for Recognition: the Moral Grammar of Social Conflicts* (J. Anderson tr, Polity Press 1996); Charles Taylor, 'The Politics of Recognition', in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994).

¹⁷Michael J Sandel, 'The Procedural Republic and the Unencumbered Self' (1984) 12 *Political Theory* 81.

¹⁸Jeffrey J. Pyle, 'Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism' (1999) 40 *Boston College Law Review* 787; Lisa Schwartzman, *Challenging Liberalism: Feminism as Political Critique* (Pennsylvania State University Press 2010).

¹⁹Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1993).

orientation. Typically, the objective of international and regional human rights instruments has been to provide specific legal protections to groups of people whose ascribed identities confer upon them a minority status within the nation-states they inhabit. The significance of minority identity rights' claims is also far more apparent and visible in a rapidly growing body of cases adjudicated by constitutional and supreme courts within many liberal democracies.²⁰

Set against the context of wider identity-politicking efforts to secure recognition for distinct communities of people, many human rights scholars routinely speak of the need to uphold and defend minority communities' *recognition* rights. Indeed, some argue that one of the greatest accomplishments of the human rights project in the past few decades consists of the recognition rights so many historically discriminated against communities of people have secured, particularly within liberal democratic states.²¹ Equality and non-discrimination legislation in many parts of the world has also, for example, established a category of protected characteristics which seek to ensure that marginalized peoples are better able to compete with their purportedly more privileged counterparts in areas such as education, employment, housing, and access to justice.²² No less a body than the UN Committee for Civil and Political Rights has issued a General Comment (No. 23) that recognizes the identity-based rights of minorities as human rights, albeit still as individual, not collective, rights.²³ International human rights law has clearly travelled a significant distance away from the unencumbered, asocial subject of the recent past and now substantially recognizes the importance of individuals' socially encumbered identities and agency for the protection and promotion of human rights. However, this move towards recognizing the significance of identity, while overwhelmingly welcomed by many minorities themselves, is still subject to concerted philosophical challenges that fundamentally question the ontological basis of the appeal to identity. Not everyone embraces identity.

Within individualist liberal philosophical circles there remain many scholars who reject the ongoing move away from the deontological, unencumbered subject necessitated by identity politics. Critics target a variety of ethical, political, legal, and philosophical components of identity politics and continuing efforts to secure recognition rights for distinct communities of people.²⁴ Some argue that a focus upon the substantive characteristics which distinguish different groups of people from each other serves to undermine social and political unity.²⁵ Equal rights and entitlements perform a vital

²⁰See Neus Torbisco-Casals, 'Multiculturalism, Identity Claims, and Human Rights: From Politics to Courts'. (2016) 10 *Law & Ethics of Human Rights* 367. Although results have been mixed for the claimants in many instances. Torbisco-Casal's analysis focuses extensively and specifically upon ECtHR cases concerning freedom of religion and the right to display religious symbols, meaning claims against France, Switzerland, and Turkey. Among of the more prominent are: *Dahlab v Switzerland* App no 42393/98 (ECtHR, 2001); *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 2004); *Dogru v France* App no 27058/05 (ECtHR, 2008); *Kervanci v France* App no. 31645/04 (ECtHR, 2008) and *S.A.S v France* App no 43835/11 (ECtHR, 2014).

²¹Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2017).

²²The UK Equality Act (2010) recognizes age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation as personal characteristics entitled to legal protection. The US Constitution accords protection to the following characteristics against employment discrimination specifically: age, ancestry, colour, disability, ethnicity, gender, gender identity or expression, genetic information, HIV/AIDS status, military status, national origin, pregnancy, race, religion, sex, sexual orientation, or veteran status.

²³CCPR General Comment No. 23: Article 27 (Rights of Minorities) CCPR/C/21/Rev.1/Add.5.

²⁴See Kwame A. Appiah, *The Lies That Bind: Rethinking Identity* (Profile Books 2018); Olufemi Taiwo *Elite Capture: How the Powerful Took Over Identity Politics (and Everything Else)* (Pluto 2022).

²⁵Todd Gitlin, *The Twilight of Common Dreams: Why America is Wracked by Culture Wars* (Henry Holt 1995).

function for the modern rights-based nation-state, which critics argue is threatened by some groups of people apparently gaining more rights protections than many fellow citizens. Typically, these forms of positive equality or affirmative action are justified as compensation or remedies for the historical and systemic injustices suffered by many minorities. While many such claims are well-grounded, those who advocate for them are often exposed to concerted and widespread opposition from other sections of their deeply divided societies.

Others argue that identity politicking and efforts to promote recognition rights adopt an unduly narrow and ideologically biased approach to injustice.²⁶ More specifically, prevailing forms of identity politicking such as those engaged with race and gender, for example have been criticized for a failure to include social class as a key component of wider systemic inequality and discrimination, which many people suffer from.²⁷

However, another critique concerns a more fundamental denial of the existence of distinct and separate communities of people and the shared collective identity required to ground their specific rights claims. The challenge to identity politics and the human-rights-based response to them posed by these epistemological objections—which deny that communities of people exist in the ways identity politicking typically relies upon—are particularly pertinent to the focus of this article. Anti-essentialist opponents of identity-based rights claims have argued that all forms of identity are contingent constructions and, in some cases, purposeful fabrications which lay claim to an essence which can never truly exist in the way required by rights-based forms of recognition. They posit that all purportedly ascribed communities, whether national, racial, ethnic, religious, sexual, or otherwise, are imagined.²⁸ The impossibility of truly individuating distinct and discrete communities of people thus prevents the conferral of rights to such constructed communities and the individuals who comprise them.²⁹ For many opponents of essentialism; an account of identity which holds that all such identities consist of distinct and deeply grounded attributes, anti-essentialism serves to invalidate specific identity-based human rights claims. If culturally and socially grounded identities do not ultimately exist beyond the imaginations of those who champion them, rights to those identities cannot exist. Rights cannot attach to and seek to protect non-existent entities.

This amounts to a fundamental challenge to any attempt to develop normative frameworks beyond those we see in earlier forms of liberal individualism and any attempts to develop rights for socially encumbered subjects. However, whatever the logical merits of epistemological anti-essentialism may be, it threatens to discard the baby with the bathwater by ignoring the social reality of identity for all of us and, particularly, the undeniable fact that, many peoples' 'imagined' identities provide the basis for systemic harm, injustice, and violations of human rights. Identity exists as an integral component of and vehicle for inhumanity. The philosophical wisdom of anti-essentialism offers scant protection against the very real discrimination, hate speech, and violence suffered by

²⁶Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity 2001).

²⁷Walter Benn Michaels, *The Trouble with Diversity: How We Learned to Love Identity and Ignore Inequality* (Metropolitan Books 2006); Andrew Fagan, 'Taking Class Seriously' (2023) 45 *Human Rights Quarterly* 260.

²⁸Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. (Verso 1991); Diane Fuss, *Essentially Speaking* (Routledge 1989); Anne Phillips, 'What's Wrong with Essentialism?' (2010) 11 *Distinktion: Scandinavian Journal of Social Theory* 47.

²⁹Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (OUP 2003).

so many on the grounds of their ostensive identity. The reality of various forms of identity owe less to philosophical reasoning and far more to discrimination, marginalization, and concerted attacks on many communities. Philosophical skepticism and wisdom offer no defense against xenophobia.

Identity is not the exclusive or sole preserve of those who suffer inhumanity. It is also a recurring component of those who perpetrate inhumanity in the name of protecting nation, race, creed, sex, class, or other such constructions against alleged despoilers and interlopers: human beings perceived as matter out of place.

For its part, and entirely in keeping with its ethos, the human rights project has focused most of its attention upon the identities of the marginalized and vulnerable—a point to which I will return shortly.³⁰ A great many identity-based rights claims are founded upon the lived experience of vulnerability.³¹ Indeed, Martha Fineman has identified a distinct form of subjectivity that she terms the ‘vulnerable subject’, and which she views as grounding and legitimizing the turn towards recognition rights.³² Many believe that the sociocultural encumbrances which shape our sense of self and deeply impact our self-worth, self-respect, and access to rights are profoundly affected by our vulnerability to the harm inflicted on marginalized minorities by other sections of society and the state. In many ways, identity politicking is one of the most visible manifestations of this approach. One can stick to one’s anti-essentialist guns and insist that no one is ever *essentially* a woman, gay or trans, of African descent, Jewish or Muslim, or any of the other multitude of identities systemically subjected to abuse, discrimination, and hatred. However, this standpoint does nothing to prevent specific communities suffering such harms and being targeted as such. Rights remain the foremost (though fragile) instrument for protecting individuals against abuse of power; claims to identity-based rights are a direct response to the lived realities of many communities.³³ As one gay rights activist and academic has written, ‘how do you protest a socially imposed categorization except by organizing around the category?’³⁴

As Martha Fineman (2008) proceeds to argue, many minority rights claims grounded in the state of vulnerability possess a double-edged character. They offer the promise of establishing formal claims for enjoying equal opportunities with other members of society, but also, and significantly, provide formal recognition of one’s claims to be vulnerable and a victim of wider discrimination and hostility. In laying claim to identity-based rights, one is declaring oneself to be a victim and vulnerable. Such claims are then formally validated in the granting of those rights (although they are of course often contested by others). After all, one may reasonably argue that minority rights claims are principally, if not solely, required precisely to offer protection against other peoples’ prejudice and are therefore reactive to others’ hostility.³⁵ I believe the reactive

³⁰The requirement that one must first establish the vulnerability of the community one identifies with and which is seeking rights protections seems reasonable enough when viewed through the content of human rights as existing primarily to provide remedies and protections to the most vulnerable. However, many of these claims are in dispute within the increasingly divisive societies in which identity politics play out.

³¹Robert Elias, *The Politics of Victimization: Victims, Victimology and Human Rights* (OUP 1981); Bryan Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press 2006).

³²Martha Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 8.

³³Alcoff (n 14); Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001).

³⁴Stephen Epstein, ‘Gay Politics, Ethnic Identity: the limits of social constructionism’ (1987) 93 *Socialist Review* 27.

³⁵Shachar (n 33).

character of identity-based rights claims to be crucial, and will return to this in more detail.

The human rights project has travelled a long way beyond the identity-blind limitations of its earlier philosophical heritage—specifically the unencumbered asocial individual subject of so much rights theorizing and jurisprudence, particularly the deontological. The rise of identity as a core field of contestation, combined with the inevitability of contesting parties seeking redress and protection through claiming constitutional and human rights instruments, leaves us with little option but to recognize the socially encumbered subject and that so many peoples' encumbrances are fundamentally marked by harm and vulnerability. Rights appear to offer protection for those vulnerable, encumbered subjects who successfully secure them. Or do they?

Rights to identity amid the culture wars

The rights-bearing vulnerable subject is both a proposed remedy to and a symptom of the wider inter-cultural conflict and hostility which characterizes our present moment. As a remedial instrument for securing legal, societal, and political recognition for many marginalized, minority communities, recognition rights have undoubtedly achieved many, particularly legal, successes in many established liberal democracies and beyond. The securing of recognition rights by many owes a great deal to the wider accomplishments of multiculturalism which have secured legal protection for a wide range of communities, and for its supporters at least, was thought to be destined to secure hegemonic status within many liberal democracies following the fall of the Soviet Union, while also gaining influence and followers in many other parts of the world.³⁶ However, notwithstanding the multicultural optimism of the recent past and the extravagant declarations of liberal democracy's normative triumph over its rivals, I believe that we now occupy a very different, much darker, age. The normative objectives of the age of multiculturalism since the 1980s appear to be increasingly remote in a global environment in which fear, xenophobia, and intolerance increasingly define and shape relations between communities of people.³⁷ From the religious hatred regularly incited by key political figures in India to the recent US Supreme Court's overturning of women's constitutional right to abortion in 2021, many recognition rights are coming under increasing threat from powerful forces.³⁸

Within both liberal democracies and illiberal states, struggles for recognition rights now occur within the framework of 'culture wars', in which different communities' claims to their allegedly identity-defining ways of being and believing have become both more divisive and more prominent within many diverse societies. Some scholars associate culture wars with various communities' refusal to seek compromise and negotiation on socio-cultural and political issues.³⁹ Those who demand recognition of their

³⁶Francis Fukuyama, *The End of History and the Last Man*. (Penguin 1992); Nathan Glazer, *We are all Multiculturalists Now* (Harvard University Press 1997).

³⁷William A. Galston, *Anti-Pluralism: the Populist Threat to Liberal Democracy* (Yale University Press 2018); Jan-Werner Müller, *What is Populism?* (Penguin 2017).

³⁸For a discussion of identity politics in India see David O'Reilly 'Exploring Religion and Identity Politics in India' Pew Trust (2022). The US Supreme Court's overruling of *Roe v Wade* was contained in its 2021 ruling in *Dobbs v Jackson*.

³⁹See Ezra Klein, *Why We're Polarized* (Profile Books 2020); see also Ipsos Mori. 2019. 'Populist and Nativist Sentiment in 2019: A 27 Country Survey' <https://www.ipsos.com/sites/default/files/ct/news/documents/2019-08/populism-and-nativism-2019_0.pdf> accessed 14 June 2023.

human rights are increasingly confronted by the stark reality that the moral rhetorical force of such claims offers little protection in the absence of robustly enforced legal rights, elite political support, or widespread social acceptance. As our culture was become more virulent and uncompromising, the recognition rights gained by many appear increasingly precarious.

Identity politics recognizes the extent to which we are all socially constituted in ways which affect the lives and opportunities of everyone, but especially those whose ostensive identities have been blighted by systemic and wide-ranging hostility. As human rights is the predominant instrument for securing political and civil justice, it is not surprising that so many minorities seek redress and protection from them. Fueled by many peoples' vulnerability to systemic harm, recognition rights have offered the promise of overcoming the injustices many have suffered and of contributing to the establishment of potentially transformational legal, political, and (less assuredly) socio-economic environments no longer systemically blighted by identity-based injustices. However, these efforts have attracted concerted and powerful opposition in environments increasingly influenced by illiberal autocratic forces that roundly reject multiculturalism and the minority rights it lauds.⁴⁰ In such hostile environments, the efforts of many to protect their recognition rights have become increasingly reactive and dogmatic.⁴¹

It seems reasonable to contemplate whether some peoples' hopes for the transformational potential of recognition rights were and are over-inflated. After all, and as others have argued, recognition rights primarily consist of vitally important civil and political rights, which have a limited impact upon wider socio-economic forms of injustice.⁴² The persistent inequalities suffered by many among the African American population in the US illustrates the double-edged character of a strategy based primarily, if not exclusively, upon securing equality before the law and the civil and political rights this entails.⁴³ While substantial accomplishments have been achieved against brutal opposition, a relative neglect of other, particularly social, rights in the struggle against poverty and inequality have left many people politically enfranchised, but subject to precarity, crippling poverty, and even destitution.⁴⁴ Securing civil rights also appears to have done little, if anything, to dent the endemic racism among law enforcement officers and in the wider criminal justice system in the US and elsewhere.⁴⁵ Civil and political rights may be necessary for effectively confronting and remedying systemic discrimination, but inequality and injustice extend beyond formal discrimination. Many of those who have secured recognition rights remain profoundly vulnerable, and I believe

⁴⁰Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Harvard University Press 2019).

⁴¹Frédéric Mégret, 'Human Rights Populism' (2022) 13 *Humanity: International Journal of Human Rights, Humanitarianism, and Development* 240.

⁴²Nancy Fraser, *The Old is Dying and the New Cannot be Born: From Progressive Neoliberalism to Trump and Beyond* (Verso 2019).

⁴³John Creamer, 'Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups' (United States Census Bureau 2020).

⁴⁴Although for a study of ongoing attempts to curtail voting rights in many states of the US see the web portal provided by the American Civil Liberties Union, *Fighting Voter Suppression*, (2021) <<https://www.aclu.org/issues/voting-rights/fighting-voter-suppression>> accessed 21 January 2023

⁴⁵American Civil Liberties Union, 'What 100 years of History Tells us About Racism in Policing', (December 11 2020) <<https://www.aclu.org/news/criminal-law-reform/what-100-years-of-history-tells-us-about-racism-in-policing>> accessed 21 January 2023. For a critical analysis of the identity-politicking strategy for the African American population in the US see John McWhorter, *Woke Racism: How a New Religion has Betrayed Black America* (Faber & Faber 2022).

this is partly due to the tendency to conceive of recognition rights in largely civil and political terms and to see injustice as consisting primarily of discrimination.⁴⁶

Beyond the unduly narrow conceptualization of what may be required for securing recognition rights, there are undoubtedly a vast collection of factors and causes for the wider backlash against human rights and, as a particularly prominent element of this, the hostility directed towards so many marginalized peoples across the globe. As well as the precarious protection that recognition rights have proved to offer many communities who have secured them, countless millions of vulnerable people's claims to recognition rights are denied. I shall now proceed to argue that a key factor in the growing fragility of human rights' response to identity politics lies within the project itself. Specifically, I shall argue that a feature of rights generally, and recognition rights more specifically, results in a failure to fully engage with the challenge of identity. The human rights project faces many serious challenges not of its making, but in this case a long-standing component of the theory and practice of human rights is exacerbating some of the greatest challenges. Those working with human rights need to reformulate our understanding of the subject of rights and the relationships between rights-holders.

Relationality, rights, and conflict

Social anthropology is right: human beings are socially embodied agents. Who we are, what we value, and what we support and oppose are fundamentally shaped by the social conditions we are born into and subsequently develop within.⁴⁷ In some cases, by virtue of a complex combination of circumstances and decision-making, some of us enjoy lives that are largely free from discrimination, marginalization, poverty, and systemic harm. Vast numbers of others are far less fortunate. For many of us, who we are (or are seen to be) attracts the hostility of others and results in systemic harm. These injustices entail the continuing need for recognizing and mobilizing around identity. The importance of identity for so many people demonstrates the overwhelming significance of our relationships with others. Ignoring or denying identity is simply not an option.

Our identities mean that we are essentially relational beings, dependent upon each other in a bewilderingly complex set of ways. No one can be an island unto themselves, self-reliant or self-sufficient, but the importance of our relations with each other extends beyond that banal truism into the processes through which our identities are shaped. The identities we affirm, or which are imposed upon us, are not created from a metaphorical blank state, but are constituted through relationships with proximate and distant others across space and time. Identity politics and the recognition rights it has helped establish would not exist were it not for the fact that, as Emcke has written, 'since each person is intersubjectively interwoven with others, he or she is dependent on the reactions of others for his or her self-image and identity.'⁴⁸ Identities cannot be thought of not as

⁴⁶This tendency is not inherent to recognition rights. One can and must argue that social and economic rights have a fundamental role to play in combatting identity-targeting injustice. See Fagan (n 27) for an example of this argument.

⁴⁷Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press 1997); Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973); George Herbert Mead, *Mind, Self and Society* (University of Chicago Press 1967).

⁴⁸Carolin Emcke, 'Between Choice and Coercion: Identities, Injuries, and Different Forms of Recognition' (2000) 7 *Constellations* 489.

separate forms or silos (akin to metaphorical billiard balls), but as embedded within constellations of inter-dependent and inter-related characteristics and attributes.

What it means to be religious is inextricably tied to what it means to be secular. In many places, what it means to profess a specific faith is deeply entwined with the differing faiths of one's significant others. Understandings of gender and sexuality emerge from highly complex and socio-historically grounded institutions, practices, and beliefs.⁴⁹ Constitutive relationality explains the deep controversies surrounding trans peoples' rights claims.⁵⁰ The normative coding of colour and race is embroiled within hierarchical relationships which cross centuries and continents.⁵¹ No one is who they are as a consequence of being left alone in complete solitude. Every identity is interconnected with other identities in intricate ways. Effectively responding to identity-related harms requires recognizing and engaging with these constitutively relational conditions.

In their currently predominant configuration, many if not all recognition rights recognize identity in a limited way that ignores or denies the constitutive relationality of agency and identity. As a direct consequence and expression of the continuing influence of the non-relational understandings of the individual rights-holder I analysed above, recognition rights characteristically focus upon securing individuals' protection *against* external engagement and interference. While consisting of complex bundles of negative and positive rights entitlements, recognition rights invariably seek to secure a degree of individual sovereignty to those who are vulnerable to the hostility of other members of society. In this form, rights offer very fragile, if not tokenistic, protections purportedly received (but never really achieved) through residing within one's own personal 'gated community'. In this form, as we see in the culture wars which pose an existential threat to any rights-based order, recognition rights are incapable of addressing, let alone remedying the deeper identity-based conflicts they ostensibly respond to.

The desire for rights to provide an instrument for excluding others has become (and perhaps always was for many) a core element of identity politicking. Identity politics extends across a wide political spectrum, which includes some of those who reject multiculturalism and the recognition rights claims of many minorities.⁵² Right-wing populism draws heavily upon identity politics, as evident in its appeal to forms of exclusionary sovereignty that lean on the alleged rights of the so-called silent majority.⁵³ Many people who otherwise have little or no sympathy for the human rights project, as they understand it, appeal to rights in their efforts to 'make their country great again (again)', to 'take back control', to restore some illusory past age of ethnic homogeneity by instituting hostile environments towards immigration, or to gentrify their neighbourhood. In response, more conventionally legitimate recognition rights claimants increasingly seek to reinforce their own homogeneous enclaves from which hostile outsiders can be excluded, such as for example those who seek to only engage with like-minded others in social media spaces. I am not suggesting that these otherwise very different appeals to identity-based rights are morally equivalent or have similarly valid claims to such rights.

⁴⁹Pat Caplan, *The Cultural Construction of Sexuality* (Routledge 1987).

⁵⁰Paisley Currah, Richard M. Juang & Shannon P. Minter, *Transgender Rights* (University of Minnesota Press 2006).

⁵¹Richard Delgado & Jean Stefancic, *Critical Race Theory: an Introduction* (New York University Press 2012).

⁵²Nikos Sotirakopoulos, *Identity Politics and Tribalism: The New Culture Wars* (Societas 2021).

⁵³Andrew Doyle, *The New Puritans How the Religion of Social Justice Captured the Western World* (Constable Press 2023).

Identity politicking needn't collapse into ethical relativism. Manifestly illiberal appeals to recognition rights in support of some ways of being and believing, such as those found amongst many far-right forms of populism, raise many complex questions which cannot be addressed here.⁵⁴ At the very least, any community which seeks to deny the basic equal moral worth of human beings fails a core human rights principle and condition. However, concerted attempts to deny the rights claims of illiberal right-wing populists have predictably failed to prevent further such claims, and rights-opponents have been propelled into government in many places across the globe.

The earlier hope of some advocates of multiculturalism dating back to the 1980s that recognition rights would eventually diminish identity-based conflict and hostility has been replaced by a reality in which rights have become a key weapon for those waging culture wars. It is ironic that, to use Ronald Dworkin's iconic term, right seem to have become 'trumps' against the wider societal value of living together sufficiently peacefully amid diversity.⁵⁵ The continuing faith so many people place in recognition rights appears to be little more than what Raymond Geuss refers to as 'wishful thinking' and a refusal to appreciate how dark our present times are.⁵⁶

Others before me have argued that the institutionalization of rights (if not the very idea) is a product of deeper forms of contingent human conflict and pathology, and highlighted the constitutive relationality of agency and identity in their critiques of the individualism that has shaped rights. Arguably the most influential source for an analysis of rights as manifestations of contingent conflict and pathology is Karl Marx's (1844) short publication *On the Jewish Question*, in which he situates the civil and political rights of the mid-19th century within the deeper and wider context of capitalism and its defining relations of production.⁵⁷ Marx argues that the institution of rights is an ideological reflection of the prevailing capitalist relations of production in which individuals, notwithstanding any formal legal equality rights might confer, encounter one another not as colleagues, citizens, or even compatriots united by a common overarching cause based upon solidarity, but as competitors, rivals, and adversaries in pursuit of the narrow self-interest which capitalism requires. Rights provide shields and defenses against others who are invariably constituted by these wider societal forces as rivals, while consigning people to forms of identity and affiliation that are entwined with the very forms of injustice they purport to remedy. In this form, rights can never be truly transformative because of their entwinement with the underlying pathology we are all afflicted by.

Marx's view of rights is complex, as are subsequent evaluations of the relationship between Marxism and rights as potential instruments for confronting and overcoming injustice.⁵⁸ For my present purposes, what has remained influential, at least within critical theory, is the characterization of any transformative powers rights might possess as

⁵⁴For an interesting and thought-provoking recent analysis of this challenge see Alexandra Huneus, 'When Illiberals Embrace Human Rights' (2019) 113 *AJIL Unbound* 380.

⁵⁵Dworkin (n 7).

⁵⁶Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press 2008).

⁵⁷Karl Marx, 'On the Jewish Question'. In Richard Tucker (ed.) *The Marx-Engels Reader* (Norton & Company 1978).

⁵⁸For a discussion of Marx's and Marxist evaluations of the potential emancipatory potential of human rights see Ishay (n 1). Paul O'Connell, 'On the Human Rights Question' (2018) 40 *Human Rights Quarterly* 962. For a detailed study of the possibility and shape of a socialist approach to human rights see Tom Campbell, *The Left and Rights: a Conceptual Analysis of the Idea of Socialist Rights* (Routledge and Kegan Paul 1983).

being systemically undercut by their predominant function of providing an illusory sovereign space for individuals to seek refuge within.

Thus, directly acknowledging the influence of Marx's critique of rights, in the 1990s Wendy Brown characterized rights to identity as largely devoid of genuinely transformative power because of their entwinement with the prevailing neoliberal order. Brown emphasizes the exclusionary function of rights when she writes that:

rights assertion is inevitably a propellant movement. The motion of rights is to push away from—*against* others, *against* the state, *against* incursions, limitations, or encroachments upon our autonomy. Insofar as rights operate to distance and demarcate, they are a means of socially organizing us by separating us, using the fiction of our autonomy and independence to produce a social order reflecting it.⁵⁹

As Judith Butler (1997) has also argued (following Hegel), rights do not attach externally to already constituted subjects but have already fashioned those very subjects to whom they attach.⁶⁰ We come to conceive of subjects through the prism of rights, rather than rights through the prism of socio-historically and relationally constituted agency and identity. The individual rights-bearing sovereign subject is a socio-historical construction, heavily dependent upon the surrounding infrastructure of rights.

This argument has also been defended by William Connolly, who has comprehensively challenged what I see as the prevailing rights-based desire to reject and deny our ontological interdependency and inter-subjectivity.⁶¹ He argues that the politics of recognition and the allure of multiculturalism have done little to dislodge commitments to the fiction of the self-constituting subject upon which much of liberal modernity has been based. Even as we acknowledge others as different from ourselves, we still appear compelled to reassert our illusory sovereignty and separateness. The reification of purportedly distinct identities which stamps rights-based identity-politicking draws upon entrenched ontological myths of the ideal of the self-constituting and self-reliant individual and, in so doing, fails to discern or accept the reality of our constitutive relationality. As William Connolly writes, 'identity requires difference in order to be, and it converts difference into otherness in order to secure its own self-certainty.'⁶²

Many human beings continue to seek to define ourselves through the denial of our constitutive relationality and by seeking to distinguish ourselves from specific communities of the other. When it comes to our collective attitudes towards our relational interdependence, I believe that far too many of us remain mired in denial, craving a sovereign power of self-constitution that our relationality necessarily precludes. For all the protection they apparently offer vulnerable communities, in their current configuration rights often serve to exacerbate conflict and division. While identity politics unequivocally illustrates the essentially relational character of human agency and identity, the specific function of recognition rights provides a means to ignore or deny our relationality.

The stark ontological fact is that human agency and identity are constituted by and based upon intercultural and interpersonal relationships. Hell might too often be other people, but there's no escaping our interdependence on and exposure to one

⁵⁹Brown (n 12) 158.

⁶⁰Butler (n 47); G.W.F. Hegel, *Elements of the Philosophy of Right* (H.B. Nisbet tr, CUP 1991).

⁶¹William E. Connolly, *Identity/Difference: democratic negotiations of political paradox*, (expanded ed University of Minnesota Press 1991).

⁶²Connolly (n 61) 64.

another. Painful and difficult though the process will prove to be, any normatively effective response to the challenges of the politization of identity must be based upon an accurate conceptualization of constitutively relational agency and identity. As the backlash against human rights and minority recognition rights demonstrates, the current human rights-based response to identity politics provides increasingly fragile protection. Can this failing be addressed from a human-rights-based approach?

Resetting rights and identity

As I wrote above, philosophical skepticism and wisdom offer no defense against xenophobia. For me, the weaponizing of identity constitutes one of the most disturbing challenges we face. However impotent normative argument is in the face of systemic inhumanity, it may be the only way to avoid succumbing to despair and hopelessness. For all of its many shortcomings in practice, human rights remains humankind's predominant modern social imaginary in our efforts to confront and overcome systemic forms of injustice.⁶³ No alternative has arisen to challenge human rights' status as the predominant vehicle for the global pursuit of justice; this does not provide ultimate or compelling justification for the project's normative claims, but is a fact that requires nuanced critiques of human rights' shortcomings.⁶⁴ In this spirit, I turn now to consider the final question of this article: what needs to change in order for human rights to more effectively respond to the divisive identity politics which threaten to engulf many of us?

It is important to acknowledge that some human rights scholars have discussed the relational character of agency and identity, but this scholarship remains in its infancy and has only begun to engage concertedly with some of the more challenging questions, discussed above, that relationality raises for the human rights project.⁶⁵ The hostile and divisive character of so much constitutively relational identity-politicking crates enormous challenges which have yet to be satisfactorily acknowledged or engaged with from within human rights circles. Any attempt to reconcile the normative objectives of human rights with a conceptualization of the relational subject of rights will raise many questions. Before I endeavor to identify and discuss three key areas for any reset of the human-rights-based approach to identity politics, one issue requires clarifying.

Philosophers have disagreed over the precise details of what human rights must normatively consist of and be based upon,⁶⁶ but what is beyond dispute is the essential role played by the ideal of the fundamental moral equality of all human beings, regardless of the differences that distinguish us one from another. For present purposes, this means that no one's human rights claims can be normatively conditional upon others' agreement. The core recognition rights of minorities thus cannot be normatively dependent upon the opinions of racists, homophobes, and misogynists, for example. No one is

⁶³For a sophisticated discussion of the importance of social imaginaries to the pursuit of social justice see Charles Taylor, *Modern Social Imaginaries* (Duke University Press 2004).

⁶⁴I would include here Costas Douzinas's long-standing critical engagement with human rights and, in a different way, Samuel Moyn's justified critique of human rights' inadequate concern for material inequality, which alludes to a socialist alternative to the current order that seems, to put it mildly, wishful thinking of the highest order.

⁶⁵See Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Cornell University Press 1990) and Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (OUP 2012).

⁶⁶Compare the different approaches taken by James Griffin, *On Human Rights* (OUP 2008) and Maurice Cranston, *What are Human Rights?* (Bodley Head 1973).

entitled to exercise their human rights to deny the core moral equality of other human beings, or in ways which violate the human rights of others. The ideal of moral equality is a non-negotiable, red-line issue for any legitimate understanding of what human rights are and how they may be effectively practiced. With this all-important guardrail in place, I shall now briefly consider three areas in need of substantial change.

Restoring politics to the politics of identity

The core of my argument here has been that recognition rights provide an instrument through which people may seek refuge from others within a mythical sovereign domain postulated by non-relational conceptions of agency and identity. This attempted withdrawal from and denial of our interdependency offers an increasingly inadequate remedy to identity-based challenges such as racism, homophobia, and misogyny. I believe our increasingly divisive societies demonstrate that strategies of withdrawal—‘cancelling’ others we disagree with and yearning to reside within enclaves of like-minded people—compound division and mutual incomprehension. What Brown refers to as the ‘propellant movement’ of rights affords the illusion of transformative agency through the denial of constitutive relationality.⁶⁷ Addressing this requires the greater politicization of the implementation (not the possession) of recognition rights.

Once legally instituted and satisfactorily implemented, recognition rights enable those who possess them to withdraw from political contestation or debate concerning how those rights are enjoyed and their implications for the wider society. I suggest that this is broadly welcomed by many vulnerable communities of people. As discussed, the core ideal of moral equality cannot be placed on the political agenda, and nor can the rights of vulnerable minorities be normatively conditional upon the approval of others, who may have prejudices if not be overtly xenophobic. Law will continue to play a necessary but insufficient role in reinforcing the institutionalization of recognition rights. However, as many others have argued, the human rights project has largely failed to acknowledge the need to also engage with human rights through more recognizably political contexts and frameworks.⁶⁸ It is clear now that the legalization of recognition rights provides no cast-iron guarantee against their violation due to implementation failures or removal through politicized constitutional court rulings and executive action.

I think that our constitutive relationality calls for a much more extensive and substantial political engagement in defense of recognition rights. Over-reliance upon law as a protective realm for the recognition rights of vulnerable communities results in the attempted de-politization of identity politics, in which differences become entrenched and compounded as conflicting parties abandon political fora and revert to increasingly incommensurable moral registers.⁶⁹ Inadvertently or not, human rights contributes to this unsustainable and potentially irreconcilable division by affording people the unrealizable promise of guaranteed security behind the protective walls of their recognition rights. Reversion to a moral register leads to division; morality has proven incapable

⁶⁷Brown (n 12) 29.

⁶⁸See Peter Gabel, ‘The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves,’ 62 *Texas Law Review* 1563 (1984) and Mark Tushnet, ‘The Critique of Rights’ (1994) 47 *SMU L. Rev.* 23.

⁶⁹Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (Penguin 2013).

of authoritatively grounding a core set of principles and ideals which humankind is capable or willing to affirm and abide by.⁷⁰

An obvious implication of this is that we need to begin developing effective political instruments and frameworks in which constitutively related but potentially very different communities of people may commit to what will be extremely challenging processes of negotiation, deliberation, and contestation. If, as I believe, the divisiveness of identity politics is unsustainable and poses an existential threat to the maintenance of a rights-based order (or perhaps any form of collective political organization), then we must focus upon attempts to reconnect and reengage with each other. The core human rights ideal of moral equality provides a normative foundation stone for such collective efforts, which will enable us to strike down overt and unequivocal forms of discrimination and xenophobia. However, this will almost certainly require communities of people who currently appear to be incompatible and irreconcilably opposed to each other, such as those on either side of the bitter disputes surrounding gender identity for example, agreeing to enter into dialogue with the aim of better understanding the interdependency and constitutive relationality of their identities and ways of being and believing. Rights have a vital contribution to make to this daunting task if, following the insights of Iris Marion Young and recognizing the truth of the constitutive relationality of agency and identity, we develop an understanding of rights not as reified individual *possessions*, but as institutionalized instruments which mediate *relationships* between people. As Young argues:

rights are not fruitfully conceived as possessions. Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain action.⁷¹

The personal is political and we urgently need to reengage with this vital truth.

The second, similarly daunting, area in need of change required by an acknowledgment of constitutive relationality concerns what might be termed the attitudinal dimension of a rights-based concern for others. At the risk of simplifying a very complex and shifting set of issues concerning recognition rights, I suggest that many peoples' support for such rights is increasingly based upon feelings of affinity and approval of the substantial ways of being and believing seen to characterize minority communities. A combination of the weaponization of identity and the above-discussed blindness towards constitutive relationality results in a partiality for the human rights of some and a disregard for the experiences, interests, or human rights of others, particularly those seen as the significant others or antagonists of those whose recognition rights one is most concerned to protect. We can see evidence of this in the tendency to 'cancel' those who are seen to deviate from some purported distinguishing 'truths', and the manifest inequalities in what might be referred to as the 'political economy' of human rights concerns, as a direct consequence of the 'mobilization of bias' in favour of some communities at the expense of others.⁷² Richard Rorty's insights into the emotionality of human

⁷⁰Alasdair MacIntyre, *After Virtue: a Study in Moral Theory* (3rd ed University of Notre Dame Press 2007); Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge 2011).

⁷¹Young (n 14) 25.

⁷²Todd Landman, *The Political Science of Human Rights* (CUP 2005).

rights accounts for a profoundly important deviation away from the ethical impartiality that human rights entails.⁷³ Our emotional interests direct us towards the suffering of some and away from that of others.

Vulnerability is a key element in directing human rights concerns towards particular peoples. Indeed, some have argued that the entire human rights project should be based upon the normative condition of human vulnerability.⁷⁴ While vulnerability undoubtedly exerts a powerful influence upon what can be termed the social imaginary of human rights amongst many scholars and practitioners, the appeal to vulnerability raises difficult questions surrounding our collective ability to agree on what constitutes the kind of vulnerability capable of attracting human rights protections. As others have argued, vulnerability is deeply politicized in ways which too often exacerbate disagreement within diverse societies.⁷⁵ While identity has necessarily come to dominate so much of people's concerns for social justice, a focus upon the specific identities of some creates a partiality for the human rights of those one identifies with or seeks to be an ally of. An ethically coherent engagement with the human rights of vulnerable peoples must eschew such partial sentiments. A fundamental concern for *human* rights must include all peoples, not only those one feels an affinity towards.

The third and final area of change required by an acknowledgement of the constitutive relationality of agency and identity concerns the inclusion of an additional form of identity to human rights' engagement with identity politics: social class. As I have argued elsewhere social class, a core identity constituted through hierarchical relationships within capitalist societies, is largely conspicuous by its absence from human rights' engagement with identity.⁷⁶ In societies blighted by decades of neoliberalism, one can no longer ignore how social class adversely affects the lives of countless millions of people, as decreasing levels of social mobility in those societies expose many to lives of precarity, poverty, and destitution.⁷⁷

Social class intersects through many minority communities in ways which compound the discrimination and inequalities they suffer. It also affects the lives of people who do not conventionally qualify as members of recognized minorities entitled to additional human-rights-based protections. Blindness towards social class seriously undermines the prevailing human-rights-based model of recognition rights because it fails to pick up on how poverty compounds the vulnerabilities of many recognized minority communities and blights the lives of many who are not categorized as deserving of identity-based-human rights protections. No less a figure than Martin Luther King Jr. recognized the importance of widening the struggle against injustice to include poor white people, including those who succumbed to racism.⁷⁸

Recognizing social class as a ground of vulnerability means reassimilating a concern for the politics of redistribution within a substantially reformed understanding of identity politics and recognition rights, in which social rights are fully accepted as integral

⁷³Richard Rorty, *Truth and Progress: Philosophical Papers* (CUP 1998), 167.

⁷⁴Turner (n 31).

⁷⁵Asma T. Uddin, *The Politics of Vulnerability: How to Heal Muslim-Christian Relations in a Post-Christian America: Today's Threat to Religion and Religious Freedom* (Pegasus 2021).

⁷⁶Fagan (n 27).

⁷⁷Guy Standing, *The Precariat: the new dangerous class* (Bloomsbury 2014).

⁷⁸Tommie Shelby, & Brandon M. Terry, *To Shape a New World: Essays on the Political Philosophy of Martin Luther King, Jr.* (Belknap Press 2020).

elements of a robust human rights project. Widening human rights' engagement with identity might also enable a far wider constituency of people to appreciate its potential value for their lives, as Philip Alston as argued, and thereby directly challenge a widely held view that human rights exist only to promote the special interests of selected minorities.⁷⁹

Conclusion

Human rights currently faces serious challenges, including ongoing global conflicts surrounding identity. It would be easy to pessimistically offer a counsel of despair or double down on the prevailing human-rights-based response to identity politics—that is, recognition rights in their current form—in the hope that these problems are external to human rights and may, with time and enough moral condemnation, fade away. For me, as I have attempted to present in this article, neither of these constitute a credible or desirable response to the challenges in question. I have sought to set out a more constructively critical response: I am arguing that the human rights project has a key role to play in encouraging and facilitating dialogue among otherwise hostile parties through recognition of our constitutive relationality. I am also calling for a more political and thus less morally righteous disposition among many in the global human rights community, which some might interpret as entailing a diminution of the principles which human rights enshrine. I have sought to be clear that dialogue and deliberation cannot justify calling into question the moral equality which human rights is fundamentally based upon. I have not advocated for a retraction of recognition rights, but for their extension to include recognition of social class as a key factor in systemic injustice within many societies. Hopefully, what I have written here will encourage some readers to reflect again upon how human rights might develop more effective mechanisms for responding to the all-important challenge of identity politics.

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⁷⁹Philip P. Alston, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* 1.