



## Four Human Rights Myths

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# Four Human Rights Myths

Susan Marks<sup>\*</sup>

**Abstract:** This paper examines work by three scholars who have recently subjected the intellectual framework of human rights to critical scrutiny. For one, the central problem is that the universality of human rights is too readily presumed. For another, it is that the relative novelty of human rights is not properly appreciated. For yet another, it is that human rights are treated as somehow beyond politics, as opposed to being a politics in themselves. What are we to make of these claims? Where do they lead us in policy terms? How does each stand with respect to the core practical objective of putting abuses of human rights to an end?

In early August 2011 riots broke out in England. They started with the torching of two police cars in a suburb of London, and before long there was arson and looting in cities across the country. How could this happen? Why did it happen? There was much national soul-searching. In his initial response, British Prime Minister David Cameron denounced the riots as sheer deviance. ‘This is criminality, pure and simple’, he declared.<sup>1</sup> But it soon became clear that more needed to be said, and by the next week his analysis had shifted to highlight what he took to be the underlying problem, namely, ‘the slow-motion moral collapse that has taken place in parts of our country these past few generations[...] Irresponsibility. Selfishness. Behaving as if your choices have no consequences [...] Reward without effort. Crime without punishment. Rights without responsibilities [...]’<sup>2</sup>

In a later statement, Cameron elaborated on that last aspect of the moral collapse. ‘The greed and thuggery we saw during the riots did not come out of nowhere’, he said. ‘There are deep problems in our society’, among which is ‘a growing sense that individual rights come before anything else’. A ‘concerted

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<sup>1</sup> ‘David Cameron’s full statement on the UK riots’, *The Guardian*, 9 August 2011.

<sup>2</sup> Allegra Stratton, ‘David Cameron on riots: broken society is top of my political agenda’, *The Guardian*, 15 August 2011.

fightback' must be waged, and that 'means rebuilding the sense of personal responsibility that has been eroded over the years by [...] the twisting and misrepresenting of human rights'.<sup>3</sup> When the riots first began, Cameron emphasised that 'phoney human rights concerns' about publishing CCTV images of those involved would not be allowed to 'get in the way of bringing these criminals to justice'.<sup>4</sup> Now, however, he made a bolder, broader pledge to 'take on parts of the establishment' and stop human rights being used 'as cover for rules or excuses that fly in the face of common sense'.<sup>5</sup>

To those other and, of course, rather less powerful parts of the establishment, this was all dreadfully familiar. The 'cover' at stake was 'political cover for disagreeable court rulings', an attempt to evade the consequences of 'government being subject to the rule of law along with everyone else'.<sup>6</sup> Shami Chakrabarti, Director of the British human rights organisation Liberty, observed that it is in fact 'perfectly reasonable and permissible under [human rights law] to publish photos of wanted suspects'.<sup>7</sup> Surely the Prime Minister was the one who was 'twisting and misrepresenting' human rights? Likewise, the 'idea that [human rights law] somehow provides unfettered and limitless rights without any corresponding responsibilities is patent nonsense – respect for the rights of others is inbuilt into [human rights law] and rights can be limited for a number of legitimate reasons including public safety and national security'. In dismissing these claims, Chakrabarti announced that her organisation was launching its own new campaign, aimed at 'explaining, informing and mythbusting about a different article of the Human Rights Act every week'.<sup>8</sup>

Cameron's analysis also elicited another sort of response. If the riots were a symptom of irresponsibility, selfishness, greed and a sense of entitlement, *whose* irresponsibility, selfishness, greed and sense of entitlement were they a symptom of? Indeed, whose looting was at issue? Naomi Klein recalled Argentina's mass looting of 2001.<sup>9</sup> She explained that it was known as '*el saqueo*' – the sacking – and that that was the same word that had earlier been used to describe the sell-off of public assets in corrupt privatisation deals, leading to a brutal austerity package. 'Argentines understood', she wrote, 'that the *saqueo* of the shopping centres would not have happened without the bigger *saqueo* of the country'. Fast forward to 2011, and after massive bank bailouts and undiminished financial-sector bonuses, many governments of the world, including Cameron's, were implementing swingeing

<sup>3</sup> David Cameron, 'Human rights in my sights', *Sunday Express*, 21 August 2011.

<sup>4</sup> Nicholas Watt, 'UK riots: David Cameron defends police cuts in Commons sitting', *The Guardian*, 11 August 2011.

<sup>5</sup> David Cameron, 'Human rights in my sights', *Sunday Express*, 21 August 2011.

<sup>6</sup> Benjamin Ward, 'It is David Cameron who is "twisting and misrepresenting" human rights', *The Guardian*, 17 August 2011.

<sup>7</sup> Shami Chakrabarti, 'Spare us the dog whistle Prime Minister ...', 22 August 2011, <http://www.liberty-human-rights.org.uk/news/2011/spare-us-the-dog-whistle-prime-minister.php> (accessed 1 March 2012).

<sup>8</sup> Ibid.

<sup>9</sup> Naomi Klein, 'Looting with the lights on', *The Guardian*, 17 August 2011.

cuts that served to force the costs of financial crisis onto those who could least afford them. In this context, the homology was, for Klein, again plain: ‘the people committing night-time robbery sure as hell know that their elites have been committing day-time robbery’.<sup>10</sup> So although the rioters issued no political demands,<sup>11</sup> the riots were, in her assessment, inescapably political – not so much a mark of moral collapse as a sign of our ‘time of great taking’.<sup>12</sup>

In their respective contributions to this debate over the English riots of August 2011, Cameron, Chakrabarti and Klein each orient us in a different way in thinking about the interrelation of human rights, morality and politics. Cameron sets a moralistic tone. He is concerned about how human rights affect moral progress, or rather, how they promote moral decline. Chakrabarti is a professional defender of human rights. For her, on the contrary, it is necessary to insist on human rights as a core social good, and she worries about how politics may be used to undermine their legal protection. In Klein’s assessment, the real problem is instead depoliticisation – the transformation into moral panics of phenomena that are rooted in the political economy of contemporary capitalism. Klein does not refer to human rights in the article I spoke of. Yet that very silence prompts reflection. If, as she puts it, governments, financial institutions and other powerful economic agents are ‘looting with the lights on, as if there was nothing at all to hide’,<sup>13</sup> what kind of mythbusting about human rights is indicated?

That is the question I want to take up in this chapter, and in doing so, I want to consider three different projects of mythbusting. The projects I will discuss are not vindicationist campaigns like Chakrabarti’s. They are academic studies, undertaken for the sake of subjecting the general intellectual framework of human rights to critical scrutiny. But how, on what basis, and with reference to which perceived fallacies, illusions and mystifications? The first author I will discuss is Joseph Raz. As we shall see, he points to misconceptions touching on the justification for human rights and whether particular rights can be shown really to exist. The second author is Samuel Moyn. He analyses distortions to do with the history of human rights and how we tell it. And the final author is Wendy Brown. She criticises ideological representations that belong with the legitimisation of human rights advocacy. Together these three scholars put before us an array of human rights-related myths. But I shall argue that they leave out of account a powerful myth which itself affects those myths and which cannot be captured in their terms.

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<sup>10</sup> Ibid.

<sup>11</sup> The ‘trigger’ for the riots is widely believed to have been a protest in the north London suburb of Tottenham, arising out of the fatal shooting by the police of Mark Duggan. At that protest, political demands – calls for information about the circumstances of Duggan’s death and a proper investigation into possible misconduct by police officers – were issued.

<sup>12</sup> Naomi Klein, ‘Looting with the lights on’, *The Guardian*, 17 August 2011.

<sup>13</sup> Ibid.

## THE MYTH OF PRESUMPTIVE UNIVERSALITY

In an article published in 2010, Raz sets out to explore the role of human rights in what he refers to as the ‘emerging world order’.<sup>14</sup> By this he intends the post-1989 order of a ‘world growing smaller and more interdependent’ through enhanced communications technology and globalisation more generally.<sup>15</sup> He acknowledges that the recognition and implementation of human rights may not be the most important aspects of the emerging world order, but notes that they are nonetheless prominent aspects, so that the question of the role human rights play and could usefully play becomes significant. Connecting this question to his broader work, Raz begins his analysis with some observations about rights in general. There is discussion of ‘legal rights’, ‘moral rights’, ‘legal rights with moral force’, ‘legal rights with no moral force’ and the interrelation of those various categories. There is also discussion of certain basic features which he takes to be common to all rights. He then turns to consider human rights.

What kind of rights are these, and what is the justification for them? Raz is unpersuaded by the idea that these are rights we have purely by virtue of being human beings. He thinks they are rights everyone has because their objects – the things to which they entitle us – are of universal value. Putting those objects together, he declares that one crucial contribution of human rights to the emerging world order is in ‘underpinning its commitment to the value of human life’.<sup>16</sup> The fact that human rights are rights that belong to everyone means, he observes, that respect for those rights can be demanded by anyone, including people and organisations outside the country concerned. But he emphasises that this fact also ‘raises the bar for any claim that a particular human right exists’.<sup>17</sup> He believes that many scholars and activists underestimate the difficulty of the task they face, because they ‘labour under the illusion that all they need to do is to point to the importance of the alleged right or its object to the putative right-holders’.<sup>18</sup> Yet, as Jeremy Bentham once put it in another context, want is not supply, hunger is not bread.<sup>19</sup>

The specific issue that Raz seeks to highlight in this connection is the need to ‘establish a case for holding others under a duty to secure, at least to some degree and in some ways, the right-holders’ enjoyment of the rights’.<sup>20</sup> This duty he takes to be a feature of all rights – and therefore of human rights as one category of

<sup>14</sup> Joseph Raz, ‘Human Rights in the Emerging World Order’, 1 *Transnational Legal Theory* (2010) 31. See further Joseph Raz, ‘Human Rights without Foundations’ in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321.

<sup>15</sup> Joseph Raz, ‘Human Rights in the Emerging World Order’, 1 *Transnational Legal Theory* (2010) 31, 39.

<sup>16</sup> *Ibid.*, 41.

<sup>17</sup> *Ibid.*, 43.

<sup>18</sup> *Ibid.*

<sup>19</sup> See Jeremy Waldron (ed.), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987) 53. Unlike Bentham, however, Raz seeks to argue ‘not that the right does not exist’; ‘only that it is not a human right’. *Ibid.*, 44.

<sup>20</sup> *Ibid.*, 43.

rights. In the particular case of human rights, he considers that it poses a two-fold difficulty. On the one hand, there is the ‘process’-related difficulty that only limited procedures exist for overseeing and enforcing the international protection of human rights. In his judgement, ‘where there is no possibility of fair and reliable enforcement, there is no human right’.<sup>21</sup> On the other hand, there is also the ‘content’-related difficulty that arises from the ‘suspicion that claims – or some claims – of human rights are culturally biased’, and represent an attempt to impose ‘the ideas of the West [...] across the globe’.<sup>22</sup> ‘[C]ontrary to much current rhetoric’, he writes, most human rights are ‘not absolute’ and require sensitivity to cultural diversity and to the validity not only of other rights, but also of other ends than those they advance.<sup>23</sup>

That, in essence, is Raz’s analysis of the role of human rights in the emerging world order. It takes aim, as we have just witnessed, at what he does not call, but we might for convenience label, the ‘myth of presumptive universality’. For him, the key issue is whether a particular human right actually exists or not – that is to say, whether the supposed right exists as one that can be claimed by everyone – and that requires showing that some other agent or entity is under a duty to secure the enjoyment of the right, at least to some degree and in some way that is plausibly fair and reliable. Raz contends that scholars and activists discount this aspect, believing instead that universality can simply be read off, or presumed from, the importance, as they see it, of a right or its object. The problem is not just theoretical. It leads, he maintains, to ‘reckless activism’ that underrates the vital issue of enforcement through impartial and efficient institutions, and displays insufficient alertness to the non-absolute character of most human rights and to the variability of their significance.<sup>24</sup>

Is human rights activism really that reckless? Just as Chakrabarti accused Cameron of setting up straw men, so I think she might wish to ask Raz what this predominant rhetoric is that treats human rights as absolute, ignores local specificities, and downplays problems of enforcement. I think she might recall that questions of proportionality to competing social goods are at the centre of debates about the interpretation of human rights; that cultures are not themselves uncontested bodies of thought and practice, but that in any event universal applicability never has been heard to entail uniform application; and that deficiencies of international institutional oversight could scarcely be a more prominent theme of efforts to enhance the implementation of human rights. Beyond these points, I think Chakrabarti might also wonder about Raz’s claim that she and others engaged in human rights advocacy labour under the illusion that all they need to do is point to a need and a right will follow. I think she might observe in response that the specification of duties and duty-bearers, both

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<sup>21</sup> Ibid, 44.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid, 47.

<sup>24</sup> Ibid.

generally and in particular circumstances, is what the work of human rights organisations is in large part about.

Yet it will appear, as our discussion proceeds, that these are not only grounds on which Raz's analysis might be challenged, and nor are they necessarily the most telling ones. For the moment, we might simply raise the question of how it is that human rights can, as he proposes, underpin a global 'commitment to the value of human life' when the most conspicuous fact about the current world order is that there exists no such generalised commitment, inasmuch as some lives are endowed with very much more value than others. To bring another critique into focus, let us turn now to my next author. Samuel Moyn shares Raz's interest in the role human rights play and could usefully play in the global order. He also shares Raz's anxieties about the current state of human rights practice. He too is concerned that the human rights movement may be overreaching itself, and that well-intended ambitions may be undermining the prospects for effective, prudent and appropriate action. But for him, the problems that are faced cannot adequately be elucidated through formal analysis. Historical investigation is necessary of the emergence and evolution of the human rights 'phenomenon'. Whereas it is a given of Raz's enquiry that human rights are a significant factor in world affairs, Moyn finds it crucial to determine how and when they became so.

### THE MYTH OF DEEP ROOTS

In his recent book, *The Last Utopia*, Moyn advances the claim that human rights are a much newer phenomenon than is generally supposed.<sup>25</sup> The standard story is that human rights rose to prominence in the second half of the 1940s, with the adoption of the Universal Declaration of Human Rights as the decisive step, and with forerunners in the late 18th century rights charters of France and America. For Moyn, however, those revolutionary charters bear little relation to human rights, which are concerned with rights against the state, not popular sovereignty. As for the 1940s, the period of post-war reconstruction was not the watershed commonly portrayed. The Universal Declaration of Human Rights failed to launch its putative project in any meaningful way, and nor were human rights rescued from obscurity by developments in the 1950s or 60s. In his assessment, the true starting-point for the history of human rights as we now know them is the mid-1970s. It was then that they became a movement, a mode of activism, and a language of claim, aspiration and justification that would be heard throughout the world.

What was the context in which this occurred? Moyn highlights a range of events: the turn to human rights in US foreign policy, the signing of the Helsinki

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<sup>25</sup> Samuel Moyn, *The Last Utopia* (Cambridge, MA: Harvard University Press, 2010).

Final Act and establishment of the Conference on Security and Co-operation in Europe (now Organization for Security and Co-operation in Europe), the invocation of human rights by Soviet and later Central and Eastern European dissidents, the use of human rights to denounce abuses in Latin America, the award to Amnesty International of the Nobel Peace Prize, and the actualisation and expansion of measures for the protection of human rights within the United Nations and in Europe. But the key development which, as he sees it, explains all the rest is one signalled in the title of his book: human rights became ‘the last utopia’. This claim needs some unpacking. On the one hand, it involves the idea that human rights are a sort of utopia. Moyn uses the term ‘utopia’ in a simple, untheorised sense. Human rights are, for him, utopian because they evoke a vision of ‘another, better world’,<sup>26</sup> and because they champion standards and inspire passions by drawing on ‘the image of a place that has not yet been called into being’.<sup>27</sup>

On the other hand, his claim regarding the ‘last utopia’ also involves the idea that human rights have displaced alternative utopias. In his words, human rights ‘became powerful and prominent because other visions imploded’;<sup>28</sup> they ‘are best understood as survivors: the god that did not fail while other political ideologies did’.<sup>29</sup> The ‘god that failed’ was, of course, communism, as seen by ex-communists who had repudiated it.<sup>30</sup> But while Moyn highlights the ‘anti-totalitarianism’ of this period, he also stresses the ‘anti-politics’. If human rights avoided failure, he explains that this was ‘most of all because they were widely understood as a moral alternative to bankrupt political utopias’.<sup>31</sup> Their success ‘depended on leaving behind political utopias and turning to smaller, more manageable moral acts’.<sup>32</sup> Human rights thus involved the ‘substitution of moral for political utopianism’.<sup>33</sup> They were a ‘minimalist, hardy utopia that could survive in the harsh climate’ of the post-oil shock era, with its straitened economic circumstances and ‘mistrust of more maximal plans for transformation – especially revolutions but also programmatic endeavours of any kind’.<sup>34</sup>

Moyn contends, however, that in recent years things have begun to change. While human rights emerged out of the anti-totalitarianism and anti-authoritarianism of the 1970s, today their agenda is much larger. As the ‘last utopia’, they have been called upon to address not just repression and violence, but ‘humanitarian’ concerns about suffering in all its forms. And to do this – to retain their relevance in contemporary conditions – they have needed to give up the ‘pure struggle of morality’ and ‘enter the realm where political visions clash,

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<sup>26</sup> Ibid, 4.

<sup>27</sup> Ibid, 1.

<sup>28</sup> Ibid, 5.

<sup>29</sup> Ibid.

<sup>30</sup> Richard Crossman (ed.), *The God That Failed* (London: Hamilton, 1950).

<sup>31</sup> Samuel Moyn, *The Last Utopia* (Cambridge, MA: Harvard University Press, 2010), 5.

<sup>32</sup> Ibid, 14.

<sup>33</sup> Ibid, 171.

<sup>34</sup> Ibid, 121.



with its hard choices, compromising bargains and dirty hands'.<sup>35</sup> That is to say, they have needed to move from 'morality' to 'politics', and from 'antipolitics to program'.<sup>36</sup> In turn, this has meant '[assuming] the very maximalism they triumphed by avoiding'.<sup>37</sup> Yet Moyn observes that human rights 'still trade on the moral transcendence of politics'.<sup>38</sup> He concludes with the thought that it may not then be 'too late to wonder whether the concept of human rights, and the movement around it, should restrict themselves to offering minimal constraints on responsible politics, not a new form of maximal politics of their own'.<sup>39</sup>

Moyn is very clear that his 'last utopia' is not an end of history. In debunking what he refers to as the 'myth of deep roots',<sup>40</sup> he wants us to understand the ascent of human rights as not just more recent, but also less inevitable, than is commonly supposed. Rather than using history to memorialise human rights or confirm the self-evidence of their triumph, he believes we should use it to 'register the choices that were made and the accidents that happen'.<sup>41</sup> As he registers those choices and accidents, the early postwar decades were a period of miscarriage for human rights. Then came the 1970s, and – quite suddenly, in his account – human rights arrived. Opposing 'minimalism' to 'maximalism', and 'morality' to 'politics', he tells a story in which human rights triumphed by avoiding maximalism, but then came to embrace it. So now the choice returns. The way he puts it is that the human rights movement can either go on trying to '[build] utopia through maximalist political vision', or it can, in effect, renounce utopianism and strengthen itself as a tool for 'preventing catastrophe through minimalist ethical norms'.<sup>42</sup>

What are we to make of these claims? Well, if Chakrabarti might have words for Raz, I think Klein might likewise have words for Moyn. Indeed Klein *has had* words on the subject of the relative recentness of human rights as a distinctive mode of activism and advocacy.<sup>43</sup> For her too, the human rights movement as we know it today took shape during the 1970s. And for her too, a defining characteristic of the new movement was its non-political creed. But her angle on this story differs from Moyn's in two notable respects. In the first place, she considers that a rather important aspect of the context for the movement's emergence is one Moyn omits to mention: the rise in that period of the neo-liberal version of 'private' capitalism, with its now familiar policy prescription of privatisation, deregulation and state retreat from social provision. To its influential

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<sup>35</sup> Ibid, 217.

<sup>36</sup> Ibid, 218.

<sup>37</sup> Ibid, 9.

<sup>38</sup> Ibid, 227.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid, 12.

<sup>41</sup> Ibid, 5.

<sup>42</sup> Ibid, 226.

<sup>43</sup> See Naomi Klein, *The Shock Doctrine* (London: Penguin, 2007), 118. I discuss Klein's analysis in 'Human Rights and Root Causes', 74 *Modern Law Review* (2011) 57.

enthusiasts then and now, *that* is the last utopia.<sup>44</sup> But equally, Klein believes – secondly – that part of the context for the consolidation of neo-liberalism itself was the emergence of the human rights movement, with its non-political creed. For where the effects of neo-liberal reconstruction began to bite, activists confined their criticism to the denunciation of abuses, leaving unchallenged the conditions in which those abuses had become possible and even, in some sense, rational.<sup>45</sup>

From Klein's perspective, then, the history of human rights cannot be told in isolation from developments in the history of capitalism. And once the link is made, it casts in a new light the idea of human rights as the last utopia. What is this utopia that becomes available when 'utopia' spells 'totalitarianism' and all imagining of revolutionary social transformation only seems to lead to disaster? What is its relation to the utopia of the 'free market' – or, for that matter, the utopia of the 'welfare state'? Moyn wonders whether it might not be better to go back to offering 'minimal constraints on responsible politics'. Idealism and realism come together in his story in the idea that we may need to give up 'utopian politics', and limit ourselves to 'catastrophe prevention'. Yet we know that minimalism never has been minimalism, that anti-politics is also politics, and that constraints on responsible politics are themselves social programmes. We know too that catastrophes are not sudden disturbances or outbreaks – what makes them catastrophic is the 'slow violence'<sup>46</sup> of inherited phenomena – and we know that nothing is more utopian than the idea that 'minimalist ethical norms' could or will prevent them.

## THE MYTH OF NO POLITICS

My final author will help us to explore these points further. In an article that appeared in 2004, Wendy Brown discusses the ideology of human rights activism.<sup>47</sup> The article is actually framed as a response to a text by Michael Ignatieff,<sup>48</sup> but for our purposes there will be no need to refer to that text, as the tenor of her analysis is quite general. She is interested in the human rights movement's claim to be engaged in a 'pure defence of the innocent and powerless against power'.<sup>49</sup> Even where the politics of the endeavour are acknowledged, she observes that this claim typically remains in place, inasmuch as by 'politics' is

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<sup>44</sup> If it is significant that Amnesty International won the Nobel Peace Prize in 1977, perhaps it should also be remembered that Milton Friedman won the Nobel Prize for Economics in 1976.

<sup>45</sup> See Naomi Klein, *The Shock Doctrine* (London: Penguin, 2007), 126.

<sup>46</sup> See Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge, MA, Harvard University Press, 2010).

<sup>47</sup> Wendy Brown, "'The Most We Can Hope For ...': Human Rights and the Politics of Fatalism, 103 *South Atlantic Quarterly* (2004) 451.

<sup>48</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001).

<sup>49</sup> Wendy Brown, "'The Most We Can Hope For ...': Human Rights and the Politics of Fatalism, 103 *South Atlantic Quarterly* (2004) 451, 453.

understood pragmatism – the pragmatic deployment of rules, procedures and arguments to uphold the human dignity of all. Brown wants us to see that there is no such thing as a pure defence of the innocent and powerless, and that human rights are, in any event, not just defences against power, but themselves significant forms of power. Let us start with the first part of this. At one level, she is simply reminding us that all projects overflow their own boundaries; both in what drives them and in their outcomes, there is always contradiction, never ‘pure’ positivity.

At another level, however, she is calling attention to the particular effects of activism that is at once ‘non-political’ (or ‘pragmatic-moral’) and ‘empowering’. Among these are the following three. First, it predicates an anti-political form of subjectivity, in which the subjects of human rights are cast, not as participants in a collective project, but, on the contrary, as ‘yearning to be free of politics and, indeed, of all collective determinations of ends’. In other words, ‘human rights discourse not only aspires to be beyond politics’; it ‘carries implicitly antipolitical aspirations for its subjects’.<sup>50</sup> Second, this kind of activism ratifies the social and systemic constraints within which even those anti-political aspirations – let alone more ‘political’ ones – might be fulfilled. Empowerment is understood as agency within existing constraints; those latter are never in question. Thirdly, and in consequence of the first two effects, there arises an ‘unresolved interval between the expressly moral and antipolitical discourse of human rights’, on the one hand, and its promise of empowerment and democratisation, on the other.<sup>51</sup>

This brings us to the second part of what Brown wants us to see: that human rights are not just defences against power, but themselves significant forms of power. She observes that power tends to be represented by the human rights movement (and in much scholarly literature upon it) as a zero-sum game: rights against the state are the measure of power removed from it and put into the hands of the citizenry. Yet theorists of power have long taught that this is not, in reality, how things work. One reason is simply that ‘power does not only come in sovereign or juridical form’. But another reason is that rights are themselves ‘an aspect of governmentality, a crucial aspect of power’s aperture’.<sup>52</sup> Brown writes here with civil and political rights primarily in mind, but the idea that human rights are themselves aspects of governmentality applies with equal, if not greater, force to the case of economic and social rights. Enhanced social protection is one side of a coin which has as its other face enhanced social control and defence of the arrangements that throw up (and keep throwing up) the need for protection.

For Brown, then, the vindication of human rights is never just that. ‘It is a politics, and it organizes political space, often with the aim of monopolizing it.’<sup>53</sup> What sort of politics is it? In another work, Brown analyses the larger

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<sup>50</sup> Ibid, 456.

<sup>51</sup> Ibid, 459.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid, 461.

phenomenon of political moralism, to which she alludes in this article.<sup>54</sup> ‘Rather than offering analytically substantive accounts of the forces of injustice or injury’, she writes, moralistic discourses ‘condemn the manifestation of these forces in particular [...] events’.<sup>55</sup> This leads to a ‘politics of rhetoric and gesture’,<sup>56</sup> which ‘misleads about the nature of oppressive social forces, and about the scope of the project of transformation required by serious ambitions for justice’.<sup>57</sup> States, for instance, are treated, not as entities with specific political-economic investments, but rather as if, in allowing inequality to persist, they were ‘momentarily misguided [parents] who forgot [their] promise to treat all [their] children in the same way’.<sup>58</sup> Brown observes that that kind of obfuscation is not generally the aim of moralisers. But she considers that it is among the displaced effects of a ‘felt yet unacknowledged impotence’. Put differently, it ‘signals despair over the prospects for more far-reaching transformations’.<sup>59</sup>

We saw earlier that, in Raz’s assessment, the human rights movement confronts us with the danger of ‘reckless activism’. For Moyn too, there is a ‘maximalist’ drift which risks diluting the movement’s strength and compromising its achievements to date. To Brown, however, as the passages I have just quoted already suggest, the problem is quite the reverse. The politics of human rights is a ‘politics of fatalism’.<sup>60</sup> One is supposed to condemn abuses, but not to provide analytically substantive accounts of the forces that produce them. One is urged to relieve suffering, but not to develop insight into why it occurs. Yet, of course, if we do not understand why violations occur, then we do not understand what it will take to stop them from recurring. For all the hopefulness of the human rights movement and all its dedication to the cause of ‘another, better world’ (to recall Moyn’s phrase), what appears from this angle is an overriding melancholy.<sup>61</sup> The point is not so much that melancholy *per se*; it is how the renunciation of hopes for significant and lasting change affects the *prospects* of such change. Fatalism is a politics because, and to the extent that, by treating actuality as though it were fate, activists help to make it become so.

Brown’s analysis also departs from Raz’s and Moyn’s in another respect. The myths they identify are myths *about* human rights. In contrast, the ‘myth of no politics’ (as we might term it) involves a claim about the mystifying character of human rights themselves – the way they mystify us about the world and their own engagement with it. One aspect of what is at stake can be captured with the observation that, just as the human rights movement presents its project as ‘pure defence’, so too it presents its subject-matter as ‘pure suffering’. Abuses heave into

<sup>54</sup> Wendy Brown, *Politics Out of History* (Princeton, NJ: Princeton University Press, 2001), chap. 2.

<sup>55</sup> Ibid, 35.

<sup>56</sup> Ibid, 36.

<sup>57</sup> Ibid, 37.

<sup>58</sup> Ibid, 36.

<sup>59</sup> Ibid, 37.

<sup>60</sup> Wendy Brown, “‘The Most We Can Hope For ...’: Human Rights and the Politics of Fatalism”, 103 *South Atlantic Quarterly* (2004) 451, 453.

<sup>61</sup> See further Wendy Brown, *Politics Out of History* (Princeton, NJ: Princeton University Press, 2001), chap. 7, esp. 168 *et seq.* (though there the discussion is of a specific form of ‘left melancholia’).

view as so many senseless brutalities, random delinquencies, or mistakes that should never have been made. Brown directs attention to this aspect when she writes of how, in considering the persistence of inequality, moralistic discourse treats states as though they were momentarily misguided and forgetful parents. Were the problem indeed simple misguidedness or forgetfulness on the part of responsible officials, then clearly the solution would lie with initiatives to promote a more serious, careful and informed attentiveness to the obligations correlative to human rights – perhaps through enhanced monitoring, greater accountability, and improved technical assistance. But insofar as the problem and its solution implicate also the wider context within which governmental misguidedness and forgetfulness themselves arise, Brown is signalling that the politics of fatalism is a politics of rhetoric and gesture.

### THE MYTH OF THE DANGEROUS DARK

As promised, there will be one more myth in my story. However, I have been speaking of mythmaking and mythbusting without as yet saying anything about the central concept that is involved, and I want first to pause to dwell a little on that concept. What is myth? We are obviously not talking here about fables that tell of supernatural beings or forces, so let us move straight to the ‘critical’ sense of myth that is used in public political discourse and in academic analysis of society and culture. To speak of myth in this sense is to speak of misconceptions, false opinions, or erroneous beliefs that are widely held. Demystification (or, in less jargonistic language, mythbusting) is the act of exposing such misconceptions, false opinions and erroneous beliefs, so that we are no longer in thrall to them. Through demystification, collective delusions are revealed and thereby reduced or removed. In his famous work on myth, written during the 1950s, Roland Barthes identified myth with the dubious common sense of the prevailing culture – that which ‘goes without saying’ but which, when actually said, begins to appear ‘falsely obvious’.<sup>62</sup>

Barthes’s work brought out the way myth, although misleading, is socially and politically operative. Its falsity coexists with a truth that arises from being part of reality, rather than a mere figment of our imaginations. But if myth is not simple falsehood, others have emphasised that it is also not simple delusion. According to Marina Warner, there is doubt as to whether even the ancient Greeks believed in, or accepted, their myths (to refer to myth in the different, but related, sense I put aside) in the manner of later religious faith.<sup>63</sup> When it comes to (post-)modern times, Peter Sloterdijk’s well-known account of ‘cynical reason’ points to a

<sup>62</sup> Roland Barthes, *Mythologies*, A. Lavers, trans. (London: Vintage, 2000), 11.

<sup>63</sup> Marina Warner, *Managing Monsters: Six Myths of Our Time* (London, Vintage, 1994).

condition of ‘enlightened false consciousness’.<sup>64</sup> This is a form of consciousness which is without illusions ‘and knows itself to be without illusions’. As Sloterdijk characterises it, enlightened false consciousness is a ‘collaborating consciousness’: ‘dragged down by the “power of things”’, it experiences itself as compelled to ‘put up with preestablished relations’, and ‘finally even to carry out their business’; after all, ‘[o]thers would do it [...], [and] perhaps worse’.<sup>65</sup>

Where there is cynical reason, demystification is ‘already reflexively buffered’,<sup>66</sup> for action takes place not in ignorance, but in full knowledge. Cynicism is thus to be understood as ‘the reply of the rulers and the ruling culture’ to those who would confront them with their self-authorising myths; they see that what the critics describe is true, ‘but proceed with oppression’ anyway.<sup>67</sup> If we return now to where we left off, I was speaking about the mystifying character of human rights, and in particular about the myth, as we may term it, of pure suffering. This is the idea that the violation of human rights is a failure of national and international governance, as distinct from a problem that implicates also wider systemic processes, dynamics and institutions. It is the idea that becoming the victim of a violation is an adventitious misfortune, rather than a state of affairs that depends crucially on vulnerabilities that are systematically produced and reproduced. And it is the idea that the suffering of victims is only about suffering, and has nothing to do with the historical legacies and current realities of exploitation, domination and dispossession. Does anyone really believe this myth? I think it is fairly clear that the answer is no.

This brings me to my final myth, which I shall call the myth of the dangerous dark. A powerful theme of human rights literature and advocacy is that the worst abuses happen, so to speak, under cover of darkness. Incommunicado detention is a breeding ground for torture. Secret prisons are where arbitrary execution most often occurs. From the beginning, a central ambition of the human rights movement has been to shine a light into these hidden spaces, so that the outside world can see what is going on there and those on the inside can see that we see. But what if the worst abuses do not happen under cover of darkness? Or if they do, what if the enabling conditions for those abuses do not arise or subsist under cover of darkness? What if the violation of human rights is fundamentally a matter of things that occur in broad daylight – facts that we all know about; events that unfold in our presence; practices, policies and rationalities that belong with a way of organising collective life which seems so self-evident and so commonsensical there is no need even to name it?

If indeed we should be most concerned with what happens in broad daylight (or, in Klein’s phrase, ‘with the lights on’), then perhaps the key myth is mystification itself – the myth of myths. Or perhaps instead it is the

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<sup>64</sup> Peter Sloterdijk, *Critique of Cynical Reason*, M. Eldred, trans. (Minneapolis: University of Minnesota, 1987).

<sup>65</sup> Ibid, 6.

<sup>66</sup> Ibid, 5.

<sup>67</sup> Ibid, 218.

commonsensical and self-evident character of that way of organising collective life. At a meeting in the United States of the Republican Governors Association, held in late 2011, Republican Party officials asked their candidates not to use the word ‘capitalism’. ‘We’re replacing it with either “economic freedom” or “free market”’, explained one strategist. He continued: ‘The public ... still prefers capitalism to socialism ... [but] if we’re seen as defenders of quote, Wall Street, end quote, we’ve got a problem’.<sup>68</sup> The human rights movement appears to have followed a broadly similar approach, albeit for different reasons and with codings that are generally negative, rather than positive. Thus, the talk in human rights reports, as well as in the academic literature, is of how human rights stand with respect to ‘the market’ or to ‘globalisation’, ‘economic liberalisation’, or ‘neo-liberalism’. Near the beginning of this chapter, we encountered Raz’s reference to the idea of the ‘emerging order’ of a ‘world growing smaller and more interdependent’. It’s a familiar trope and, in the face of persistent global relations of privilege and dependency, one of contemporary capitalism’s most seductive fantasies. Of course, capitalism is just another word. But then, if Barthes is right, our venerable, adaptable, polymorphous mode of production remains an enveloping reality so long as it ‘goes without saying’; it begins to appear ‘falsely obvious’ only once it is said.

## HUMAN RIGHTS BY DAYLIGHT

The myth of the dangerous dark takes up the old saw that the most effective hiding place may be out in the open since no-one would ever think to search there. In doing so, it reminds us of our capacity for looking at the world without actually seeing it. In this final part of my discussion I would like to explore a little further what may be at stake here by returning to the English riots of August 2011. In particular, I would like to highlight one aspect of the response on which I did not touch at the beginning. After three nights – for the riots were indeed a phenomenon of the night – morning brought a striking development. Hundreds of people, armed with brooms, dustpans, brushes, bin bags and rubber gloves, turned out to clean up the debris. The volunteers were apparently mobilised by a campaign coordinated on Twitter and Facebook. Among the organisers was Dan Thompson, an artist who worked on community art projects. Thompson

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<sup>68</sup><http://news.yahoo.com/blogs/ticket/republicans-being-taught-talk-occupy-wall-street-133707949.html> (accessed 1 March 2012). In contrast, political leaders in the United Kingdom initiated a debate during the same period over what might be termed ‘capitalism with adjectives’: ‘responsible capitalism’ as opposed to ‘predator capitalism’, ‘popular capitalism’ as opposed to ‘turbo-capitalism’. See, e.g., Nicholas Watt, ‘David Cameron pledges era of “popular capitalism”’, *The Guardian*, 19 January 2011. Of course, this has the same effect as the US Republican Party strategy of placing capitalism itself beyond question, and legitimises a similarly narrow range of ‘responsible’ and ‘popular’ policy options.

remarked on how the campaign had changed things: ‘People have said they woke up this morning feeling fear, but they now feel optimistic ... It’s a movement’.<sup>69</sup>

The image of the Blitz-spirited, broom-wielding volunteers was to become as much a symbol of the riots as that of the hooded looters themselves. But what kind of symbol was it? What kind of movement was it? Concentrated, at least initially, in certain highly gentrified neighbourhoods of south London, it was, in the assessment of one commentator, a ‘strikingly middle-class, broadly white [effort] to sweep issues of inequality under the carpet’.<sup>70</sup> Behind the ‘thinly veiled symbolism of social cleansing’, there emerged a rhetorical division between the ‘real Londoners’, to whom the city rightly belonged, and their opposite, the “inauthentic” Londoners’ or ‘feral rats’ who had no right to the city.<sup>71</sup> Already hit by unemployment, poor housing, benefit cuts, the lack of educational opportunities, and relentless police harassment, those latter became burdened still further; they were now ‘bad citizens’ whose primary social function was to make all the more vivid what and who was a ‘good citizen’ (and where he and she lived). This commentator went on: ‘I do not wish to denigrate people who want to help each other out as best they can or to express their social solidarity in some way, but this cannot be at the expense of further exclusion and segregation’.<sup>72</sup> At the same time, she wrote, ‘I do not wish to applaud [the acts of those who have caused] suffering to others’; however, the solution was not to ‘paper over the cracks’ with a simulacrum of societal cohesion.<sup>73</sup>

It is difficult to be critical of the work of Dan Thompson and his well-meaning clean-up brigade. No-one wishes to denigrate community projects born of public-spiritedness and a sense of solidarity with those whose peace has been disturbed or indeed destroyed. The same applies – in spades – to that other ‘civil society’ movement which is the primary subject of this paper. Yet, as David Kennedy has argued, we need to be very careful of treating human rights as objects of veneration.<sup>74</sup> We need to be very careful of letting ourselves get carried away by concerned citizenship and good causes. The three authors I have discussed plainly agree with that proposition, though each for different reasons.<sup>75</sup>

<sup>69</sup> Dan Thompson, ‘Get up, clean up, sweep away the riots’, *The Guardian*, 9 August 2011.

<sup>70</sup> See ‘#riotcleanup or #riotwhitewash?’, 10 August 2011, <http://universityforstrategicoptimism.wordpress.com/2011/08/10/riotcleanup-or-riotwhitewash/> (accessed 1 March 2012). For further discussion of this text, see also <http://universityforstrategicoptimism.wordpress.com/2011/08/12/riotwhitewash-sofia-himmelblau-responds-to-her-critics/> (accessed 1 March 2012).

<sup>71</sup> ‘#riotcleanup or #riotwhitewash?’, 10 August 2011, <http://universityforstrategicoptimism.wordpress.com/2011/08/10/riotcleanup-or-riotwhitewash/> (accessed 1 March 2012).

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ *European Human Rights Law Review* (2001) 245. For him, this is because human rights ought to be viewed instead as ‘objects of calculation’, so that not only the benefits but also the costs of invoking them are adequately and appropriately weighed. I discuss this analysis in ‘False Contingency’, 62 *Current Legal Problems* (2009) 1, 13–14.

<sup>75</sup> For criticism of human rights ‘idolatry’, see also Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001).



Raz emphasises the need to pay attention to the justification for human rights. There is no presumptive universality, and we should not allow ourselves to blunder into unjustified and ‘reckless’ activism. Moyn shares this concern with reckless activism but considers that it is best understood in historical terms. Lacking deep roots, human rights emerged historically as a ‘minimalist utopia’, which is now at risk of over-inflation. For her part, Brown highlights the limits of just that ‘minimalism’. The claim to ‘no politics’ is itself political, and the idea that human rights involve a pure defence of the innocent and powerless against power must be criticised as ideology.

Brown shows how, behind the human rights movement’s dedication to the cause of another, better world is a deep and abiding pessimism. As with the post-riot clean-up, doughty optimism coexists with a form of engagement that rules out collective political – that is to say, potentially transformative – agency in advance. The project is to keep calm and carry on, even if that means pressing into service a simulacrum of social cohesion. For human rights too paper over the cracks that are the context for indignity and unfreedom. Human rights too sweep the systemic basis of inequality under the carpet, and seek to wipe ills away. To be sure, discrimination is well and truly on the agenda. But what accounts for discrimination in all its various forms? What assures its persistence, and therefore needs to change if it is to be eliminated? When it comes to social exclusion, our large catalogue of internationally protected human rights does not encompass the ‘right to the city’.<sup>76</sup> We have no legal language for challenging the division of societies into ‘good’ citizens and ‘bad’ ones, just as we have no legal vantage-point from which to examine how ‘night-time robbery’ and ‘day-time robbery’<sup>77</sup> might be linked.

In my opening remarks, I referred to a statement by Shami Chakrabarti parrying David Cameron’s claim that the riots were a symptom of the overblown significance and corrosive effect of human rights. What I did not mention then was the title of her statement: ‘Spare us the dog whistle Prime Minister’.<sup>78</sup> The human rights movement knows that it is engaged in a politics of rhetoric and gesture. It knows that, last utopia or not, human rights stand today for a highly ritualised set of interventions and interactions. Yet when the whistle sounds, the activists still come running. They have to come running; as Chakrabarti would rightly say, that’s their job. But if it’s our job as theorists to subject this work to critical scrutiny, then I believe we need to move the discussion beyond moralism and anti-politics. More than that, the thrust of my argument is that, in this ‘time of great taking’,<sup>79</sup> our most urgent task is to challenge fatalism, resist melancholy, and

<sup>76</sup> Regarding this concept, see David Harvey, ‘The Right to the City’, 53 *New Left Review* (Sep-Oct 2008) 23 and *Rebel Cities* (London and New York: Verso, 2012).

<sup>77</sup> Naomi Klein, ‘Looting with the lights on’, *The Guardian*, 17 August 2011.

<sup>78</sup> Shami Chakrabarti, ‘Spare us the dog whistle Prime Minister ...’, 22 August 2011, <http://www.liberty-human-rights.org.uk/news/2011/spare-us-the-dog-whistle-prime-minister-.php> (accessed 1 March 2012).

<sup>79</sup> Naomi Klein, ‘Looting with the lights on’, *The Guardian*, 17 August 2011.

refocus the gaze of the human rights movement onto what currently remains hidden in plain sight.