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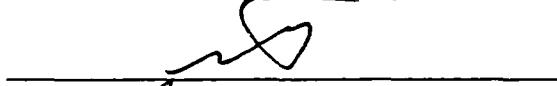
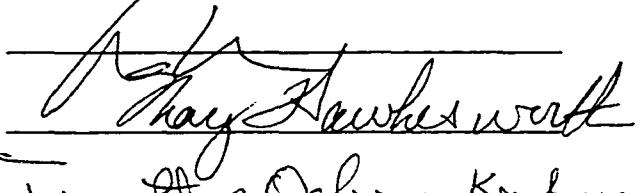
READING RIGHTS:
FEMINISM AND THE POLITICS OF RESISTANCE
by
KAREN DALE ZIVI

A Dissertation submitted to the
Graduate School-New Brunswick
Rutgers, The State University of New Jersey
in partial fulfillment of the requirements
for the degree of
Doctor of Philosophy
Graduate Program in Political Science

written under the direction of

Professor Linda Zerilli

and approved by

Karen Dale Zivi
Timothy Osborne-Kaufman (TOK)

New Brunswick, New Jersey

January 2001

UMI Number: 3000874

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ABSTRACT OF THE DISSERTATION

Reading Rights: Feminism and the Politics of Resistance

by KAREN DALE ZIVI

Dissertation Director:

Linda Zerilli

Are rights an effective tool of political resistance for women? In response to critiques that suggest rights serve mainly to mask and reinforce hegemonic power, I argue for a renewed appreciation of rights' contestatory potential. I suggest that rights can enable political and social transformation in ways overlooked or obscured by contemporary rights critiques. I develop what I call a "political reading of rights" by turning to the work of Hannah Arendt, John Stuart Mill, and Michel Foucault. While Arendt shows that the transformative power of rights derives from their status as unstable products of civic engagement, Mill's work suggests that rights engender rather than simply foreclose political discussion, and contest rather than reinforce social customs. In addition, Foucault illustrates that rights are a powerful language through which to contest and reconfigure, rather than codify, existing relations of power and the attitudes upon which they are based. I explore the implications of a political reading of rights through an analysis of rights in the context of debates over mandatory HIV testing of pregnant women and newborns.

ACKNOWLEDGEMENTS

Although attributed to a single author, the dissertation is by no means the work of one person. This project would not have been possible without, and is certainly much stronger because of, the assistance and support of the wonderful teachers, colleagues, friends, and family that I am fortunate enough to have in my life.

I would like to thank my committee members for their willingness to think out loud with me and to support my attempts to bring seemingly disparate interests together. To Linda Zerilli who continues to teach me what it means to be a feminist political theorist, whose intellectual acuity and willingness to engage ideas is truly inspiring. To Gordon Schochet who encouraged me to take intellectual risks and then reminded me to “just write it down.” To Mary Hawkesworth who was able to show me the big picture when I would get lost in the details and whose faith in me I borrowed during times of uncertainty. And to Tim Kaufman-Osborn who, despite joining the committee late, engaged my work with an intellectual rigor and a spirit of generosity that made my work stronger and set a standard for the kind of reader I hope to be for others. It has been a privilege to have such scholars on my dissertation committee. They have taught me not only how to think and write, but also how to be invested politically and how to be a good colleague. I hope to be fortunate enough to continue learning from them in the years to come.

I could not have written this dissertation, nor survived with my sanity in tact without the generosity of time, intellectual energy, and compassion shown by my friends. Laurie Naranch has been the kind of friend we should all be fortunate enough to have in our lives. Always willing to read or talk about a draft, Laurie was also always ready with a smile and words of support. Michael Ferguson, whom I met in the later stages of the dissertation, not only made my new life in Cambridge much easier, but also offered the kind of generous and critical feedback on my work that was both challenging and

encouraging. The work is smarter because Michaele read it. David Guterman, Farid Abdel-Nour, Jill Locke, Jennet Kirkpatrick, and Ronnee Schreiber, in various combinations and at different times part of rotating dissertation and support groups, provided the intellectual engagement and comic relief that was essential to the completion of this project. I am grateful to have them as friends and colleagues. And to Suzanne Strulowitz and Joanne Fernando for reminding me that I do have a life outside of graduate school.

My parents, whose faith in me has never wavered, despite my attempts at wearing them down, were also essential to the process. They taught me to be intellectually curious, and to enjoy ideas and learning. And they provided me with strength and comfort when I needed an escape from graduate school. On some days it was only the thought that I too would be, like my mother, “Dr. Zivi,” that kept me going.

And finally to my partner, best friend, and husband Michael Moody. It's not easy to capture in words his contributions to this project. He has spent countless hours discussing ideas with me, indulging my desire to look at them inside and out. He has provided even more hours of support, taking time out of his own work to cheer me on and to make sure I had food to eat. And he reminded me that we had a life to enjoy beyond the dissertation, a life that we also needed to enjoy even while working on the dissertation. Michael inspires me to be a better scholar and person on a daily basis. I dedicate this work to him.

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Chapter One

Introduction:

Reading Rights as Political

Introduction

In the summer of 1848, a group of individuals gathered at Seneca Falls, New York to discuss the "social, civil and religious conditions and rights of women."¹ Those attending this first Women's Rights Convention catalogued the "repeated injuries and usurpations on the part of man toward woman" and worked together to envision a more just and equitable future. They captured these ideas in the "Declaration of Sentiments." Drawing directly on the language and spirit of the Declaration of Independence, the Seneca Falls delegates demanded that women be recognized as endowed with "inalienable rights." They demanded that women be granted the right to vote, the right to education, the right to own property, and all other rights already granted to men. According to the delegates, the United States government was failing to live up to its role as the protector of individuals' right to "life, liberty, and the pursuit of happiness" by failing to recognize these "most sacred rights" for women.²

With the drafting of the Declaration of Sentiments, the Seneca Falls delegates expressed a belief in the transformative potential of rights long shared by other champions of individual rights. Like rights theorists and advocates before them, the Seneca Falls delegates turned to rights as a powerful idiom of political contestation and transformation. They believed and expected that their rights arguments and rights-based political activity would lead to social and political changes beneficial to women.³

¹From the proceedings of the Seneca Falls Convention posted at <http://www.sscnet.ucla/history/dubois/classes/995/98F/doc5.html>.

²The text of the Declaration of Sentiments can also be found at <http://www.closeup.org/sentimnt.htm>.

³Throughout this project I use "rights language," "rights," "rights discourse," "rights talk" and "rights claims" interchangeably. I follow the general tendency of scholarship on rights which seems not to distinguish between these labels. Kirstie McClure (1995) is a rare exception. She argues for the adoption of "rights language" over "rights discourse." The former, she believes, better captures the unsettled character of rights.

One hundred and fifty years later, First Lady Hillary Rodham Clinton stood at the site of the Seneca Falls Convention to commemorate the courage and vision of these early women's rights activists. While Clinton affirmed the delegates' belief in the transformative potential of rights by enumerating the gains made as a result of their rights arguments, she also reminded her audience of the limits of rights. On the one hand, she suggested, delegates' rights language and rights-based political activity helped bring about women's enfranchisement, the passage of the Civil Rights Act and Title 9, and the passage of the Equal Pay Act. Without their articulation of inequality and their demands for women's rights, the political and social power of contemporary women would be greatly diminished. On the other hand, she continued, the vision of Seneca Falls remains unfulfilled. A gap exists, she explained, between the ideas espoused in the Declaration of Sentiments and the reality of women's lives. In areas such as pay equity, health care, and education, gender inequality and discrimination remain. Legal barriers to women's equality may be gone, but women continue to earn less than men, to lack affordable and accessible health care, and to be the victims of physical and sexual abuse in great numbers. In honor of the spirit and vision of Seneca Falls, Clinton exhorted her audience not only to celebrate the changes won as a result of previous political efforts, but also to "finish the work" that the Seneca Falls delegates began so long ago (Harris 1998).⁴

In her speech, Hillary Clinton comes up against a quandary endemic to feminism's engagement with rights. Rights language, her arguments suggest, has been central to feminist efforts to eradicate gender discrimination, to demand women's political inclusion, and to secure women's individual freedom.⁵ Yet rights have not always been an

⁴Visit the White House web site, http://www.whitehouse.gov/WH/EOP/First_Lady, for the text of Hillary Clinton's speech.

⁵Indeed, rights continue to be central to feminist politics, particularly in the realms of international politics and abortion politics. Internationally, the language of rights has been central to the 1995 Beijing Platform for Action. The Platform is directed at "removing obstacles to women's...participation in all spheres of public and private life." These obstacles can be removed, the Platform suggests, by recognizing that "the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights." The text of the Platform can be found at <http://www.un.org/womenwatch>. See also Bunch & Fried 1996 and Robinson 1999.

effective language of reform, contributing to changes far short of, indeed sometimes contrary to, those expected. What is needed, then, to "finish the work" of Seneca Falls? For some feminists, the answer lies with a renewed commitment to traditional notions of rights. Traditional notions of rights, as articulated within the work of liberal political theorists such as John Locke and John Stuart Mill,⁶ suggest that rights are a powerful language of critique and transformation. In particular, rights, as claims directed to the state, are expected to challenge laws and social practices that encroach upon individual freedom. Rights, in other words, are presumed to help create necessary and inviolable boundaries between atomistic and autonomous individuals. These boundaries, and the freedom they are meant to ensure, are said to be a natural right of individuals who depend on this freedom for their very development as human beings. Women's freedom and equality, a number of feminists argue, depend on precisely the presumptions, values, and promises entailed in traditionally conceived rights (Williams 1991; Kiss 1997).⁷

Other feminists, however, are skeptical about the value of traditional rights for feminist politics. Re-examining the intellectual foundations and political implications of rights, these feminists raise critical questions about the attendant costs and implications of rights for feminist politics.⁸ And while feminists with differing theoretical commitments

Rights language also remains central to abortion politics. For example, this past June feminists in the United States breathed a sigh of relief when the Supreme Court overturned a Nebraska law that would have banned late-term abortions involving the dilation and extraction method, what abortion opponents call the "partial-birth abortion" procedure. Arguing that the Nebraska law would place an undue burden on women's constitutional right to make an abortion decision and would jeopardize women's health, the Court reaffirmed women's right to choose by a vote of 5-4. Although pleased with the outcome of the case, abortion rights advocates were surprised and disappointed that the vote had not been 6-3, as expected. Janet Benshoof, president of the Center for Reproductive Law and Policy was quoted as saying that the Court decisions called for "Champagne and shivers." While the Court's decision called for a celebration, thoughts of future abortion rights cases provoked anxiety and concern. See Greenhouse 2000. The Court's decision in *Stenberg v. Carhart* can be viewed at <http://www.findlaw.com/casecode/supreme.html>.

⁶ In Chapter Three I challenge this reading of Mill.

⁷Traditional or conventional understandings of rights are identified in different ways by different scholars. Among the most frequent labels for traditional conceptions of rights are "liberal rights" (Brown 1995; Hirschmann 1999), "liberal legalism" (West 1997) or the "politics of official recognition" (Bower 1994; 1997).

⁸Feminists are not, of course, the only scholars to raise concerns about rights in the context of progressive politics. Scholars identified with Critical Legal Studies and Critical Race Theory, for example, also make strong critiques of rights that share affinities with feminist critiques. See, for example, Tushnet 1984, Williams 1991, Crenshaw 1995, and Waldron 1997.

raise slightly different critiques, many come to similarly grim conclusions.⁹ Rights, they argue, may be part of the problem. Rights may be at best a limited tool of women's political resistance and, at worst, a dangerous language that codifies women's subordination. For some feminists the problem with rights stems from their liberal political character. Rights, these feminists argue, actually reinforce the very power relations and inequalities they are meant to challenge, in part, by valuing atomistic individualism and separation (Glendon 1991; Hirschmann 1999). Rather than addressing women's needs and experiences, rights actually represent and reinforce male values and masculine privilege (Roberts 1997; West 1997). For other feminists influenced by the work of Michel Foucault, the problem with rights stems from their disciplinary character (Smart 1989, 1992; Brown 1995, 2000).¹⁰ Rights fix women in particular identities categories that enable increased practices of regulation and surveillance. Rather than providing a language through which women can contest the definitions of womanhood and femininity used to subordinate them, rights language actually reifies and naturalizes these identity categories and the practices they support. A number of feminists, having articulated these problems, have called for the complete rejection of rights. They suggest that a different language of political contestation or a new style of politics would be more effective in the fight for women's equality (Brown 1983, 1995; Hirschmann 1992). Other critics suggest, however, that rights should remain a central part of feminist politics but if, and only if, they are revised to more adequately reflect women's experiences (Minow 1990; Roberts 1997; West 1997).

In this project, I challenge feminists' skepticism about rights and argue for a renewed appreciation of rights' contestatory potential. Though I take feminist rights critiques seriously, I reject their conclusions. I defend rights not, however, by returning to a traditional understanding of rights that values rights for their ability to establish

⁹For good reviews of feminist critiques of rights see Rhode 1989; Villmoare 1991, 1999; McClain 1992; Kiss 1997; Hirschmann 1999.

¹⁰See Baynes (2000) for a critique of this perspective articulated through a rereading of Marx and Habermas.

inviolable boundaries between individuals. Instead, I suggest that we shift the way we understand and evaluate rights in order to recognize and embrace the fundamentally *political* character of rights. I develop this political reading of rights by working through the writings of Hannah Arendt, John Stuart Mill, and Michel Foucault, and analyzing debates around mandatory HIV testing. By engaging in "a political reading of rights," I mean to draw attention to certain dimensions of rights overlooked or obscured by both traditional conceptions of rights, and the feminist critiques they engender. A political reading of rights moves beyond a focus on the historical origins and narrowly drawn implications of rights to acknowledge rights as a contested, unsettled, and historically contingent language of political contestation. A political reading attends to the way in which rights, as the unstable products of civic engagement and debate, simultaneously enable and constrain political change.¹¹

More specifically, a political reading of rights can be distinguished from a traditional approach to rights on three accounts. First, a political reading of rights requires reconceiving the location and function of rights-based politics. While traditional understandings and critiques of rights identify the state as the primary addressee of rights-based politics, and the law as its primary target of attack, a political reading of rights examines rights-based politics in realms beyond the state. Shifting the location of rights politics to "everyday" practices, a political reading recognizes rights as claims that individuals address to each other as citizens. In the process of debate, deliberation, and engagement with each other, rights claims are used to challenge and reconfigure cultural codes, norms, relationships, and attitudes. Second, a political reading of rights shifts our

¹¹I am indebted here to recent work on the "politics of direct address" in historical and contemporary political activism (McClure 1992; Coombe 1993; Bower 1994, 1997). This scholarship suggests that rights play an important role in the everyday political engagements of citizens. A politics of direct address posits rights as claims that individuals make to each other, rather than as claims addressed primarily to the state. A politics of direct address, that is, is a lens of analysis that shifts our focus from rights in the context of state-focused politics, to rights in the context of everyday cultural practices. Though I draw on ideas developed in this scholarship, I explore the intellectual foundations of a political approach to rights. As I work through theoretical writings, I move beyond the focus on direct address politics and thus choose to capture my ideas by the more general notion of a "political reading" of rights.

understanding of the relationship between identity and political change. Traditional approaches to rights posit a fixed and unitary identity, most often described in terms of atomistic individualism, as the basis of a rights claim. A political approach to rights, however, conceives of identity as both constituted and contested through political engagement with rights, and therefore mutable and unsettled. In contrast to a traditional conception of rights, a political approach does not presume an essential identity to be the necessary precondition for or basis upon which rights claims are made. Instead, identity is understood as that which is simultaneously contested and reconstituted through engagement with rights politics. And third, a political reading of rights embraces the contingent and paradoxical character of rights claims. That is, rights are not conceived of as irresistible and irrefutable truth claims that demand assent.¹² Rights are, rather, conceived of as fragile, partial claims that are open to contestation and result in unpredictable outcomes. Rather than evaluating rights solely in terms of their ability or their failure to bring about a specific political goal, a political reading of rights acknowledges their potentially paradoxical outcomes and embraces the fact that rights discourse both promotes and limits transformation.

I find, as I suggested above, intimations and expressions of a political approach to rights in some unlikely places--in the work of Hannah Arendt, John Stuart Mill, and Michel Foucault. While Arendt is not usually read for her insights on rights,¹³ both Mill and Foucault are often quite central to discussions of rights. However, while Mill is read as promoting a traditional conception of rights, Foucault is interpreted as a critic of that tradition. Throughout this project, I offer interpretations of their work that are at odds with these more traditional readings. Indeed, I contend that these thinkers articulate

¹²This is captured best by Ronald Dworkin's (1978) notion of rights as "trumps," those absolute claims that are beyond dispute.

¹³This is changing. See Jeffrey Isaacs (1996) for a discussion of Arendt on human rights, McGowan (1998) for a discussion of the relationship between rights and a participatory ethos in Arendt, and Landes (1995) for a critique of Arendt's perspective on rights. Isaacs explains Arendt's absence from discussions of rights by stating that "Arendt's lack of explicit attention to distinctively moral arguments of the kind to be found in more recent, standard classics of political philosophy . . . has led many to overlook her concern with human rights" (61).

conceptions of rights as political, contributing to a new understanding of the location of rights-based politics, the relationship between identity and political change, and the contestatory potential of rights. They help us understand that rights are the fragile product of civic engagement and deliberation, rather than representations of some self-evident truth about human nature (Arendt); that rights can engender rather than simply foreclose political discussion, contesting rather than reinforcing social customs (Mill); and that rights offer a language through which to contest and reconfigure attitudes and relationships, rather than solely codifying existing relations of power (Foucault). These insights into the political character of rights, I suggest, have important implications for the way in which feminists understand and engage rights. In order to illuminate these implications, I turn, in the last chapter of this project, to an analysis of rights in the context of mandatory HIV testing debates.

Feminism's Uneasy Relationship with Rights: A Brief Overview

Since at least the seventeenth century, rights have played a key role in emancipatory politics. Whether they have been used to challenge absolutist forms of power embodied in monarchical structures of government, or to challenge race- and gender-based exclusions in the contemporary United States, rights have served as a language through which marginalized individuals have identified injustices, articulated political demands, and envisioned a more equitable future. Through rights language social movements and individuals have expressed discontent with the political practices and structures they deem unjust and unacceptable. In recent years, however, many of the groups that once turned to rights as a promising language of political reform, have begun to rethink their relationship to rights. Feminists, once among the most ardent proponents of rights, are now among rights' most vocal critics. This is not to say that feminists have completely or even mostly abandoned the language of rights in their challenges to gender inequality. Rather, it is to suggest that feminists have an increasingly uneasy relationship

with rights.¹⁴ In this section, I briefly examine feminism's ambivalence around rights. In particular, I focus on feminism's concern with the "subject of rights," that is, with the conception of personhood and identity implicit in the notion of the "rights-bearing subject." Though I expand on this discussion in Chapter Two, I offer it here in order to draw a sharp contrast between the traditional conceptions of rights, the critiques they engender, and the more thoroughly political conception of rights I advance. Feminists' anxiety about rights, as I will illustrate in Chapter Two, stems in part from their continued association of rights with the former, more traditional understanding of rights.

Rights, to be fair, do not have a universally agreed upon meaning. There is considerable debate about the origins of rights theory as well as disagreement about the source and function of rights.¹⁵ Despite the variations among rights theorists and rights activists, there are some widely agreed upon ideas about rights that I try to capture with a notion of "traditional" or "conventional" rights. Traditionally, rights have been associated with a certain set of ideas about human nature, social relations, and the role of the state, as well as with a set of beliefs about the origin, value, and implications of rights. According to traditional conceptions, rights come to hold an important place in politics around the seventeenth and eighteenth centuries, with the development of ideas about the natural equality and freedom of individuals. With the theoretical and political contributions of scholars such as Thomas Hobbes and John Locke, and the deployment of rights claims in the American and French Revolutions, rights become crucial to political challenges to absolutist forms of governance. Central to this tradition is the idea of "inalienable" rights. These rights do not depend on or derive from one's social status or ancestral heredity. Rather, inalienable rights emanate from the fact of being human.

¹⁴Global feminism, in particular, continues to rely on rights language as the notion of women's rights as human rights has gained currency in recent years. For a review of rights and global feminism see Peters and Wolper 1995.

¹⁵See the essays in Waldron 1990a for a good introduction to these debates. On debates about the origins of rights see Tuck (1993) who places the origin of rights discourse prior to the seventeenth century.

Born free and equal, all individuals, according to traditional rights theories, are endowed with rights.¹⁶

But rights-bearing individuals are not simply free and equal. Indeed, as numerous scholars have suggested, rights claims entail a more expansive set of assumptions about the personhood or nature, the "identity," of the individual who bears these rights. This individual, they suggest, is often depicted as autonomous, atomistic and self-interested (Taylor 1979; Glendon 1991; Poovey 1992). As Charles Taylor (1979) explains, rights theories rest on and perpetuate an "atomism thesis" that posits individuals as self-sufficient and independent. To be self-sufficient, according to Taylor, does not mean that individuals can survive apart from society, but rather that individual capacities and human potentialities develop best outside of and unconstrained by social relations and obligations. Atomism repudiates the notion that distinctive human capacities develop within the context of social relations and, instead, posits such relations as a threat to this development. In addition, traditional rights theories posit atomistic individualism as the essential attribute of a unified, pre-political identity. Only those individuals who possess this essential identity can be rights-bearing citizens and make rights demands on the state.

In making rights claims to the state, individuals call into question the reach of state and social power. As Taylor (1979) explains, in claiming rights, individuals attempt to protect that sphere of freedom in which they can best develop. To make a rights claim, then, is to identify and challenge arbitrary and illegitimate encroachments upon that realm of individual freedom. Rights function, in other words, as "a language of limitation [that] delineate(s) the proper boundaries of state power over the liberties and properties of its citizens" and marks the distinction between legitimate and arbitrary exercises of power (McClure 1996, 9-10). As Jeremy Waldron suggests, rights offer marginalized

¹⁶Although utilitarian thinkers take issue with the notion of "natural" rights, I group them with "traditional" rights theorists to the extent that they center rights around a conception of the subject of rights as atomistic and individualistic. See Waldron 1990a and Lyons 1997 for a discussion of the tensions between utilitarianism and rights theory.

individuals and social movements a language by which to evaluate and critique the legitimacy of political structures and express political demands (1987, 1). The role of governments, accordingly, is to protect and preserve individual rights by limiting the reach of state and social power, and thereby lessening the possibility of unnecessary and arbitrary interferences with individuals' freedom and development. Rights claims demand that political structures and practices be established so "that it becomes impossible for individual rights to be pushed aside for the sake of the private interests of those in power or even in pursuit of other social goals and aspirations" (Waldron 1990b, 1).

The state, according to this theory, functions as a neutral arbiter of the competing interests and claims of individuals, while society is envisioned as a collection of individuals committed to fulfilling their own end. Rights-bearing subjects are presumed to care little about the "moral responsibilities that one has to other persons and to society at large" (Gewirth 1996, 1). Engaged in antagonistic relationships, these individuals are said to be concerned only with "the fulfillment of [their] own desires or needs regardless of broader social goals" (Gewirth 1996, 1). Rights, accordingly, are said to promote self-interest and isolation from others, and imply that the "most significant part of human life is lived in an apolitical realm and the state is a necessary evil that should be kept strictly bounded" (McGowan 1998, 24).

Feminists have long had a complicated relationship with traditional rights. Feminists recognize and celebrate rights' promise of universal equality and freedom. Yet the gendered aspects of rights also trouble them. That is, feminists are concerned by the fact that rights, as both theoretical concepts and practical political realities, have historically excluded women. This exclusion, they explain, has often been justified by defining woman in opposition to the autonomous, independent, and self-sufficient rights-bearing subject, and by positing womanhood as meaning something other than being endowed with inalienable rights (Brennan and Pateman 1979; Hirschmann 1999). These exclusions have not, however, prevented women from using the language of rights to

demand inclusion and equality. Since Mary Wollstonecraft called for women's right to education in the late eighteenth century, feminists have turned to the language of rights to demand women's equality and freedom. Feminists have used rights language to challenge patriarchal forms of authority and the conceptions of gender difference upon which they rested. They have used rights language to describe harms, to name injustice and inequity, and to give voice to a new vision of gender equality and social justice. Along the way, they have challenged the conceptions of womanhood and femininity that have justified and perpetuated relations of inequality. They have used "the rhetoric of rights to press for women's full participation in political, professional, and economic life, for control over their reproductive lives, and for full equality within marriage" (Kiss 1997, 1). Whether it was Frances Power Cobbe arguing for married women's right to own property, Ruth Bader Ginsburg arguing for women's right to administer estates, or contemporary feminists arguing for women's right to control their own bodies, feminists have relied heavily on rights language to challenge the relations of power and social practices that perpetuate women's subordination.¹⁷

It should come as little surprise that feminists turn to the language of rights. Not only does rights theory promise universal equality and freedom, but also it has proven to be a successful language of political contestation in the past. Successfully deployed in the American and French Revolutions, and taken up by civil rights activists to challenge racial inequality, rights, it appears, lead to significant changes beneficial to marginalized and subordinated peoples. In addition, historical rights struggles suggest that rights language "give(s) status to the groups or minorities who are making demands" (Smart 1989, 152). As Martha Minow (1990) explains, a rights claim "sustains the call that makes those in power at least listen. Rights--as words and as forms--structure attention even for the claimant who is much less powerful than the authorities, and even for

¹⁷For good histories of feminist engagement with rights see, for example, Law 1984; Rhode 1989; Goldstein 1992; and Villmoare 1999.

individuals and groups treated throughout the community as less than equal" (1990, 297). Indeed, rights language is now so powerful and recognized a language of political contestation that it has come to seem essential to any oppositional political movement, making it difficult to effect political change without turning to the language of rights.

For some feminists, however, the disappointing and somewhat unexpected results of rights-based politics overshadow resulting gains. While these feminists acknowledge that rights-based political opposition has led to women's increased access to political participation, has resulted in changes in workplace and divorce practices, and has given women a measure of control over their lives and bodies, they cannot forget the failures of rights. Even where rights have been won and legal barriers dismantled, economic and social conditions remain in place that perpetuate women's inequality or subordination. In the context of abortion politics, for example, women may have the right to choose, but the exercise of that choice is severely constrained by their economic status and geographical location. Having won their challenges to explicit gender discrimination in the workplace, feminists still struggle against less explicit forms of discrimination identified with the "glass ceiling," the gender dimensions of the workplace, and the "pink collar" tracking of women in the labor force. Indeed, despite feminists' efforts to challenge and to a great extent displace conceptions of femininity used to justify discriminatory practices against women, images of women and norms of femininity remain that constrain women's ability to be recognized as full citizens. For example, it may no longer be accepted to define women as ruled by their biology and thus as the "weaker sex," but it is still quite common to depict women, particularly poor women of color, as sexually unruly and dangerous and thereby justify regulatory laws and practices.¹⁸

¹⁸See Roberts (1997) for a discussion of contemporary mythologies of Black women that enable regulatory practices such as their incarceration for exposing a fetus to drugs. See Smart (1989, 1992) for a more historically oriented discussion of the relationship between conceptions of femininity and the regulation of women's bodies.

A number of feminists contend that rights themselves, as theoretical constructs and political tools, may be responsible for these failings. This argument, and the critical investigations out of which it grows, is not limited to the work of any single strand of feminist theory. Feminist scholars associated with a variety of theoretical traditions, including liberalism, Marxism, communitarianism, and postmodernism, offer differing critiques and estimations of rights-based political opposition. Notwithstanding the important differences among their arguments, two dominant critiques emerge from the literature. The first critique, which I call the "critique of liberal individualism," locates the failure of rights language in its liberal character. That is, rights are condemned for perpetuating liberal individualism, a set of beliefs that are built on and reinforce the exclusion of women from full rights-bearing citizenship. Feminists who are critical of rights' liberal individualistic character, as we will see in Chapter Two, argue that rights entail a conception of personhood that is at odds with, and therefore cannot attend to, women's experiences and needs. Whereas rights presume atomistic and self-sufficient individuals, women experience their lives as profoundly relational, as characterized by connections of care and dependence. Liberal individualistic rights obscure these features of women's lives, abstracting them from context, and erasing their diverse experiences (DiStefano 1991; Roberts 1997; West 1997). Furthermore, feminists argue that such a conception of individuality encourages competition and isolation among individuals (Hirschmann 1996). Rights, these critics contend, must either be rejected as a language of political opposition, or significantly revised to reflect women's experiences of connection and relationality.

The second critique, which I call the "critique of discipline," raises concerns about the disciplinary character of rights. Critics who adopt this approach draw on the insights of Michel Foucault to argue that rights function to solidify and naturalize identities in ways that reinforce rather than undermine existing relations of power. In contrast to the critics of liberal individualism, these scholars argue that rights fail not simply because

they reinforce a masculinist liberal individualism that is at odds with women's experiences. Nor can the problem of rights be resolved by replacing the atomistic subject with a relational one. Rather, these critics argue that rights discourse, regardless of whether it is centered on an autonomous subject or a connected one, is a disciplinary discourse. That is, rights not only mask and reinforce relations of domination and subjection, but also fix women in particular identities that increase the regulation and surveillance of their bodies. Rights, therefore, actually resubjugate the very women who seek emancipation through recourse to rights. According to these critics, rights must be abandoned in favor of a new style of politics that can challenge disciplinary power.

Not all feminists dismiss rights, however. Indeed, in recent years there has been a growing attempt to recover rights for feminists and other marginal groups in the face of these critiques. Some feminists defend as necessary and important the very demarcating and separating function that critics condemn. "Feminists who issue sweeping denunciations of rights to non-interference as atomistic and isolating," Elizabeth Kiss contends, "ignore the ways in which women need precisely these sorts of rights" (1997, 6). Others suggest that traditional rights language provides marginalized individuals with an important sense of self by implying "a respect that places one in the referential range of self and others, that elevates one's status from human body to social being" (Williams 1991, 153). Still others suggest that rights language does not distance and separate, but rather respects and supports relationships. Rights offer a language through which relationships can be constituted and strengthened as in the context, for example, of child custody law (Minow 1987), animal rights activism (Silverstein 1995), or the radical seventeenth century politics of the Levellers (Petchesky 1995). In these cases, scholars suggest that rights language contributes to the creation and sustenance of relations of responsibility and care for others. These themes also appear in interpretations of rights theory. In recent years, some of the most traditionally liberal rights arguments, such as those offered by John Locke, Ronald Dworkin, and John Rawls, have been reinterpreted

as envisioning rights as contributing to the production of relationships and connections (McClain 1992; Waldron 1997).

But rights' political value and contestatory potential may be more complicated than these defenses suggest. That is, rights may have a quality beyond either their ability to separate or to connect individuals. These defenses, like the critiques against which they are directed, overlook a number of important dimensions of rights that are best captured, I believe, by a political reading of rights. A political reading of rights, as I will detail below, challenges traditional understandings of the location, function, and value of rights-based politics. It demands that we reconceive the "political" character of rights. For example, a political reading of rights identifies rights language with "quotidian" or everyday political activities, with the deliberations and engagements of citizens beyond the realm of the state. Furthermore, it identifies cultural codes, identity categories, and affiliations as the appropriate target of rights. These are contested and reconstituted through alternative forms of political practice. A political reading of rights stands in sharp contrast to a more traditional understanding of rights as it relocates political action outside the realm of the state, redescribes the work of politics, and rearticulates the relationship between identity and political change.

A Political Reading of Rights in Theory and Practice

A political reading of rights, as I suggested above, entails rethinking the location, function, and value of rights-based politics. In particular, a political reading of rights positions rights as claims that individuals make to each other as citizens.¹⁹ That is to say, rights are not simply a set of demands addressed solely to the state, or the political

¹⁹In fact, scholars have used the notion of a "politics of direct address" to capture this particular aspect of rights. In particular, direct address politics concerns itself with rights as they are used to address other individuals in the context of everyday political practices. As I suggested earlier, the political reading of rights I advance is indebted to earlier scholarship on the politics of direct address. However, as I draw on different theoretical sources who offer insights unnoticed by direct address scholarship, I have chosen to use the more general language of a political reading of rights to identify the approach I develop.

practice of making rights claims. In this section, I offer a more detailed discussion of the political approach to rights advanced in this project to suggest its implications for contemporary political movements like feminism.

A political reading of rights involves expanding the location of rights from an exclusive focus on the state to non-state centered sites. A political reading of rights identifies as political numerous practices obscured by conventional understandings of rights politics. That is, the state is not considered to be the primary addressee of a rights claim nor are state institutions (e.g. courtrooms and legislatures) taken as the principal and privileged location of politics. A political reading of rights, when understood as both a lens of analysis and a style of politics, attends to rights as they function in "quotidian politics," in the "everyday enactment of social practices and the routine reiteration of cultural representations" (McClure 1992, 123). According to Kirstie McClure's political reading of rights, rights function in a "diffusion of political sites across the surface of the social itself." Hence the definition of the political itself is expanded "beyond its modernist enclosure within the territorially-bounded juridical institutions of the state into the far more fluid and shifting domain of cultural representations and social practices" (1992, 123).

The political is redefined not only in terms of location, but in terms of action as well. That is, a political reading of rights offers a new vision of the contours of rights-based political activity as well as the proper target of rights contestation. Rather than reducing the political moment of rights to making claims that protect a space of non-interference, a political approach to rights understands that the meaning and value of rights are produced through the active engagement of individuals. It is through civic engagement and debate that individuals challenge and reconstitute attitudes and behaviors, cultural norms and relationships. If traditionally rights claims target expansive state and social power in order to limit it, a political reading takes rights as posing a challenge to cultural codes and norms. Rights language, that is, takes attitudes and

behaviors, not just laws, as its target. It seeks to change and alter these norms so as to produce different kinds of relationships. A political reading of rights does not eschew state-based political reform efforts altogether, but rather recognizes that a juridical outcome (e.g. winning new rights) is not the only signifier of rights' contestatory potential. In fact, winning rights is often just one component of rights politics. Other dimensions and goals include the formation of a coalition, the construction of a political identity for a group without a previous one, or engendering new public attitudes and social relations. Whether or not a right is won, what may be of more importance are the social relations that develop through the exercise of that right and in the process of demanding the right.

A political reading of rights also posits a different relationship between identity and political change. Traditionally, identity, defined in terms of atomistic individualism for example, is taken as the basis of a rights claim, and a fixed and stable identity is posited as the prior condition for claiming rights. In a political approach, however, identity is understood as that which is constituted through an engagement with rights. As a lens of analysis, a political reading of rights allows us to recognize as political the processes of negotiating and forming identities that often precede engagement with the state. Rather than reducing the political moment of rights politics to the negotiation between the state and the rights claimant, this approach acknowledges that the production of subjectivity occurs in and through the process of articulating a rights claim, and that this is itself a political process which need not be dependent upon the state for authorization. From this perspective, the identity of the subject of rights is far less settled or unified than traditional conceptions of rights suggest.

And finally, a political reading of rights acknowledges that the contestatory potential of rights language is never predictable or stable. That is, it embraces the paradoxical effects and the instability of rights-based politics, recognizing that rights can both enable and limit the possibility of social change, enlarging as well as limiting "the

form and content of legal struggles" (Hunt 1992, 31). Rights language may not engender desired and expected legislative or legal victories, but it may alter conceptions of individual and collective identity and transform relationships among neighbors (Brigham 1994; McCann 1994; Merry 1990; Sarat and Kearns 1995a; Scheingold 1974, 1989). Rights language can serve as an important tool of political mobilization, group cohesion, and legal consciousness (Hunt 1992; Bower 1994, 1997; Silverstein 1995), at the same time as it "fixes" identity and constrains "the expression of individual and group aspirations and claims" (Bower 1994, 1009). Rights, in this sense:

can be sources of empowerment and protection for persons against the societies in which they live, yet can constrain those same persons. Additionally, they can liberate and yet limit the imagination of the possible; they can revolutionize action and yet undermine authority's claims. . . . They both constitute us as subjects and provide a language through which we can resist that constitution and forge new identities (Sarat and Kearns 1995b, 7-8).²⁰

This is not, however, to suggest that rights can mean anything at anytime. Rather, as Kirstie McClure explains, engaging rights as political entails a certain amount of responsibility and risk. "It offers no resolution of the tensions and contradictions of 'identity' politics as an unsettled, unsettling, and contentious discursive field. It may however, suggest avenues for political and theoretical exploration" previously unanticipated or unimagined (McClure 1992, 125).

But what would a political approach to rights look like in practice? To illustrate the difference between the traditional rights-based politics and the political reading discussed above, I turn to the work of Lisa Bower (1994, 1997). Bower examines gay activism before and after the Supreme Court's 1986 decision in *Bowers v. Hardwick* to suggest the limits of traditional conceptions of rights and to elaborate and celebrate what she calls "the politics of direct address." "Direct address politics," Bower suggests, is a way to capture the function and value of rights as they are deployed in realms outside the

²⁰For more discussion of the paradoxical nature and implications of rights see Scheingold 1989; the debate between Rosenberg 1991 and McCann 1995; and Scott 1996. This literature illustrates that rights discourse, as Scheingold (1989) suggests, "cuts both ways," engendering as well as circumscribing political change.

state. For Bower, a politics of direct address is a way of thinking about and engaging with rights and the law that locates the transformative potential of rights in the relationships rights-politics establishes between individuals.

Bower turns to the *Hardwick* case to illustrate the limits and dangers of adopting a traditional approach to rights, or what she calls "a politics of official recognition." In this case, gay activists challenged anti-sodomy laws that were being used to criminalize same-sex sodomy by making a privacy rights claim. They called upon the state to recognize homosexuals as a protected class whose privacy it was the state's duty to protect. Gay rights advocates attempted to claim a right to intimate association for homosexuals by asking the state to recognize homosexuality identity as a "suspect class" whose discrimination demanded "heightened scrutiny" from the courts. In order to make this argument, they had to depict homosexuals as having a fixed, biologically based, essential identity. Their goal in *Hardwick* was official recognition of homosexuals as a protected class and the rejection of anti-sodomy laws.

This strategy, however, proved unsuccessful on a number of levels. The Supreme Court rejected the rights claim, arguing that the right to privacy did not encompass a right to homosexual sodomy. In making this argument, the Court did not deny the unity of homosexual identity, but rather redefined that identity in terms of sexual behavior. That is, the Court conflated sexual identity with sexual behavior, thereby reinforcing the distinction between heterosexuality and homosexuality, and defining privacy as the privileged right of heterosexuals only. In the aftermath of *Hardwick*, it became clear to gay rights advocates that basing claims for political change upon fixed and stable identity categories was not only empirically inaccurate, but also politically problematic. As Bower explains, the *Hardwick* decision revealed that "any emphasis on a fixed sexual orientation, whether by the courts or by gay rights activists, is ill founded and empirically incorrect" (1997, 271). Not only are sexual identities mutable and experienced differently by different individuals, but also, as the Court decision illustrated, "to reduce homosexual

identity to a unitary essence based upon a singular behavior stabilizes heterosexual identity" (271).²¹

Bower's assessment of the *Hardwick* case is not, however, completely pessimistic. Rather than reading this case as illustrating the utter bankruptcy of rights-based political opposition, Bower makes the more subtle point that it illustrates the paradoxical character of rights discourse. *Hardwick*, she explains, seems, at first glance, to have constrained gay rights politics, but closer examination reveals that a new form of political contestation emerged, a form of politics that enables a different kind of political transformation sought through the discourse of privacy. While *Hardwick* may have consolidated homosexual identity in problematic ways, this unwelcome court decision also provided the impetus for a new form of politics by making visible the shortcomings of using legal strategies to challenge discrimination. Furthermore, *Hardwick* furnished the very identity categories and legal conceptions contested in subsequent political activities. In other words, *Hardwick* "created the rhetorical conditions for queers to resist

²¹Even under the best circumstances, turning to the state and adopting a "politics of official recognition," is a problematic strategy. As Bower illustrates in her reading of two court cases involving discrimination against a transsexual, legal discourse tends to fix identity, rather than to reflect its ambiguous and unstable character. Karen Ulane, a male-to-female transsexual, was fired by Eastern Airlines following her sex reassignment surgery. She sued the airline for discrimination under Title VII of the Civil Rights Act, a statute usually used in cases of gender discrimination. The judge who heard the original case, Judge Grady, had to determine whether or not transsexuals qualified for protection under Title VII. As Bower explains, "While the legal questions presented in the...court suggest Judge Grady's task was merely to decide if Ulane was female (and therefore a member of a class protected by Title VII), Ulane's transsexuality confounded the determination of 'sex' from the beginning" (1997, 275). Judge Grady took an unusual approach celebrated by Bower. He refused to fix Ulane's sexual identity in either biology (male) or performance (female). He allowed, that is, for sexual identity to remain something unstable and mutable, and incapable of being fully determined by either chromosomal determinants or gendered behavior. Grady refused to define sexual identity solely in terms of gender performance and thus could not define Ulane as a woman. Instead, Grady argued that Ulane was discriminated against as a transsexual and thus protected under Title VII. As Bower explains, "Grady recognized an ambiguously sexed subject and asserted that sex should be reconceived as a question of 'sexual identity' defined in social and relation terms, rather than as a discrete, essential category of being" (1994, 1022).

Judge Grady's decision was, however, overturned on appeal. The judge for the appellate case refused to consider sexual identity as something fundamentally unstable. Instead, the judge reduced sexual identity to biology and determined that Karen Ulane was in fact a male. According to the court, Congress had intended the Civil Rights Act to protect individuals according to traditional conceptions of sex identity which could be determined with regard to biology. As a biological male, Ulane was not entitled to discrimination protection. The lesson here, Bower suggests, is that while "sexually ambiguous subjects may create instability in legal discourse," there is no guarantee that "transgressive representations of sexual identity in the legal field" will have long-lasting and transformative effects (1014). Official recognition of unstable identities, Bower suggests, may well be impossible given the consolidating and fixing impulses of the law.

this representation of their identity and to turn to alternative forms of social activism" (1994, 1016). Following these cases, gay rights advocates reappropriated and deployed the very identity categories produced in the court cases in locations outside the realm of the legal field. They took legal classifications and language, including identity categories, and redeployed them outside of the realm of the state "to create contestation in the public sphere" (1019).

The political practices of Queer Nation illustrate the direct address politics Bower embraces. Frustrated by the outcome of *Hardwick*, gays and lesbians formed Queer Nation to challenge conceptions of homosexuality and discrimination outside the realm of the state. Through political practices such as public displays of affection in shopping malls and the development of a Queer Shopping Network, Queer Nation challenged assumptions about the difference between hetero- and homosexuality and about the proper realm of homosexual sexual activity. Queer Nation confronted other citizens, and their attitudes and beliefs about hetero- and homosexuality, through a cultural politics that occurs in non-state locations. They did not rely on the state for official recognition of their particular political identities, but rather turned to cultural practices in public arenas to unsettle conventional understandings of homosexuality and contest conventional configurations of the political. In rejecting the more traditional right to privacy arguments that have been central to the gay rights movement, Queer Nation also rejected the notion that homosexuality constituted a fixed, biologically based, and private identity. As Bower explains, the goal of Queer Nation was "to destabilize traditional meanings of sex and sexual orientation" and unsettle "societal assumptions that sexual identities, including heterosexuality, are stable" (1994, 1016-1018).

Though Queer Nation did not necessarily use the language of rights explicitly, their political practices were informed by rights in a variety of ways. As Bower suggests, it is the limits of traditional rights arguments that not only incited the alternative political practices adopted by Queer Nation, but it was the very conception of identity and privacy

implicated in *Hardwick* that was being challenged through their politics. Their political practices, that is, involved appropriating and redeploying the very categories supposedly fixed and settled through legal decisions. They may have "refuse[d] the historical, cultural, and legal terms used to frame sexuality" (1997, 282), but in so doing, Queer Nation attempted to transform cultural codes in order to create a freedom similar to that first sought through the more traditional political practice of official recognition. Bower celebrates Queer Nation for engaging in political practices that simultaneously draw on and yet challenge the identity categories and social expectations thought to be codified through judicial decision-making. Their political practices, she suggests, make clear that the law cannot "in every instance control the use of its own signifiers" (273).²²

Political or Natural? Hannah Arendt, Rights, and the Lessons of Totalitarianism

Though Lisa Bower uses a contemporary example to illustrate the contours of a political approach to rights, such an approach is by no means confined to contemporary political practice or to the politics of sexuality. As I illustrate at various points throughout this project, articulations of rights, both in theory and in practice, have long recognized rights as political, as something unsettled and unsettling, contested and contestatory. Indeed, Hannah Arendt's work on rights in the context of twentieth-century totalitarianism, as well as in the context of the American and French Revolutions, offers evidence of this more political practice of rights, and provides a normative argument commending such an understanding of rights. Her work suggests, that is, that traditional conceptions of rights, particularly as they presume rights to have the status of truth claims, are not only empirically mistaken but also politically dangerous. According to

²²According to Bower (1994, 1997), a politics of direct address also redeploys legal categories and rights language to challenge and reconstitute affiliations and relationships. This can be seen in the arena of AIDS activism. Though legal tactics and official recognition practices represent a large part of the response to AIDS-based discrimination, alternative practices of contestation exist as well. Turning her attention to the cultural politics of AIDS activism, Bower explains that, "Transformation occurs not merely by exposing differences and arguing for their inclusion under the guise of a politics of official 'recognition'; rather change occurs when the affiliations of 'ordinary people' are reconstituted" (1997, 283).

Arendt, when we assume that rights have the status of irrefutable and indisputable truth claims, we not only misunderstand why rights succeed or fail to engender political transformation, but we also place in jeopardy human dignity and freedom, the very things rights are meant to protect. These warnings about the dangers that result from overlooking rights' political dimensions serve as inspiration for what follows in this project. Her warnings, coupled with her embrace of a political understanding of rights, make Arendt an appropriate theorist to turn to at this juncture.

According to Arendt, traditional conceptions of rights—particularly as they are embodied in "natural" and "human" rights claims—presume that rights have the status of truth claims. That is, rights are believed to reflect self-evident, independently discoverable and confirmable facts about human nature and social arrangements. Captured in notions like the "inalienable" rights of man, and presented in documents like the French Revolution's Declaration of the Rights of Man, traditional understandings of rights are linked to truth through a conception of human nature. Rights, Arendt explains, are believed to "spring immediately from the 'nature' of man" (1958b, 297). Humans are, in other words, envisioned as being endowed with rights by virtue of their birth and their humanity. Deriving from this natural state of man, rights exist outside and independent of political communities. They do not depend on political communities for their meaning and value. To make a rights claim is, then, simply to state a truth, to make a claim about nature that is supposed to be irresistible. To be irresistible is, furthermore, to have the power to alter the very structure and fabric of political institutions and organizations. In particular, rights are presumed to have the absolute power to curtail state power and social forces, thereby protecting a realm of individual freedom.

Arendt cautions against this set of beliefs and assumptions. Rights do not, she argues, have the power of truth claims, nor should we want them to have that power. It is both mistaken and dangerous to continue to approach rights as truth claims. To make this point, Arendt turns to the plight of refugees in the face of mid-twentieth century

totalitarianism. These refugees, stripped of their citizenship and displaced from their political communities, found themselves in a situation similar to the natural state of man. And thus, in the face of horrific abuses of power, the stateless individuals turned to the language of human rights as a language of political contestation. They expected that atrocities and abuses of power could be effectively countered through rights claims. They believed, in other words, that "if a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided" (1958b, 300). As "people who had indeed lost all other qualities and specific relationships—except that they were still human," the stateless expected their rights claims to engender beneficial political change. What they learned, however, was that their "abstract nakedness" guaranteed them nothing. As Arendt explains, at the crucial "moment [when] human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them" (1958b, 291-2). Their claims for asylum and other kinds of "human" rights went unheeded not only by totalitarian regimes, but by the liberal governments expressly committed to protecting such rights. Statelessness, Arendt continues, entailed a form of rightlessness as "the world found nothing sacred in the abstract nakedness of being human" (1958b, 299).

While some might fault governments for failing to respond correctly to the rights claims of these individuals, or reject rights altogether for failing to protect individuals from abuses of power, Arendt offers a different response. If the rise of totalitarianism teaches us anything, Arendt argues, it should teach us that rights are fundamentally and unmistakably political claims, claims that depend on the existence of political communities for their power and their meaning. In other words, the lesson of totalitarianism is not that we should no longer challenge indignity through recourse to rights language, but rather that we must recognize that rights claiming is not enough. It

is not enough to make rights claims and expect that they be respected as truth claims, and it is a mistake to believe that rights claims, simply through their articulation, could or should have the power of truth claims. We must, Arendt urges, come to grips with the fact that every rights claim, Arendt suggests, is a political, not a natural truth claim. Rights claims, that is, are something that communities of individuals agree upon. They are not discovered nor given by human nature, but rather created through the process of civic engagement, debate and deliberation. And they require that citizens "act in concert" to constitute their meaning and ensure their preservation and power. Rights do not, and cannot, as the experiences of totalitarianism teach, exist independent of and prior to politics. Nor are rights protected and preserved through a constitution, a bill of rights, or even a democratic state alone. Without political activity, the actions and speech of citizens, rights are meaningless and powerless.

Arendt's support for a political understanding of rights comes not only from her interpretation of rights failures in the face of totalitarianism. It comes, as well, from rights successes, as evidenced by the American Revolution. In particular, Arendt celebrates Thomas Jefferson and the Preamble of the Declaration of Independence for capturing the political practices and political context through which rights come to have meaning and power. It is in the Preamble, where Jefferson writes that "We hold these truths to be self-evident," that Arendt finds this understanding. While most people read Jefferson as emphasizing the "self-evident" character of rights, a reading that would find Jefferson embracing a traditional conception of rights, Arendt emphasizes his use of the words "We hold." She argues that this statement reveals Jefferson's understanding that rights are created by individuals working together in communities. Had he truly believed rights to be self-evident and discoverable truth claims he would not need to have written the "We hold." "[I]n the Declaration of Independence," Arendt argues, "Jefferson declared certain 'truths to be self-evident,' because he wished to put the basic consent among the men of the Revolution beyond dispute and argument" (1968b, 246). Yet he

did not believe that rights or claims about the natural equality of men had the same status as mathematic claims, the quintessential form of truth claims. Indeed, "by saying '*We hold* these truths to be self-evident,' he conceded . . . that the statement . . . is not self-evident but stands in need of agreement and consent" (1968b, 246). He recognized, whether consciously or not, that "'All men are created equal' could not possibly possess the same power to compel as the statement that two times two make four" (1986, 193). With his preface that "*We hold*" truths to be self-evident, Jefferson captures the constructed and contestable character of rights. He captures an understanding of rights as something created by agreement and consent, but never beyond the dispute of members of political communities. By writing "*We hold*," Jefferson expresses "the only sort of power that is 'real' and 'legitimate,' the sort of power that 'rest[s] on reciprocity and mutuality' and comes into being only 'when men join themselves together for the purpose of action' by binding 'themselves through promises, covenants, and mutual pledges'" (Honig 1993, 100). This understanding, Arendt contends, sets Jefferson and the American Revolution quite apart from the French Revolutionaries who "proclaim[ed] the existence of rights independent of and outside the body politic" (1986, 149).²³

But Arendt celebrates Jefferson for more than articulating and embracing the constitutive character of rights. She also celebrates his recognition that rights require, for their meaning and their power, the continual political engagement of citizens. He knew that stating communally based, agreed upon commitments would not be enough to engender the public's lasting respect for these rights. He understood that rights would depend, for their power and preservation, on the ongoing efforts of citizens engaging in politics together. This understanding, Arendt suggests, is reflected in Jefferson's support

²³Joan Landes (1995) challenges Arendt's interpretation of the French Revolution. She argues that Arendt is wrong to identify the French Revolution with one voice or perspective on rights. Such an interpretation obscures the important and varied opinion of women at the time of the Revolution. Arendt's equation of natural and "inalienable" rights with truth claims, Landes argues, not only obscures the more unsettled character of rights language at the time of the Revolution, but "never addresses the radical implications of the discourse of natural rights when embraced by advocates of women, slaves, or the poor" (210). Landes draws on Joan Scott's (1996) research for evidence of the paradoxical nature of rights claims for feminist revolutionaries.

of the "ward" or "council" system of politics. Jefferson intended the council system to provide an opportunity for ordinary citizens to act politically. These "small republics" would provide individuals with an opportunity to "become 'an acting member of the Common government'" and thereby lead to a regeneration of democracy and the strengthening of individual power (1986, 253- 263).

In celebrating the American Revolution and Jefferson's vision, Arendt rejects the "minimalist" conception of politics that attends the more traditional conception of rights. She rejects the idea that the primary goal of political action is to create a space of individual freedom where freedom is defined in terms of being left alone. Rather, Arendt suggests that rights entail political action of a different sort and engender a very different kind of freedom. For Arendt, freedom is achieved, not by being untouched by state and social interference, but rather through acting in concert with other individuals. She embraces the ward system and the councils for encouraging precisely this kind of political activity, and never forgets that rights language plays an important role in this arena. It is through citizens' continual engagement in politics, in realms beyond state institutions, that rights come to have meaning and power. Indeed, as Jeffrey Isaacs explains, Arendt "wants to resist the enormous brutality and suffering characteristic of the twentieth century. She does this, however, not by appealing to the doctrine of natural rights before which men are passive recipients but by emphasizing the *activity of doing something about it*" (1996, 65). Rights, in other words, "are always tenuous results of a politics that seeks to establish them, a vigorous politics intent on constituting relatively secure spaces of human freedom and dignity" (72).

It is this political realm that rights as truth claims threaten. Truth, Arendt warns, "strikes at the very heart of all politics and all governments" (1968b, 233). Truth, with its presumption of self-evidence, coerces and demands a uniformity of ideas, silencing differences of opinion and perspective. In so doing, truth functions like a tyrannical leader foreclosing the debate and speech of individuals, the very activities that, for

Arendt, are constitutive of "the very essence of political life" (1968b, 241). Truth, she explains, "might have the result that all men would suddenly unite in a single opinion, so that out of many opinions one would emerge, as though no men in their infinite plurality but man in the singular...were to inhabit the earth" (1968a, 31). But this denies the uniqueness and plurality that characterizes humanity, and denies the practices that constitute freedom. Evidencing a despotic character truth denies the "human capacity to act and speak together" (1958a, 203). Without that capacity, without differences of opinion and perspective, "the world, which can form only in the interspaces between men in all their variety, would vanish altogether" (1968a, 31). Individuals would be denied "the joy and the gratification that arise out of being in company with our peers, out of acting together and appearing in public, out of inserting ourselves into the world by word and deed" (1968b, 263). Through this plurality and debate, individuals come to acquire unique identities and create something new. This process of creation is the very essence of freedom, according to Arendt. It is this "sheer capacity to begin," to bring something unexpected and unpredictable into the world, that Arendt believes "animates and inspires all human activities" (1968c, 169).²⁴

According to Arendt, natural and human rights claims threaten human dignity and individual freedom when they are presumed to have the status of truth claims. Traditional approaches to rights, she suggests, ultimately deny the importance of opinions and political engagement. In so doing, traditional rights as truth claims deprive

²⁴Arendt does not, however, reject truth altogether. She does acknowledge that there are factual truths which encompass information such as which country invades another to start a war. In "Truth and Politics," Arendt distinguishes between rational and factual truths. Rational truths are those that, like mathematical truths, are self-evident and can be discovered in isolation from others. Factual truths consist of information such as when Germany invaded Berlin and which country fired the first shots. Factual truths have a contingent character; they are not self-evident because they could have been otherwise (1968b, 249-251).

Arendt's position, then, is not to discount truth altogether nor encourage "propagandist lying" (Canovan 1974, 113). Rather, Arendt argues that truth, objectivity, and absolute standards should be denied the status of supreme value or absolute necessity (Canovan 1974, 113). Indeed, she wants us to understand that truth threatens political action and human connectedness which are "some of the most essential characteristics of human life" (1958b, 297). By foreclosing the possibility of acting in concert and forming connections with others, truth claims and truth seekers produce a life that "is literally dead to the world; it has ceased to be a human life because it is no longer lived among men" (1958a, 176).

individuals of "a place in the world which makes opinions significant and actions effective" (1958b, 296). The right to engage in political activity, the right and space to share opinions and act in concert with others, these are for Arendt more fundamental and essential to human well-being and freedom than even the rights of citizens. And it is only by understanding and embracing rights as fundamentally political constructs, fragile products of civic engagement that we can actually promote and protect the very dignity and freedom that rights were long meant to ensure.

Chapter Outline

A political understanding of rights, as advanced by Arendt and captured in Bower's idea of a politics of direct address, challenges not only traditional conceptions of rights, but the many critiques leveled against them. This becomes important when we realize that rights critics, as much as rights theorists and activists, shape our understanding of the power and limits of rights. In fact, these critiques undermine our ability to appreciate the importance and transformative potential of rights with regard to both historical and contemporary political struggles. Rather than offering a defense of rights by revaluing the traditional conception of rights, in the subsequent chapters I explore in more detail the contours and implications of a political understanding of rights. Such an approach to both the analysis of and the political engagement with rights more adequately captures the contestatory potential of rights for a feminist politics.

I begin in Chapter Two with a critical examination of feminist critiques of rights. Identifying two dominant critiques in the literature--which I call the "critique of liberal individualism" and the "critique of discipline"--I suggest that both remain invested, albeit in different ways, in a traditional conception of rights. This investment, I argue, limits critics' ability to fully recognize the contestatory potential of rights and leads them to undervalue the role rights can play in a transformative politics.

Rights, as I suggested earlier, have been a source of disappointment for a number of feminists. Unable to bring about the kinds of political change expected and desired, rights have come under the critical eye of feminist scholars. For many, the failure of rights has much to do with its derivation from and perpetuation of liberal political concepts and ideals. In particular, critics of rights' liberal individualism locate the failure of rights in their reliance upon and perpetuation of an image of the subject of rights as atomistic. They suggest that this conception of the proper rights-bearing subject is responsible for rights' inability to adequately address, indeed even recognize, women's needs and experiences of inequality. Their solution is either to reject rights completely in favor of an alternative language of political contestation, such as is entailed in an "ethic of care," or in the language of responsibility; or, more likely, to suggest a reconceptualization of rights (Gilligan 1982; Minow 1990; Hirschmann 1992; West 1997). This reconceptualization entails articulating a different conception of the subject as relational. That is, rather than premising rights on a notion of individuals as isolatable and abstractable from social context and relationships, feminists suggest building rights claims and theories around a conception of the individuals as fundamentally embedded in and shaped by a network of social relationships. Relationality, they argue, not only more accurately captures the experiences of women, but promises to engender more positive outcomes of rights-based political resistance.

I contend that this critique, and the alternative proposed, remain caught in an understanding of the relationship between identity and political change that is problematic. Implicit in feminist critics' approach to rights is an assumption that identity is established prior to, indeed functions as the foundation for, rights arguments. Drawing on the insights of Arendt detailed above, I suggest that critics fail to appreciate the extent to which identity, the very "subject" of rights, is produced through engagement with rights. That is, I suggest that critics of liberal individualism implicitly assume that coherent identities are necessary prerequisites for rights claiming and that the role of the

state is to recognize these identities officially. This approach obscures the extent to which identities are configured and contested in and through rights politics.

Critics of rights' disciplinary character, who draw on the insights of Michel Foucault, recognize precisely this point. Their concern is, however, that rights discourse produces particular identities that further subjugate and subordinate women and other marginalized individuals. That is, rights discourse reinforces regulatory power by inscribing women in normative identities, such as "victim of oppression" or even "autonomous individual". These identity categories are then used to reinforce techniques of surveillance and regulation that undermine the emancipatory aim of feminist politics. What gets lost here, I suggest, is an appreciation of the paradoxical qualities of rights. According to critics of rights' disciplinary power, rights discourse always and only functions as a regulatory discourse. Engagement with rights, they suggest, leads only to the legitimization of hegemonic power. Rights discourse, these feminists argue, supports the law's "capacity to reduce, rephrase, and normalize identities and interests so that they 'fit' . . . into legal classifications" (Bower 1994, 1020). What these critics fail to recognize, or at least obscure through their arguments, is the extent to which rights enable political change as well. They overlook the extent to which rights language "provides citizens with a powerful repertoire of discourses and practices that enables them to (re)construct meaning, identity, and social interaction" (Bower 1994, 1020). These critics overlook the extent to which, as Arendt suggests, the outcomes of rights are never completely predictable or controllable, providing evidence of Bower's insight that legal signifiers always exceed the ability of the state to control their meaning.

In Chapters Three and Four I turn my attention to the work of two theorists central to feminist critiques of rights, John Stuart Mill and Michel Foucault. Mill, usually identified with a traditional liberal individualistic approach to rights, is often the target of feminist critics. He is condemned for perpetuating the kind of atomistic individualism that undermines women's equality and freedom. Foucault, on the other hand, is

interpreted as a critic of rights, and thus has inspired feminist critiques of rights' disciplinary character. These readings, I suggest, occlude a more complex appreciation of rights articulated in the work of each thinker. Both Mill and Foucault, that is, are not simply for or against traditional conceptions of rights, respectively, but rather each offers a vision of rights that embodies intimations and expressions of the political character of rights. That is to say, they both identify and embrace the more unsettled, and potentially unsettling, qualities of rights.

Chapter Three is devoted to an examination of rights in Mill's work. Mill is usually read as the quintessential theorist of individual liberty who offers a utilitarian defense of individual rights. Accordingly, Mill is both praised and condemned for articulating an understanding of rights as limiting state power and social intervention, as protecting a sphere of individual freedom that isolates individuals from each other and devalues social obligations and responsibilities. I read Mill's conception of rights, however, as entailing the rudiments of a politics of direct address. Mill, I argue, was keenly aware of the social location of subjects and the socially constituted nature of human character. Articulating a conception of rights that reflects his appreciation of the socially located subject, Mill positions rights as partial claims that reflect the fallibility and partiality of individual perspectives. Accordingly, he posits rights as claims that serve to engender rather than foreclose political discussion. Rights, as Mill envisions them, have the power to contest social norms and sedimented identities, and the ability to be meaningful in non-state locations as well. Furthermore, Mill suggests that rights are produced by the very political communities they help to constitute, thereby serving in part to foster rather than undermine social relationships.

This is not, however, to deny that Mill at other times embraces a radically individualistic conception of rights. Clearly, he often promotes a vision of isolated individualism that sits in uneasy tension with this more political conception of rights. At times, Mill betrays his own insights about the socially situated nature of individuals by

envisioning rights as the property of atomistic individuals. And he rejects his own insights into the unsettled character and function of rights by positing them as stable markers of the boundaries between public and private spheres. But rather than overemphasizing these aspects of his work, or taking them as evidence of Mill's failure to articulate a coherent and cohesive theory of rights, I suggest that there is a lesson to be learned in keeping the tension between these two Mills alive. That is to say, these tensions make visible the very seductive character of traditional conceptions of rights, as well as the anxieties that arise in the face of the contingencies and paradoxes entailed by a political conception of rights.

Michel Foucault serves as a nice complement to Mill in part because he expresses considerably less anxiety about the contingent, unsettled, and paradoxical qualities of rights. Indeed, particularly in some of his later interviews, Foucault, like Arendt, takes great pains to depict the fragility and unsettled character of rights as a source of contestatory potential and transformative promise. Calling this alternative conception of rights "relational," Foucault offers an antidote to the limits he himself identifies as arising from more traditional approaches to rights politics, such as those embodied in the privacy rights arguments of gays and lesbians. Unlike traditional privacy rights arguments, for example, relational rights are decidedly non-state centered and entail citizens interacting with one another, rather than relating solely to legal institutions. Relocating rights-based political activism in arenas beyond the state, Foucault also reconceives the aim of rights. Rights politics, he explains, can and should challenge contemporary configurations of power by contesting "accepted" and expected relationships, and the attitudes and behaviors upon which these rest.

By attending to his discussion of relational rights, an admittedly underdeveloped concept in his work, I offer a reading of Foucault that challenges the more traditional association of Foucault with rights criticism. I do not deny that Foucault offers a scathing condemnation of rights, particularly in works such as *Discipline and Punish*, *The History*

of Sexuality, and "Two Lectures." If one were to read only these works, it would be easy to interpret Foucault as concerned primarily with the constraining and regulatory impulses of rights discourse. His depiction of rights as a disciplinary discourse is, however, countered in some of his later interviews by his embrace of a relational understanding of rights. This articulation, I suggest, shares affinities with the political approach to rights discussed above. Like Mill, Foucault articulates and embraces a notion of rights as produced, but not determined, in the context of political activity. But Foucault pushes beyond Mill to embrace the messier aspects of rights from which Mill flees, and thus puts us back on track where Mill goes astray.

For Foucault, like Mill and Arendt, a vision of rights sits at the nexus of theory and practice. That is to say, for all three, a theoretical understanding of rights derives from and is meant to respond to political problems, whether those involve the horrific atrocities committed by Hitler (Arendt), the less brutal, but nonetheless debilitating consequences of social constraints on individuality (Mill), or discriminatory practices directed against homosexuals and other marginalized individuals (Foucault). Keeping in line with this spirit, in the concluding chapter, Chapter Five, I move from theory to practice. Turning my attention to rights language deployed in the context of debates over mandatory HIV testing of pregnant women and newborns, I offer some thoughts on the implications of a political understanding of rights for feminist politics. Mandatory HIV testing, a policy proposed throughout the late 1980s through the mid-1990s, and now partly encoded in law in New York State, has been the target of considerable rights-based resistance on the part of feminists. Examining these political practices from the perspective of a traditional approach to rights, one might find instances in which feminists' rights claims reinforce atomistic individualism or entrench women in a victimized identity, thereby increasing regulatory practices and further constraining the lives of HIV positive women. From the perspective of a political understanding of rights, however, a different picture emerges. It is a picture of a rights-based politics

through which sedimented identities are contested and reconfigured, rather than codified. It is a picture in which rights emerge as a language through which relationships are challenged, envisioned, and engendered, rather than a language that simply rearticulates the isolated liberal subject. It is a picture in which rights-based politics occur in non-state centered locations to create and reconfigure identities and social attitudes. Ultimately, it is a picture that reveals the contestatory potential of rights language and reminds us that rights remain a valuable tool for feminist politics, albeit for reasons and in a manner not previously anticipated.

These are the themes and insights that emerge in the work of Arendt, as I suggested above, and Mill and Foucault, as we will see shortly. And these are the themes often overlooked by the feminist critics to whom I now turn.

Chapter Two

Feminism and the Subject of Rights

Introduction

Oppositional political movements have long used rights language to challenge unacceptable forms of power and instances of inequality. Moreover, in doing this rights theorists and advocates have called into question the very categories of identity upon which such power has been based. For example, rights-based opposition to monarchical and absolutist power in the seventeenth and eighteenth centuries, as I suggested in the preceding chapter, challenged inequality and hegemonic power by calling into question the notion of natural hierarchy. In place of a conception of natural or divinely determined inequality, early rights proponents posited a conception of the individual as naturally equal, free, and endowed with inalienable rights. Political institutions, they argued, are acceptable and legitimate to the extent that they recognize and respect this conception of human nature.

Like these early rights activists, feminists have found rights to be an essential and powerful language of political resistance. And they too have challenged laws and policies in part by contesting identity categories. Feminists have called into question the conceptions of femininity, womanhood, and rights-bearing subjectivity implicit in justifications for the differential and unequal treatment of women. For example, in the 1971 case of *Reed vs. Reed*, feminists challenged an Idaho statute giving preferential treatment to men in the practice of estate administration by attacking implicit and justificatory definitions of identity. Feminists argued that the preference for men legitimated stereotypical conceptions of women as frail and less competent than men. In matters such as estate administration, they argued, women should be considered as capable and rational as men. The Supreme Court, agreeing with the feminist argument, struck down the Idaho statute on the grounds that the differential treatment of men and

women failed to meet the "rational relationship" test established under the Equal Protection Clause. Classification based on sexual difference, the Court explained, amounted to an arbitrary distinction that bore no reasonable or substantial relationship to the state objective. For the purposes of estate administration, that is, men and women are "similarly situated;" women are entitled to the same rights as men because they are for the purposes of estate administration like men.¹

Although the strategy adopted in *Reed*, known as the "sameness" or "formal equality" approach, led the way to a number of important legal victories for women,² it soon became apparent that it was a flawed strategy. In cases involving pregnancy, pay differentials or less explicit forms of gender discrimination, the sameness approach seemed only to lead to disappointment. Either legal challenges failed or, in winning the right to be treated like men, women actually faced additional and subtler forms of gender inequality.³ Why, feminists began to ask, did women fail to benefit from arguments claiming their similarity to men? If sameness was an ineffective basis on which to argue for women's rights what alternative legal approach would benefit women and lead to

¹*Reed v. Reed*, 404 U.S. 71 (1971), at 76. Legal classifications, Chief Justice Burger writes, must "be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation."

²In the *Reed* case feminists raised concerns that biological difference was being used to justify the creation of "a separate, inferior legal status for women" which would lead to the denial of women's "equal opportunity for wage work and participation in public life." Furthermore, gender difference was allowed to reinforce a gendered division of law whereby "women were required, by law and custom, to care for men and children" and rely on men for financial support (Law 1984, 958-9). They used the sameness or formal equality approach to challenge public perceptions of gender roles and gender difference and convinced the Court to adopt a new standard by which to scrutinize sex-based legal classifications. The Court used this standard—"heightened scrutiny"—to strike down a number of laws excluding women on the basis of biologically-based differences leading to changes in the public's perception of and attitudes towards women. As Herma Hill Kay (1985) explains, "Advocates of sexual equality woke the United States Supreme Court from nearly a century of insensitivity to women's capabilities outside the home [and] stimulated it to consider men's capacity for nurturance"(39). Equality feminism changed "public policy ideology" and made it "normal" for there to be working wives and mothers, even ones who engaged in non-traditional employment (Goldstein 1992a, 19).

³Less explicit forms of discrimination and inequality, particularly those involving the reproductive differences and caretaking roles of men and women, unfortunately remained in place. For example, discrimination on the basis of pregnancy was not considered to be unconstitutional because, according to the Court, both men and women could be non-pregnant persons. As feminists soon learned, a sexual equality approach could challenge traditional stereotypes of gender difference and change certain aspects of public ideology, but it could not do it all. It became clear that "a sex discrimination approach that required formally equal treatment of similarly situated persons had little to contribute to a wide range of policy problems" (Goldstein 1992b, 22). For good reviews of the debates see Goldstein 1992a, Kay 1985, Law 1986, and Rhode 1989.

desired political changes? What conception of women's identity, if any, would make for a successful rights claim?

In the wake of *Reed*, feminist legal and political scholars have offered a variety of responses to these questions. For many feminists the problematic legacy of *Reed* makes visible the fundamentally gendered nature of any rights claim. Feminists argue that rights discourse contains a set of assumptions about the personhood of the rights-bearing subject that undermines efforts to achieve gender equality through the law. Rights discourse assumes, they explain, that rights-bearing subjects are atomistic, rational, and autonomous individuals. Any rights claim that presumes such a conception of the self, they continue, is doomed to fail women because it is gendered. That is to say, it reflects and privileges a male model of selfhood or masculine values. Indeed, the historical and theoretical legacy of rights illustrates that women were originally excluded from rights-bearing subjectivity by theories and practices that deemed rights to be entitlements of property-owning men only. The proper subject of rights, in these cases, was defined "in ways that not only left out white women and people of colour, but depended on their subservience and classified them as forms of property" (Hirschmann 1999, 31). Defined in this way, the traditional rights-bearing subject of the liberal political tradition cannot accurately or adequately reflect women's experiences or women's identity and is therefore unsuited to address women's needs.

Critics who make this argument, who I call the critics of liberal individualism, usually fall into one of two camps. Either they posit rights as inextricable from their liberal masculinist legacy and therefore call for a flat out rejection of rights, urging the adoption of an alternative language of political resistance, or they express optimism about the potential of a revisioning of rights. This latter, more optimistic sentiment seems to be more common these days as scholars like Nancy Hirschmann, who at one time rejected rights altogether, work to reconceive rights for women (Hirschmann 1992, 1999). This reconceptualization or reworking of rights often centers around rethinking the subject of

rights. If rights claims can be built around an alternative conception of the rights-bearing subject, one that more accurately reflects the experiences of women, they can be a valuable language of political resistance for women, these scholars suggest. Though they may not agree on precisely what conception of subjectivity accurately represents women's identity, as I explain below, these feminists do agree that, if that identity can be properly articulated and if the state correctly recognizes it, desirable political changes will follow (e.g., Crenshaw 1989, 1995; Harris 1990; Roberts 1997; West 1997; Hirschmann 1999).

Feminist scholars inspired by the work of Michel Foucault, however, pose a considerable challenge to the optimism expressed by these feminists. Though scholars like Carol Smart and Wendy Brown agree that rights language is gendered, they do not believe that rights will ever be the effective tool of political resistance that feminists imagine. Smart and Brown, who I call critics of discipline, argue that rights will never truly engender the kind of changes feminists' desire because rights discourse has a "disciplinary" character that undermines its emancipatory potential. Smart and Brown contend that, regardless of what identity category feminists deploy in a rights claim, rights language will only reify that identity in ways that reinforce women's subordination. These critics of rights' disciplinary character contend that rights, in both their traditional liberal guise and their more feminist incarnations, hurt the very people they are meant to help.⁴

In this chapter, I review these debates among feminists not in order to come out in favor of one or the other criticism, but to point out the limitations of both. I contend that these critiques, as diverse as they are, tend to depoliticize rights by obscuring the contingent and contestatory character of rights language and removing rights from the realm of the on-going and unpredictable work of politics. This depoliticizing tendency

⁴I include Wendy Brown in this group though I recognize that she has, particularly in her recent essays, argued that rights are paradoxical rather than completely bankrupt. As I explain below, the overwhelming skepticism of Brown's earlier work creeps back into her later work in ways that continue to compromise the more political reading of rights she is trying to articulate (Brown 1995, 2000a, 2000b).

results from two assumptions that undergird their arguments. The first is that feminist critics posit an immutable relation of predictability between identity and political outcome. In other words, they set up a model of the relationship between identity and outcome whereby the political outcome of a rights claim can be predicted in part by considering the identity category deployed in a rights claim. For critics of liberal individualism this commitment is present in two parts of their argument. First, they suggest that if feminists make rights claims premised on an atomistic individual they will perpetuate gender inequality. Second, they argue that if feminists build claims around a rights-bearing subject more reflective of women's identity and experience, they can be assured more favorable political outcomes. In either case, the outcome is easily controlled and predicted. For critics of discipline, the argument is both more and less complicated. On the one hand, critics of discipline offer a more complicated understanding of identity as contingent, as I will discuss later, but they offer a simplified model of the relationship between identity and outcome. For these feminists, it does not matter what identity category feminists predicate their argument upon. In all cases, rights arguments will naturalize and fix otherwise contingent identity categories. The naturalization of identity, critics of discipline argue, ultimately leads to negative outcomes such as the increased regulation and surveillance of women. Rights, it seems, result in harm no matter what. Though feminist rights critics may disagree about what specifically results from a rights claim--continued inequality, women's liberation, or normalization and sedimenting of identities—they seem to agree that identity is partly responsible for predictable and immutable political outcomes.

This ability to predict the outcome of a rights claim, to suggest that there is one guaranteed result that is rooted in an identity category, rests on a prior commitment to understanding identity as something that is immutable itself. Though critics of liberal individualism and critics of discipline disagree in very important ways about the constitution of identity, both ultimately depict identity in the context of rights-claiming as

something that is stable and univocal. Critics of liberal individualism, for example, depict identity as pre-existing a rights claim. Though some of these feminists posit a monolithic and natural conception of women's identity while others conceive of identity as socially constructed, they suggest that identity precedes the articulation of a rights claim. In fact, identity is that which can be clearly uttered and hence reflected or represented in rights language. The goal of a rights claim is, then, proper state recognition of this stable identity. Critics of discipline challenge this conception of identity, but they too depict identity as having a single meaning, as monolithic. They argue that rights discourse, not women themselves, actually has the power to fix identity. That is, rights discourse fixes, naturalizes and normalizes identity, rendering an otherwise contingent category immutable. In making this argument, critics of discipline reject the theoretical and political desire for a stable and univocal identity evidenced by those critics of liberal individualism who attempt to reconceive rights to benefit women. Critics of discipline nonetheless reinforce the notion that immutable identity categories are an unavoidable, and undesirable, consequence of rights language.

In contrast to these understandings of rights, I argue for reading rights as political.⁵ I challenge feminist critiques for their tendencies to posit a relationship of predictability between identity and political outcome and to conceive of identity as immutable. I build this challenge in part by turning to the work of Hannah Arendt. Arendt, as I suggested in the previous chapter, cautions against assuming that rights rest on stable identity categories and expecting rights claims to engender guaranteed political outcomes. In this chapter, I revisit her concern with traditional rights arguments suggesting that feminist critics reproduce certain tendencies that Arendt criticizes. More importantly, Arendt offers an alternative way to think about the outcomes of rights

⁵It is, to be fair, precisely the point of the critique of discipline to show that rights discourse is depoliticizing. Though I agree that rights can be a limited language of political resistance, I do not believe that this critique captures the whole story. I do not think that the disciplinary character of rights is totalizing and therefore would not identify rights as a wholly depoliticizing discourse.

politics by positing a conception of identity as itself politically constituted and therefore radically contingent. Arendt's understanding of the relationship between identity and rights acknowledges and embraces contingency at the level of both identity and political outcome. With Arendt, I suggest, we find an emphasis on the political character of identity and political action, both of which suggest that unpredictability and mutability, instability and contingency, are at the heart of rights politics. Indeed, it is precisely this contingency that gives rights their political power and makes them both contestable and contestatory. For Arendt, then, instability in rights is something to embrace rather than fear, lament, or obscure, as most feminist critiques of rights do.

Rethinking the Subject of Rights: Feminism and the Critique of Liberal Individualism

The legal system, Robin West argues, "is premised upon an individual who prides himself on his autonomy and on his self-chosen life projects, including, of course, his voluntary, willful decisions to interact, on a limited basis and toward self-defined ends, with others. It is that profoundly disconnected individual which liberal societies, liberal politics, and liberal ideologies...are designed to protect" (1997, 4). Like West, Martha Minow argues that the widely held conception of the rights-bearing subject is of "an autonomous individual capable of exercising choice for personal ends and of protecting personal freedom from the pressure and power of others" (1990, 299-300). Both scholars, like many other feminists, thus reinforce Charles Taylor's argument that traditional liberal conceptions of rights rest on an atomism thesis in which individuals are depicted as independent and self-sufficient, their development threatened by the encroachment of the state and society. Feminists, however, extend this argument. Not only is the rights-bearing subject profoundly atomistic and individualistic, the individual is also gendered male. That is, as Mary Poovey explains, the subject of rights is not only coincident with a set of assumptions about human nature, but that set of assumptions is coincident with an additional set of assumptions about gender difference and the meaning of masculinity and

femininity (1992, 241). The autonomous, atomistic individual of liberal rights, feminists suggest, is defined in and through the exclusion of femininity and womanhood, and premised upon a conception of identity that privileges masculine ways of living and devalues the experiences of womanhood and femininity. It is the identity of the rights-bearing subject, the very conception of personhood implicit in rights language, feminists contend, that makes it so difficult to make deep and long-lasting strides in the struggle for gender equality.

In this section, I suggest that feminist critiques of liberal individualism rest on a set of assumptions that depoliticize rights. I argue that these critics posit a relationship of immutability and predictability between identity and political outcome that not only fuels their critique but also engenders a very particular reconceptualization of rights. The critique of liberal individualism, that is, suggests that if rights language represents the subject of rights as an atomistic individual, feminists can expect or predict the perpetuation of gender inequality. Despite these rather dire conclusions about the limits of traditional rights discourse, feminists have been hesitant to abandon rights altogether.⁶ Rather than trying to deploy traditional rights categories on behalf of women, rather than trying to fit feminist goals with historically constructed conceptions of rights, as was done in the case of *Reed*, feminists have begun to reconceptualize rights from a feminist perspective. For many feminists that means rethinking the identity of the rights-bearing subject. If identity is the cause of negative political outcomes, it may also be the source of positive ones. If the "liberal" subject of rights discourse can be replaced by a "feminist" conception of the rights-bearing subject, then rights discourse can be put in

⁶A few feminists suggest that rights discourse is so inextricably linked with liberal notions of the self that it must be abandoned. In her earlier work, Nancy Hirschmann (1992) urged feminists to abandon rights language and to replace it with a language of responsibility: "rights dialogue provides a language of distrust and competition, a responsibility model offers a language of trust and relationship. Only through the mutuality of talk, inclusion and participation can trust flourish and hence can responsibility be the primary focus of political actors, with rights taking a secondary (albeit perhaps still important role" (286). Though she has since modified this position (Hirschmann 1999), some feminists do still question the value of rights altogether. In fact, Hirschmann's (1999) recent article is written in direct response to that position.

service of feminist political goals. Below, then, I discuss feminists' attempt to reconceive the subject of rights, highlighting their concern with a subject that reflects the experiences of women and may, therefore, engender favorable political outcomes. This relationship, however, entails an additional assumption about the stability and immutability of identity. These feminists, I suggest, depict identity as something that can be clearly reflected in rights claims because it is produced prior to the articulation of a rights claim. Identity can be, therefore, articulated clearly and recognized adequately, if all goes according to plan.

Returning to Robin West, we find one of the most oft-cited articulations of the critique of liberal individualism. As I suggested above, West identifies the legal systems, or what she calls "liberal legalism"—rights language, legal education, legal reasoning—with a very particular conception of the rights-bearing subject. It is a conception of the individual as fundamentally separated from others, as someone whose sense of self develops in isolation from and outside of relationships. According to West, this conception of the individual is profoundly gendered, and because gendered, extremely detrimental to feminist goals. The liberal subject of rights, she argues, does not reflect and therefore cannot represent the experiences of women. As West explains, rights language is premised upon a masculine identity and thus ultimately excludes women's voices and experiences, failing to redress the harms they suffer (1988). Women live profoundly different lives from men, she argues. They are not atomistic, isolated individuals, but rather are involved in nurturing and caring relationships. Thus women, unable to fit this image of the subject of rights, are profoundly disadvantaged by rights discourse. In turning to traditional liberal rights discourse to redress harms and inequality, women must either obscure this relational, caring part of themselves and thereby perpetuate the valuation of male ways of being, or they can claim their true identity and thus fail in their bid for rights. To the extent that rights discourse reflects

only male experiences, it will continue to be a very limited tool of political reform for women.

If the liberal subject of rights perpetuates gender inequality, an alternative notion of the rights-bearing subject may lead to gender equality. According to West, only a feminist jurisprudence, premised upon the model of the feminine self, can do this. Only a jurisprudence that represents women as profoundly connected individuals can lead to the kind of change feminists' desire. Women, according to West, have an essential identity: "Women, and only women, and most women, transcend physically the differentiation or the individuation of biological self from the rest of human life trumpeted as the norm by the entire Kantian tradition" (1987, 140).⁷ For rights discourse to be beneficial to women, it must reflect the fact that "women's lives are not autonomous, they are profoundly relational" (1997, 130). Rights must reflect the fact that women are giving selves rather than liberal, choosing selves, other-regarding rather than self-regarding. This connected, relational female subject, West argues, should be at the center of all feminist rights claims, as should a sense of care and responsibility. A "feminist" or "humanist" jurisprudence, then, would recognize women's different identity and women's essential difference. Such a jurisprudence would reflect the "truth" of women's experiences that, according to West, is characterized by a sense of connectedness with and responsibility towards others that derives, at least partly, from women's roles as caretakers. A feminist jurisprudence built around this conception of the subject of rights, West believes, would make space for women's voices, address women's needs, and protect their equality and freedom. It would, in other words, engender precisely the kinds of reforms that feminists initially expected to result from adding women to the category of the traditional rights-bearing subject.

⁷ Here West is drawing largely on Carol Gilligan's *In a Different Voice* (1982) which has been interpreted as identifying essential differences between men and women. In her most recent work, however, West tries to move away from a notion of an essential feminine identity (1997).

Although Dorothy Roberts (1997) rejects the notion of an essential female identity, like West she articulates both a critique and revision of rights that centers on a concern with identity. She too, then, establishes a relationship of predictability between identity and political outcome. According to Roberts, it is precisely the traditional liberal conception of the rights-bearing subject that is to blame for continued constraints on the reproductive freedom of poor Black women. Traditional reproductive rights arguments, centered on liberty rights, presume that individuals have a right to liberty to the extent that they are autonomous, rational decision-makers. The standard reproductive rights argument figures individual freedom as the absence of state intervention justified by virtue of an individual's ability to be rational and autonomous. This argument, Roberts argues, does little to protect poor Black women's right to bear or not to bear children. In fact, she suggests, it is precisely the conception of individuals as autonomous, rational decision-makers that is the problem. Such a conception assumes that individuals "make procreative decisions of their own free will" absent any constraining circumstances. Traditional liberal arguments thus obscure or erase the complex context in which individuals actually do make decisions (295). While traditional reproductive rights arguments may have been effective for helping middle-class white women achieve a degree of reproductive freedom, they have not helped poor Black women. Instead, they have denied the effects that race and economics play in procreative decision-making and thereby undercut Black women's right to choose while enabling a set of punitive regulations directed at controlling their procreation.

Roberts' argument is not premised on a notion of essential female identity shared by all women, nor does she think that all poor Black women share an identity. Rather, Roberts subscribes to an understanding of identity as socially constituted; that is, as formed in different ways through a variety of social relations, institutions, and factors including race, economic status, religion, and geographical location. Identity, though

socially constructed for all, is also fundamentally different for all.⁸ Identity, according to her argument, is something that is created in a social context of often contradictory constraints. Rights arguments, Roberts argues, must reflect this complicated conception of identity; they must reflect the social context in which individual identity comes to have meaning. Traditional liberal arguments presume autonomy and atomism and thus erase the complexity of factors that contribute to poor Black women's identity. These women are denied reproductive freedom because they cannot fit the conception of the proper subject of rights. They live under a set of constraints that make it impossible and implausible for them to exercise what would be considered a "rational" and "freely willed" decision. A traditional conception of the subject of liberty rights abstracts individuals from their context and fails "take into account the background social conditions that may have constrained their decisions" (295). "There is something drastically wrong," Roberts argues, "with a conception of reproductive freedom that allows this wholesale exclusion of the most disadvantaged from its reach. We need a way of rethinking the meaning of liberty so that it protects all citizens equally" (294). This rethinking, she suggests, begins with reimagining the identity of the rights-bearing subject as relational and contextually situated.⁹

⁸Roberts' work is clearly indebted to the scholarship on intersectionality and its challenge to a notion of a singular, essential female identity. Feminists like Kimberlee Crenshaw (1989, 1995) and Angela Harris (1990), for example, argue that associating the subject of rights with a single identity (atomistic individualism or female caring) erases the diversity and contextuality of women's lives. Such an approach demands uniformity among women and abstracts women from the context that makes their differences explicit and relevant. It particularly disadvantages women of color and poor women by failing to recognize their social context and their differences, and it obscures the intersection of race and gender in ways that have undermined the achievement of feminist political goals.

⁹This critique of traditional liberal rights, I believe, rests on a narrow reading of the history of rights and exaggerates the individualistic legacy of rights and overshadows alternative conceptions of rights. The history of rights is not a seamless history of masculinist individualism. It is by no means monolithic and completely consistent. In fact, it is peppered with examples of alternative conceptions of rights as well as theorists whose work is somewhat paradoxical, embodying a tension between their commitment to conception of atomistic individuals and connected ones. Rosalind Petchesky's (1995) work on the Levellers' conception of rights and Linda McClain's (1992) rereading of Dworkin and Rawls offer just two examples of this more complicated legacy of rights. I offer several other examples in the following chapters.

Petchesky's (1995) research suggests there are alternative historical conceptions of rights that point to rights' subversive character and transformative potential. Petchesky illustrates the transformative potential of rights language by turning to the Levellers' conception of rights. Levellers, a radical seventeenth century political movement, conceived of a rights-bearing subject in ways quite distinct from Lockean atomistic individuals. The Levellers, Petchesky suggests, made rights claims, particularly claims to self-ownership, that "strongly identified individuals' bodily integrity with the collective, common rights of the families and communities they come from" (393). They did

Dorothy Roberts suggests that the key to creating legal changes beneficial to women is to adopt an alternative conception of identity or personhood that more accurately represents or reflects women's experiences. Unlike West, however, she acknowledges that the conception of personhood embedded in traditional rights claims has been beneficial to poor Black women to a certain extent: "The concept of personhood embodied in liberty can be used to affirm the role of will and creativity in Black women's construction of their own identities. Relying on the concept of self-definition celebrates the legacy of Black women who have survived and transcended conditions of oppression" (303). Roberts acknowledges that traditional conception of rights, with their reliance on atomistic individualism, have been important for challenging Black women's degradation and for making demands for social recognition (303).¹⁰ Unfortunately, traditional rights

not use rights language to reinforce notions of separateness and self-interest. Rather, "for the Levellers...self-ownership takes its meaning from the context of popular protest and the concept of popular access to public space" (393). Far from reinforcing notions of separation and atomism through the language of rights, the Levellers recognized the interdependence of individuals and communities. This history, Petchesky contends, suggests a conception of bodily rights that is far more complex and resilient than feminist critiques suggest. It provides evidence that the concept of property in one's body can and has signified much more than simply "radical individualism, instrumentalism, and...the body as commodity" (388). Furthermore, this history dispels the notion that rights have been part of "a 300-year unbroken history of masculine contractarian fictions to justify 'possessive individualism' and the relentless appropriation of others" (395). In uncovering these alternative conceptions of the subject of rights, Petchesky finds that the right to self-ownership, in a revised form, has the potential to be a crucial element in global and local feminist projects. If feminists are to continue to engage fairly with the language of rights, they must, she believes, work at "uncovering the subversive and contextualized meanings in women's claims of possession and ownership of their bodies" rather than reducing all claims to an engagement with and reinforcement of Lockean individualism (394).

As the work of Linda McClain (1992) suggests, even those theorists read as "liberal" theorists of rights have more complex and even paradoxical conceptions of the subject and function of rights. McClain revisits the work of John Rawls and Ronald Dworkin, contemporary theorists of rights often criticized for perpetuating a notion of the subject of rights as radically disconnected, individualistic, and antagonistic. These theorists are denounced for not attending to relationships, responsibility, and care for others. They are read as depicting and promoting a subject of rights who is self-interested and unconcerned about responsibilities to others. Challenging this reading, McClain argues that both writers are far more attentive to the importance of care and connection than they have been given credit for. They "recognize a wide range of human connection and interdependency as underlying and playing a part in political philosophy and law" (1203-4). For example, Rawls' conception of the person includes the capacity to care for others that entails a sense of connectedness and mutual respect. Dworkin's individual, McClain illustrates, also recognizes and appreciates human interdependency. While their work clearly reflects certain commitments to autonomy and separation, McClain finds that their conception of rights-bearing subjects and their vision of social relations also "recognize interdependency, connection, and responsibility in many ways, including duties arising from personhood, citizenship, and fraternity or sorority" (1263). Feminists, McClain cautions, would be wise not to dismiss liberal theories of rights so quickly, nor to equate them wholly with atomistic individualism, for there is a far richer understanding of human nature embodied there, one that she believes can contribute to feminist politics.

¹⁰Roberts here is drawing on the arguments of Patricia Williams, one of the most oft-cited defendants of traditional liberal conceptions of rights. According to Williams (1991), critics of traditional rights are too quick to overlook the benefits that accrue to women by virtue of individualism's demarcating and separating function. It is precisely this function of rights, she argues, that makes them so powerful, both politically and psychically, for Black people. "For the historically disempowered," she argues, "the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status

claims have not fully protected the reproductive liberty of Black women, have not effectively eliminated the subordination of Black women. Roberts argues that for such changes to arise we will need a new way of thinking about the subject of rights. We will need to understand identity in ways that affirm personhood and protect human dignity. This, Roberts believes, can be accomplished by considering the racial and class identities of individuals when making rights claims. Rights claims, she explains, must reflect social context as it affects individuals. It must reflect the fact that individuals are connected to communities in positive and negative ways; that communities inform and influence individual decision making. She identifies this approach with a commitment to positive liberty or an "affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination. This approach shifts the definition of liberty from state nonintervention to an affirmative guarantee of personhood and autonomy. Under this postliberal doctrine, the government is not only prohibited from penalizing welfare mothers or crack-dependent women from choosing to bear children; it is also required to provide subsistence benefits, drug treatment, and medical care" (309-310). As Roberts explains, under a positive liberty argument, with its recognition of socially constituted identities, "The government's duty to guarantee personhood and autonomy [would stem] not only from the needs of the individual but also from the needs of the entire community" (310).

Although they disagree about whether female identity is natural or socially constructed, both West and Roberts share a few underlying assumptions. They agree that identity is both the source of the problem and the solution for feminists engaging with rights. It is the problem to the extent that the subject of rights reflects a liberal individualistic subject. It is the solution to the extent that the subject of rights reflects women's identity. A rights argument centered around a liberal individualistic subject will

from human body to social being" (153). Like Williams, Elizabeth Kiss (1997) defends the individualism and boundary establishment associated with rights. She warns: "Feminists who issue sweeping denunciations of rights to non-interference as atomistic and isolating ignore the ways in which women need precisely these sorts of rights" (6).

engender poor legal and policy outcomes, whereas a rights argument centered around a feminist subject of the kind they imagine should engender positive political outcomes. Both scholars, then, presume that identity can be linked to predictable or expected political outcomes. This perspective rests, I believe, on a earlier move or assumption that ultimately depoliticizes identity by positing it as prior to an engagement with rights. While this is particularly evident in West's work, as she posits a notion of essential, natural female identity that is clearly reflected, not constituted, in rights language, it is a more subtle point in Roberts' argument. Though Roberts embraces a socially constructed subject more clearly than West, she suggests that the constitution of identity is completed prior to the rights claim. That is, though Roberts recognizes identity as produced in and through an individual's social relations, she suggests that it can be clearly reflected in the rights claims and legal decisions made. The construction of identity precedes the engagement with rights discourse for Roberts and thus it serves a similar function as a natural identity; it serves as the basis or prior condition for claiming a right.

This latter understanding of identity is particularly evident in the recent work of Nancy Hirschmann (1999). Though Hirschmann's earlier scholarship called for a flat out rejection of rights language in favor of the language of responsibility, her recent work reflects a shift in thinking. Whereas earlier, Hirschmann argued that rights language was so inextricable from atomistic individualism as to be incapable of adequately reflecting and attending to women's experiences or needs, her current argument is that rights can be reconceived in such a way as to engender the kinds of changes feminists seek. Hirschmann's argument rests on similar grounds as that of Roberts. Identity, for Hirschmann, is both socially constituted and the precondition for a rights claim, both differentiated and yet univocal at the moment of rights-claiming. As Hirschmann explains, rights language can accommodate and address women's needs if it reflects women's "particularity, context, and identity" (29). Rights can be successfully deployed on behalf of women when they reflect women's socially constructed and socially situated

identities, when they represent women's differences accurately. As opposed to positing rights-bearing individuals as isolated and antagonistic, a feminist conception of rights, which Hirschmann also calls a "positive conception of rights," would:

proceed beyond the borders of 'individuals' as discrete identities to the communities within which individuals are situated and in which they were formed. It would attend to such social context both in terms of evaluating the *justification* of rights and of the *provision* of the right itself, so as to avoid unfair advantaging and the promulgation of inequality, which, in turn, would damage other's abilities to utilise rights. This would entail an explicit recognition of the social and political mechanisms that stand behind *all* exercises of even the most individualist liberal rights (41).

What is striking here is Hirschmann's notion that women's difference, though recognized as socially constituted and differentiated rather than essential and monolithic, is depicted as produced prior to the rights claim. It "signals a time when rights need to be called into play" (44). It provides the "occasion for rights" and indicates "times when rights are particularly at issue; it marks out occasions when misunderstanding and conflict may arise and indicates the possibility for appropriate state protection that rights afford" (30). The implication is that if the state would clearly recognize this differentiated identity, then inequality and discrimination would be resolved in ways favorable to women. Women's inequality and oppression, according to this model, continue only because the state misrecognizes identity, making it unable to adequately accommodate and address women's needs. Crucial to the ability of the state to recognize women's identity, however, is the ability of women to articulate that identity. Women, Hirschmann argues, must be given a voice; they must be allowed to speak their identity. As she explains, "there must be avenues for rights claimants to be able to articulate their situation and their need. . . . Individuals must be allowed and empowered to name their own experiences, and not have them named by others" (44). Here Hirschmann implies that women do have the ability to control the meaning of their articulations of identity. In the process of "nam[ing] their own experiences," individuals, according to Hirschmann's

model, utter a stable and univocal identity and have control over the meaning of their utterances. This is only possible if one presumes that identity is constituted prior to the utterance and, as such, is something univocal, stable, and transparent.

Though there are important differences between the arguments of West, Roberts, and Hirschmann, they share some common assumptions that undergird both their critique of traditional liberal rights and their revised conception of rights. These feminist critics of rights' liberal individualism all assume that identity is something that is either discoverable or constituted prior to a rights claim. A clearly articulated and recognized identity is precisely what leads to a particular political outcome: if a masculine identity is partly responsible for the perpetuation of women's subordination, then an alternative conception more reflective of women's identity will engender alternative political outcomes. Furthermore, based on this notion of identity and predictability, feminists are able to suggest that if the subject of rights is reconceived to more accurately reflect women's identity (whether that identity is considered to be essential and monolithic, or socially constructed and differentiated), and the state correctly recognizes this identity, political practices and relations of inequality can be successfully challenged. These arguments reflect a belief that if feminists get identity right, they can get rights right. They can remove, that is, certain issues addressed by rights-based politics from the realm of contestation and on-going political struggle.

Fixing the Subject of Rights: Feminism and the Critique of Discipline

But is identity something that is discovered or constituted prior to engagement with rights? Is identity something that is then reflected or represented in rights language? Or is identity a political construct that is itself produced through engagement with rights? And if so, what are the implications of a such a conception of identity for the practice of rights? These are the questions taken up by feminists influenced by the work of Michel Foucault. Drawing on his insights about the way in which modern disciplinary power

functions, feminists like Carol Smart and Wendy Brown pose a considerable challenge to the scholarship of feminists like West, Roberts, and Hirschmann, calling into question both their analysis of the problem and their proposed solutions. For scholars like Smart and Brown, the problem of rights discourse is not located in the state's misrecognition of women's identity or even in its valuation of masculine identity. The problem is not that the subject of rights reflects only a partial truth or an inaccurate portrait of human nature that could be rectified by recourse to an alternative, feminist conception of the rights-bearing subject. The problem of rights discourse, they argue, is that it has a disciplinary quality. That is to say, regardless of the particularity of the identity around which a rights claim is built, rights discourse will reify that category, fixing individuals in otherwise contingent identity categories. Accordingly, rights are not only unable to address the social harms experienced by women, but ultimately end up resubordinating the very individuals they were meant to empower.

In this section I review the Foucauldian feminist critiques of rights, which I call critiques of discipline. As I will suggest below, despite presenting a challenge to critics of liberal individualism, these feminist critics of discipline also depoliticize rights in ways that obscure their more contestatory and contingent character. Indeed, it is precisely their goal to illustrate the depoliticizing tendencies of rights. It is precisely their point to show that identity, a fundamentally contingent and unstable category, is consolidated and reified through rights discourse. This naturalizing tendency, they suggest, explains why rights are such a limited, if not dangerous language of political resistance for women and other marginalized individuals. According to these feminists, the stability and univocality of identity so valued by critics of liberal individualism is not constituted or even discoverable prior to engagement with rights discourse. Identity is not, they explain, simply reflected in a rights claim to be accurately recognized by the state. Rather, identity is actually rendered stable and univocal, fixed and naturalized, constituted as something stable and immutable, through the very practice of rights-based political arguments.

Moreover, the fixity of identity, they warn, is not something that should be desired or sought after. The sedimentation of identity categories is a problem, not a solution. Not only does rights discourse render identity stable and fixed, but also this process of naturalization and normalization is precisely what contributes to the continued subordination of the very people rights were meant to free from oppression. Rights, they explain, enable a set of regulatory and disciplinary practices that are premised upon these stable identities and reinforce rather than challenge subjection. My concern here is that this depiction of rights reflects only part of the story of rights. To the extent that these feminists present rights discourse as having very predictable and fixed outcomes--naturalization, normalization, and regulation—they reinforce the notion that this dissertation is meant to challenge, the notion that rights are neither an effective tool of political resistance nor an appropriate language of political contestation.

As this perspective relies heavily on Foucault's critique of rights, I offer a brief review of his arguments before turning to the arguments of Smart and Brown. The most forceful articulation of his critique of rights comes in the "Two Lectures" (1980a). There, Foucault explains that rights discourse is an ineffective, even dangerous language of political resistance for two reasons. First, rights are caught up in what he calls the "ancient theory of sovereignty," a model of power that presumes that power emanates from a single source, the sovereign, and can be evaluated according to criteria of legitimacy which depend on the establishment of consent. Rights discourse, according to this theory, is able to identify and challenge the sovereign's illegitimate acts of power. In making visible and challenging unjustified uses of sovereign power, rights language is presumed to pose a very real and effective challenge to power. Through this challenge, rights discourse is said to protect a space of freedom for the individual, a space in which that individual can act and choose without interference of the sovereign.

Modern power, Foucault argues, no longer functions according to the model of sovereignty. While feudal and monarchical power may have functioned according to this

model modern power is no longer centralized nor emanates from a single source. Rather, modern power, what Foucault calls disciplinary power, circulates from multiple and varied sites. It functions less through prohibition than through a productive power. Accordingly, the language of rights is insufficient to make visible and to challenge government power. Rights discourse, in other words, is no longer an effective language of contestation.¹¹ Indeed, in turning to rights to contest modern configurations of power "we find ourselves in a kind of blind alley: it is not through recourse to sovereignty against discipline that the effects of disciplinary power can be limited" (1980a, 108). For example, claiming and being granted a right to privacy has done little to shift cultural norms regarding women's abortion choices. The juridical right fails to challenge the norms and social practices that discourage medical students from learning abortion procedures or frighten doctors away from providing abortion services.¹²

Foucault, however, offers a second, less explicit, but perhaps more devastating, critique of rights discourse. Not only are rights poorly equipped to challenge disciplinary power, but also they are now in its service. That is, rights are not simply blind to modern operations of power, but they function to bolster and support disciplinary power. As he explains in the *History of Sexuality*, in modern society "the law operates more and more as a norm, and the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory" (1978, 144). The law, juridical institutions, and rights language, in other words, are transformed in modern society and function like technologies of normalization themselves, focused on the management of populations. To engage in a contestatory politics through recourse to rights language is not, therefore, to expand the realm of

¹¹Foucault (1980a) also argues that rights discourse was used to mask practices of domination by the sovereign suggesting that rights may have been an ineffective contestatory discourse prior to the shift to modern forms of power.

¹²Mark Blasius (1994) offers a good example in his discussion of privacy rights discourse in the context of gay and lesbian politics. "A right to privacy," he explains, "can focus only upon the state's regulation of sexual acts. It elides the power relations that constitute compulsory heterosexuality, and it is not adequate conceptually to deal with other components of the 'gay rights' legal agenda, nondiscrimination and equality" (140).

individual freedom, but rather to bolster the power of the state. As Jon Simons explains, "legal notions of rights are colonized by the scientific norms deployed in strategies of government.... As a result, even when we believe we are upholding our sovereign rights against the state or the encroachments of disciplinary power, we do so in the name of a right and through a juridical system that has itself been disciplined" (1995, 53).¹³

Explaining this process in different terms, Foucault argues that disciplinary discourse functions like discourses of the truth. Truth, as Foucault explains, is not something that is discovered and then represented and recognized in language. Rather, it is something that is produced and has productive power; it is constituted through a system of rules, mechanisms, and practices. Each society has its own "politics" or "regime" of truth, its own procedures and practices "for the production, regulation, distribution, circulation and operation of statements" that separate the true from the false (1980b, 133). Rights discourse is one aspect of a society's regime of truth; it is one of "the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true" (1980b, 131). As a discourse of the true, rights have a particular power. As Foucault explains, there are "specific effects of power [that are] attached to the true" (1980b, 132). The most immediate effect of a truth discourse, as Foucault explains, is that it constitutes the very subjects it is purported to "know".¹⁴ In other words, a discourse of the true "licenses 'experts' to describe and objectify people's lives" and then represent these descriptions as reflecting the truth about individuals (Halperin 1995, 184-5). Through these descriptions, certain individuals or ways of being come to count as normal or abnormal. As Foucault

¹³This is the traditional interpretation of Foucault that is taken up by feminist critics of rights. I complicate this interpretation in Chapter Four and thus suggest, by way of implication, that Foucauldian feminist critiques of rights are incorrect to the extent that they overlook the more political understanding of rights present in Foucault's work.

¹⁴For example, the disciplinary practices deployed in prisons to produce obedient prisoners and docile subjects are part of a discourse on the truth of criminality.

explains, power, exercised through discourses of the truth, like those associated with rights:

categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. It is a form of power which makes individuals subjects. There are two meanings of the word *subject*: subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to (1982, 212).

With these categorizations and descriptions comes, that is, a form of subjection. This subjection is both internal and external. We not only come to see ourselves according to the norm, but practices are set up so as to police and regulate our bodies and our actions such that they conform to that norm.

Rather than understanding identity as something that is wholly constituted outside of a discourse like rights, a Foucauldian perspective posits identity as that which is produced through rights discourse. It is through rights discourse that certain ways of being come to be defined as properly human or proper for the condition of rights-bearing subjectivity. But rather than acknowledging the constituted nature of this identity, rights discourse erases or obscures this process. Identity, though decidedly not something that is self-evident or natural, is presented as if it were precisely these things, as if it were natural and true. Within the context of rights discourse then, "certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals" who are properly associated with rights-bearing subjectivity and those who are not (1980a, 98). Rights discourse, by determining what counts as the normal, also engenders practices which inculcate these norms into individuals. The resulting "normalizing-disciplinary network" shapes and trains individuals, producing capacities in individuals through mechanisms and practices that are non-violent. Disciplinary discourses, discourses of the true, as Foucault explains, produce individuals and their identity through "the specific technique of a power that regards individuals both as objects and as

instruments of its exercise" (1979, 170). Rights discourse, for example, presents a conception of human nature that, rather than reflecting some pre-existing truth about humanity, actually produces the truth of humanity it presumes to reflect. This process of production, part of what Foucault calls the "politics" or "regime" of truth, is then erased and obscured. What is left is a discourse that presents itself as the objective truth, and authorizes institutions and practices on its behalf. This process becomes all the more understandable in the context of feminist applications of Foucault.

For those feminists drawn to his work, Foucault is helpful in making visible the extent to which rights discourse produces the very female identity categories feminists presume it can contest or represent. As Mary Jo Frug explains, rights "encode the female body with meanings" and then "explain and rationalize these meanings by an appeal to the 'natural' differences between the sexes, differences that the rules themselves help to produce" (1992, 129). Rights discourse, Foucauldian feminists warn, cannot be modified to serve the interests of feminists through the displacement or reconceptualization of the subject of rights. Regardless of what image of the rights-bearing subject is embedded in rights discourse, it will always function to naturalize identities and resubjugate women.

This is precisely Carol Smart's (1989) concern. Through analysis of various legal controversies, Smart concludes that feminists are incorrect to believe that rights discourse "holds the key to unlock women's oppression" (5). In fact, according to Smart, though rights have played an important role in feminist history, in contemporary politics they actually do more harm than good, engendering more losses than gains. Rights have "become more of a weapon against women than in favour of feminism," she argues (3). For Smart, as we will see, the problem with rights is that they function like a discourse of the truth, not only producing a conception of womanhood that is at odds with women's experiences, but also disqualifying and silencing women's knowledge and voices along the way. While Smart is careful to expose identity as a political production, I suggest that she depoliticizes rights to the extent that she presents rights discourse as having a singular

and predictable outcome. Though identity is produced through rights, one can still, under Smart's model, predict the outcome of a rights claim. As Smart explains, rights language will lead to the naturalization of an unacceptable conception of womanhood. It is, therefore, incapable of transforming political and social practices in ways beneficial to women.

The danger of rights, Smart suggests, resides in their pretension to speak the truth about human nature and womanhood. In claiming access to the truth about women and proper rights-bearing subjects, rights discourse entrenches women in unflattering and inaccurate identity categories that ultimately enable the increased surveillance and regulation of their bodies. In a critique reminiscent of the liberal individualism critique, Smart argues that rights discourse, as a discourse of the true, promotes a conception of the proper subject of rights as rational and self-determining, atomistic and self-interested. Rights discourse, at the same time, constitutes the truth of womanhood as unruly and dangerous, and of women's bodies as "unpredictable" (1989, 91). Whether feminists demand rights on behalf of women as proper subjects of rights, or attempt to challenge the conception of disorderliness by positioning women as victims of oppression, rights discourse, according to Smart, offers only "unflattering" images of women that justify the need for increased surveillance and regulation of women's lives.

As a way of illustration, Smart (1992) discusses nineteenth-century policies designed to control the spread of contagious disease. According to Smart, these policies, which targeted women's bodies as sources of contagion, were justified through a discourse which produced women as disruptive bodies, as individuals "whose sexual and reproductive capacities need[ed] constant surveillance and regulation because of the threat that this supposedly 'natural' woman would otherwise pose to the moral and social order" (8). Even challenges to the policy through claims to women's liberty exacerbated

the problem, leading to different forms of control and surveillance.¹⁵ In other arenas as well, such as child custody rights, rights discourse led "to the growth of the technology of the disciplinary society" (162) by generating a need for "more centralized knowledge about [women's] sexual relationships, marriage relationships, child custody organization, and so on" (142). Rights claims, Smart concludes, do not lead to increased freedom or empowerment for women. They do not eradicate women's oppression and constraint. Rather, rights discourse ultimately produces "a new form of oppression" (142). Unless and until feminists abandon rights language as a language of contestation, women will continue to be at the mercy of a "malevolent" discourse, one that does more harm to women than good.

Like Smart, Wendy Brown is concerned that feminists have placed too much faith in rights as a language of political contestation. For Brown the problem is that rights discourse fixes women in particular normative identity categories and thereby inscribes them in their injury. Indeed, her claim is that rights are a dangerous language of political emancipation "more likely to become sites of the production and regulation of identity as injury than vehicles of emancipation" (1995, 134). Rights, according to Brown, do not have the power to transform social and political practices in ways that will engender women's freedom and emancipation, particularly if rights are meant to represent and reflect women's identities as injured and oppressed. Far from engendering women's freedom and emancipation, rights discourse and the desire for the state protection of injury-based identity actually increase the power of the state to regulate and discipline its subjects.

Unlike Smart, however, Brown's criticism and skepticism is couched in a good deal of ambivalence. She explicitly rejects the temptation to take a stand for or against rights (1995, 2000a, 2000b). What interests Brown instead are the "conundrums" and

¹⁵See also Walkowitz (1991) on the Contagious Diseases Acts.

"paradoxes" that arise from feminism's engagement with rights, the irresolvable puzzle posed by rights discourse and its ability to embody and engender multiple, yet incommensurable truths (2000b, 239). Rights, Brown explains, are paradoxical in a number of ways. They are simultaneously a political necessity and a political liability. Marginalized individuals, like women, need rights to "secure our standing as individuals," yet rights obscure the ways in which our identity as individuals is constituted in the first place and they obscure the extent to which we then become imprisoned in that identity. Rights may very well be that which "we cannot not want" given the conditions under which we live (2000b, 231), but in wanting them we "inadvertently redraw the very configurations and effects of power that they seek to vanquish" (1995, ix).

I suggest that Brown, despite her attempts to refuse a stand on rights, lends considerable support to the notion that rights are a fundamentally dangerous language of political resistance. Though her work is meant to illustrate the paradoxical character of rights, there is little attention given to the way in which rights enable, rather than simply limit political contestation. There is little attention, that is, to the politically productive moments of paradox. Indeed, her continued attention to the negative implications of rights is so strong as to obscure the more provocative moments of ambivalence in her work. Though Brown admits that rights may "slightly mitigate certain modalities of subordination or exclusion" (1995, 12), her emphasis is on the way they reinforce these very modalities of power and thus resubordinate the very individuals they were meant to assist.¹⁶ With this emphasis, Brown depicts rights predominantly as a discourse of discipline rather than as a discourse of contestation and contingency. In fact, it is

¹⁶ Indeed, this is precisely Baynes' (2000) interpretation. According to Baynes, Wendy Brown should be read as a rights skeptic: "Despite a few cautionary remarks that she is not opposed to rights, the general conclusion of Brown's inquiry is that the language of rights is likely to do more harm than good, that rights codify and reinscribe the very powers they were designed to confront, and thus, that radicals and progressives should think twice before including rights within their emancipatory projects" (452). So powerful is this emphasis in Brown's work that she has devoted two recent articles to refuting it (2000a; 2000b).

precisely contingency and contestation that are foreclosed through rights language as she depicts it.

Brown, admittedly, means to distance herself from the kind of interpretation of rights that I attribute to her. Rather than considering whether or not rights are emancipatory in the abstract, Brown contends that is important to study rights in their historical and political specificity. To that end, she raises a series of questions about the productive power of rights. In particular, she is interested in the way in which rights produce rather than reflect identity. Thus she asks:

What kind of subject, produced by what kind of powers, is led to seek what kind of rights, in the context of what kind of legal, cultural, and state discourses, with what kind of effects? . . . In a given historical context, what kinds of powers produce what kind of rights claims that might become the instruments of what kinds of regulation or domination even as they confer recognition or redress of subject-specific injuries? (2000a, 477).

These questions already presume attention to particular effects. Rather than considering all kinds of effects, Brown links identity production to "regulation or domination." Thus it is not surprising that she finds that rights entrench women and other marginalized individuals in their injuries. "[L]egal 'protection,'" Brown explains, "entrenches the injury-identity connection it denounces" and codifies "within the law the very powerlessness it aims to redress" (1995, 21). Through the process of naturalizing these contingent identities, rights discourse "imprison[s] us within the subject positions rights are secured to affirm or protect" (120). Individuals are imprisoned through a process that involves producing an identity that is presented as a reflection of the nature and truth of that individual. Despite promising to increase individual freedom by limiting the power of the state and society, rights discourse, Brown argues, entrenches women in an injury-based identity that renders them more susceptible to state regulation and discipline. According to Brown, the implication of this for feminism is that "to have a right as a woman is not to be free of being designated and subordinated by gender. Rather, while it may entail some protection from the most immobilizing features of that designation, it

reinscribes the designation as it protects us, and thus enables our further regulation through that designation" (2000b, 232).

Brown's arguments, then, are not so different from Smart's. Like Smart, Brown seems to be calling for a rejecting of rights, if not explicitly, then certainly by implication.¹⁷ Like Smart, Brown seems to be suggesting that the outcome of a rights argument is predictable. Identities will be naturalized and normalized; individuals will be reinscribed in normative identity categories that equate identity with injury. As Brown explains:

rights that are gender specific entrench the regulation of women through the regulative norms of femininity [while] rights that are neutral and universal potentially entrench the subordinated status of women by augmenting the power of the already powerful. The paradox, then, is that rights that entail some specification of our suffering, injury, or inequality lock us into the identity defined by our subordination, while rights that eschew this specificity not only sustain the invisibility of our subordination, but potentially even enhance it (2000b, 232).

Despite feminism's best efforts to articulate a complex and contingent identity for women, rights discourse and legal institutions, Brown suggests, rearticulate that identity as monolithic and natural. Rights discourse, that is, is characterized by its ability to reify and simplify complex identity categories. "We appear not only in the law but in the courts and public policy," Brown explains, "either as (undifferentiated) women, or as economically deprived, or as lesbians, or as racially stigmatized, but never as the complex, compound, and internally diverse subjects that we are" (2000b, 236-7). Rights discourse produces a "fiction of a monolithic subject" and then uses this fiction to justify a series of regulations and disciplinary practices. Having entrenched women in the very identity that justifies their subordination, having denied feminist attempts to articulate contingent identities, rights leave feminists in a predicament. As Brown explains,

¹⁷Unlike Smart, Brown does not argue for the explicit rejection of rights. Indeed, she suggests that rights may have a place in democratic politics. Unfortunately, this argument is not developed enough to dislodge the sense, deriving from Brown's tone and continued emphasis on the dangers of rights-based polities, that Brown really is calling for the rejection of rights.

ultimately rights language undercuts any political gains made by engendering a kind of political paralysis (239).

It is difficult to understand, given her description of rights' paradoxes, what Brown finds of a value in a rights-based politics. It is one thing to recognize that there is no alternative but to engage rights, as Brown suggests: "Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights, yet can be signified in no other way within existing political discourse" (2000b, 239). It is quite another thing, however, to find political possibilities within rights language itself. In fact, in a footnote Brown distinguishes her argument from the argument of Judith Butler. Like Brown, Butler attends to the paradoxical dimensions and implications of rights. However, unlike Brown, she finds political agency and contestatory potential within the paradox (2000b, 239; 241 n. 15). Brown sees very little political potential in rights language. Other than suggesting that rights are something feminists cannot do without, there is little substantive evidence in Brown's work to support the notion that rights do more than constrain political change. This is surprising considering Brown's explicit rejection of a stance against rights as well as her understanding of genealogical politics (Brown 1998). Though she acknowledges elsewhere that Foucault's notion of genealogy helps us recognize the political possibilities implicit in contingency, and though she describes her analysis of rights as genealogical, such contingency is less than apparent in her work on rights.¹⁸ Rather than focusing the inconsistencies and the

¹⁸See Brown (1998) for a discussion of the political potential of genealogical politics. Unlike Smart, who reads Foucault's discussion of truth as closing doors for feminists, Brown takes Foucault at his word that genealogical investigation opens up the space of politics by replacing "the notion that 'truth or being [lies] at the root of what we know or what we are' with an appreciation of contingency" (1998, 36). Brown explains that genealogical investigations are meant to reveal that what appears to be the necessary or logical and inevitable outcome of a discourse or practice need not be so. Foucault helps us see, she suggests, the inconsistencies and the disruptions in the ways that societies produce the truths that in turn constitute subjects and social organization. As Foucault explains in his later work, he believed in the possibility of resistance and freedom arising, in part, from the very inconsistency and fragility of power relations themselves. Contingency, Brown explains, involves making visible the non-inevitability of existence, the non-teleological character of history. History, as Foucault tells it, is constituted by malleable and partial discourses and rationalities that throw into relief the extent to which "that-which-is" can be thought of as 'that-which-might-not-be'" (42). While Foucault is often read as depicting power as total domination, his later work, as I will explain in more detail in Chapter Four, was more explicit about the possibility of resistance and freedom. In recent work, then, Brown is more closely aligned with, or at least emphasizes the aspects of Foucault that suggest that

disruptions in the ways that societies produce identities and subjects through rights as a way to illuminate the political possibilities, Brown suggests that rights imply predictable outcomes because they will always naturalize contingent identity categories. Rather than considering rights' power outside the realm of the state, Brown examines rights in the context of legal and policy controversies only. Rather than considering identity as something that can be contested through rights language, Brown focuses exclusively on the consolidation of identity. Ultimately, Brown is so emphatic about the depoliticizing tendencies of rights that the only options she leaves us with are either rejecting rights altogether or discovering a new understanding of rights that has "the temerity to sacrifice [their] absolutist or naturalized status" (2000b, 240). This suggestion, that "absent the ability to discover some wholly new form of right, women are supposedly faced either with rewriting their injuries through rights, or doing without rights altogether," as Annabelle Lever rightly points out, suggests a profound skepticism, if not complete disillusionment with rights as a language of political resistance (2000, 246).

For Brown, then, like Carol Smart, rights seem to hold little if any promise for feminist politics. Rights language, it would appear, guarantees nothing but disappointment and political danger. Identities become sedimented, injuries become entrenched, regulation increases, all because feminists attempt to achieve political change through the language of rights. Rights, both scholars seem to suggest, are part of a framework of disciplinary power in which "the subject will always be an effect of power relations, and [from] which there is no possibility of escape from domination of one sort or another" (Patton 1998, 64). Though Brown may get us thinking about paradoxes in a way that complicates the approach taken by critics of liberal individualism, she remains committed to reading that paradox as depoliticizing and thereby reinforces the notion that rights politics engender predictable outcomes.

"discourse transmits and produces power; it reinforces it" *and* it "also undermines and exposes [power], renders it fragile and makes it possible to thwart it" (Foucault 1978, 100-101).

In the next section I turn my attention to the work of Hannah Arendt. Arendt articulates a conception of rights as a key component of an agonistic politics, a politics of unpredictability and continual contestation. Within this conception, the paradox of politics is relocated and reinterpreted. Paradox is found at the level of identity and political outcome, and read as the source of political possibility. In fact, it is in presuming the stability of political outcomes and the identities from which these are believed to derive, that political movements get themselves into trouble. It is politically dangerous, Arendt warns, either to celebrate or condemn rights for their supposedly predictable political outcomes. Instead, Arendt urges us to consider the political dimensions of rights and identities, to acknowledge and embrace their contestability and instability.

Politicizing the Subject of Rights: Hannah Arendt and Contestatory Politics

Hannah Arendt's work calls into question some of the basic premises of feminist critiques of rights. Unlike critics of liberal individualism who suggest that identities are coherent prior to a rights claim,¹⁹ making it possible for the state to recognize rightly women's oppression and injury, or critics of discipline who argue that identities are actually fixed within rights discourse itself, contributing to the continued subordination of women, Arendt argues that identity is neither constituted prior to nor fixed within rights politics. Indeed, Arendt suggests that identity is produced through political action and, as such, is never univocal, fixed, or stable. The implication of this understanding of identity for rights politics is two-fold. First, it calls into question the equation of identity with predictable and expected political outcome. In revealing such an equation to be politically dangerous and naïve, Arendt undercuts both the skepticism and the optimism

¹⁹I mean to include here both a conception of identity as essential and a conception of identity as socially constituted. As I suggested earlier, feminists often conceive of identity as socially constituted prior to engagement with and reflected in rights language. In this articulation of the relationship between identity and rights, socially constituted identity serves the same function—engendering predictable political outcomes—as does an essential identity.

expressed by critics of liberal individualism. Second, Arendt challenges the overwhelming pessimism of critics of discipline. Rather than suggesting that identity becomes fixed in the practice of rights, she reveals identity, and by implication rights themselves, to be the unstable, contingent, and therefore contestable products of political engagement. Arendt's understanding of the relationship between identity and political outcome, I argue, more adequately captures an understanding of rights as political.

Identity, as depicted by feminist critics of rights, refers to a set of qualities of characteristics of individuals. It may be captured by an understanding of atomistic individualism or nurturing femininity or it may be depicted as a reflection of our experiences of our gender, race, economic status, or our injury. For Arendt, however, these are not descriptions of our identity, but rather of our "whatness." Identity, she argues, is not captured by a set of attributes that then form the basis of political action and demand recognition. To say that one is a woman or a poor Black woman is not to articulate identity in the way Arendt uses the term. "Who" we are, our unique identity, is only disclosed in the practice of politics, through the process of acting in concert with others. As Bonnie Honig explains, "the self attains identity--becomes a 'who'--by acting in the public realm in concert with others. In so doing, it forsakes 'what' it is, the roles and features that define (and even determine) it in the private realm (Honig 1993, 80). In Arendt's language, our identity is constituted by the stories that are told about these actions: "*Who* somebody is or was we can know only by knowing the story of which he is himself the hero" (1958a, 186). The story is not something that we create, but rather it is told by those who witness our actions.

As a product of political action, then, identity is never something that can be discovered, like a truth claim, nor is it as coherent and seamless as feminists imagine. It is never a stable category pre-existing or fixed in the context of political action.²⁰ In fact,

²⁰See my discussion of the Declaration of Independence in Chapter One for a good example of Arendt's understanding of the political constitution of identity.

it is precisely because identity unfolds in the presence of others that it is unstable. As Arendt suggests, when we engage in politics we act within the context of a web of relationships characterized by differing perspectives, wills, and intentions. The public, for Arendt, is a realm populated by a plurality of individuals with divergent points of view and conflicting opinions. They will interpret our actions in a variety of ways; they will tell multiple and perhaps contradictory stories about our actions likely to have little to do with what we had intended. As Arendt explains, the stories in which our identities are disclosed are "the results of action and speech, [and] reveal an agent, but this agent is not an author or producer" (1958a, 184). In other words, as actors, we are never in complete control of the stories told about ourselves; we cannot control the meaning of our actions and our speech in the way that someone like Nancy Hirschmann presumes. Our "action," Arendt argues, "almost never achieves its purpose . . . it 'produces' stories with or without intention as naturally as fabrication produces tangible things" (1958a, 184). Political communities, she reminds us, are constituted by "equals where everybody has the capacity to act" and everyone has a different and partial perspective, thus making it impossible to predict the outcome of an action (1958a, 244).²¹

As we have no control over the stories that are told about us, identity—and thus political action—is marked by a radical contingency for Arendt. If identities are formed in the context of plurality and often regardless of intent, they are not characterized by stability and univocality, as feminist critics of liberal individualism suggest. Rather, they are marked by instability, mutability, and equivocality. Identity is that which is always in process, never complete, monolithic, or transparent. As Bonnie Honig explains, "identity [is] a hard won and not always well-fitting product of action. Arendt theorizes politics as an always unfinished business, committed simultaneously and perpetually to the

²¹ See McGowan 1998 for a good discussion of politics as an "identity-disclosing action."

settlement and unsettlement of identities" (Honig 1993, 77).²² In contrast to the critics of liberal individualism and the critics of discipline, both of whom presume a singularity and univocality to identity, Arendt opens up the possibility that multiple and contradictory identities are produced through political action. These multiple identities, captured in contradictory stories, become for Arendt the source and site of political contestation rather than codification and foreclosure.

So what then is the implication of Arendt's conception of identity for the political practice of rights? Rights proponents, her work suggests, should never presume that identity is fixed prior to a rights claim. They should never assume that a solid and stable identity is the proper foundation for a rights claim. And they should never presume that the articulation of identity can or will engender a predictable political outcome.

Explaining Arendt's understanding, McGowan offers some good advice for rights activists: "From an Arendtian perspective, citizens should not think of their identities...as *faits accomplis*, that the state or polity must acknowledge" (McGowan 1998, 164). Instead of seeking recognition of an identity through a rights claim, or focusing on the way in which rights discourse fixes identities, Arendt provides us with an understanding of identity as that which can be contested through rights claims that are directed both to the state and to each other as citizens.²³

In fact, to revisit a point I raised earlier, Arendt warns about the dangers of presuming the fixity of both an identity and a political outcome in the context of rights politics. That was the mistake of stateless people who resisted totalitarianism through recourse to a notion of natural and inalienable rights. Stateless people expected, she reminds us, that rights claims could effect the end to horrific abuses of power. Their expectation was founded on a belief in the stability and irrefutability of identity itself.

²² This does not mean that identity can be anything or that we are "ever-new selves." Identity is always constrained by the context in which it disclosed. See McGowan 1998.

²³ See my earlier discussion of Lisa Bower's work in Chapter One for a good example of these issues.

States simply needed to properly recognize these individuals as the naturally endowed rights-bearing subjects they claimed to be and the unjust exercise of power would stop. Stateless people assumed that a particular political outcome would result from a rights claim presumed to reflect an identity constituted or discovered prior to the rights claim itself. They presumed that the claim of identity implicated in the rights claim was irresistible and irrefutable when in fact it was not.

Unfortunately those displaced by the totalitarian regimes of the mid-twentieth century, held on to an illusory belief. Rights do not and never have had the power to guarantee political outcomes. They have never been simply the reflection or representation of a stable and univocal identity. To conceive of the relationship between identity and rights as immutable and predictable is to hold to a dangerous illusion. Not only will it be profoundly disappointing to realize that the outcome of a rights claim cannot be guaranteed, but such a belief could lead to political apathy, according to Arendt. As Arendt explains, rights must be recognized as political claims that have meaning only within the context of political communities. That means that rights get their power from the political activities of individuals, not from having some truth-like quality. Acting together we give meaning to rights, and in these activities rights acquire their power. Without political activity, the actions and speech of citizens, rights are meaningless and powerless. As John McGowan reminds us, "The power that constitutes the political (which...Arendt calls 'acting in concert') is what constitutes and protects rights. Thus, the freedoms (of movement, of speech, etc.) and possibilities for action that rights create for individuals are products of citizenship, not of some innate humanness," nor of some innate or even constituted womanness (1998, 26).

Arendt's understanding of identity and rights implies a certain kind of optimism that is different from the optimism expressed by feminists critics of liberal individuals and challenges the pessimism of critics of discipline. From Arendt's perspective, the political nature of identity and rights means that they are open to contestation and are

marked by contingency. As such they can provide "sites of critical leverage within the ruptures, inadequacies, and ill-fittedness of existing identities" (Honig 1995, 155). This political potential, I believe, is captured by some of the recent work of Judith Butler. In her work on speech, Butler explores the implications of agonistic politics in the context of legal battles. Butler, like Arendt, depicts identity as that which is produced in political action, such as the claiming of rights. And also like Arendt, Butler suggests that what is produced is fundamentally unstable and mutable. This instability makes political contestation possible. Agreeing with Arendt that the articulation of identity is beyond an individual's control, Butler sees political possibility. "If utterances bear equivocal meanings," Butler argues, "then their power is...less unilateral and sure than it appears. Indeed, the equivocity of the utterance means that it might not always mean in the same way, that its meaning might be turned or derailed in some significant way and...produce an effect counter to the one intended" (Butler 1997). In other words, an articulation of atomistic individualism may lead to more positive outcomes than feminists expect just as an articulation of women's identity may lead to less positive outcomes than expected.²⁴ Butler reminds feminists that in using the language of rights, even when describing women in terms of atomistic individualism or autonomy, they are never simply extending an identity category to women. Rather, they are always already changing that category: "subjects who have been excluded from enfranchisement by existing conventions governing the exclusionary definition of the universal seize the language of enfranchisement and set into motion a 'performative contradiction,' claiming to be covered by that universal, thereby exposing the contradictory character of previous conventional formulations of the universal" (89). Through the articulation of this

²⁴In fact, this becomes obvious when one examines the history of feminist legal efforts as well as feminist rights debates. My point is not that feminists completely fail to recognize these contradictory outcomes, but rather that they interpret them incorrectly or obscure them. As I suggested above (footnote 9) and as I will explore in the following chapters, there is a historical legacy of instability and multiplicity within rights language that is explicitly erased or denied by feminist critiques and reconceptualizations of rights.

“performative contradiction” individuals help to reconstitute the meaning of concepts like the rights-bearing subject or the free individual.

This, of course, does not mitigate the frustration and anxiety that may attend this instability and unpredictability. As Butler acknowledges, there are considerable risks that accompany an understanding of identity and utterance as equivocal: “if one always risks meaning other than what one thinks one utters, then one is, as it were, vulnerable in a specifically linguistic sense to a social life of language that exceeds the purview of the subject who speaks” (1997, 87). That is, however, what makes rights articulations political in the first place. It is precisely their undecidability that is important. It places rights claims, and the identities articulated through them, squarely in the realm of politics by making them the product of continued contestation and struggle. As Butler explains, the equivocality of utterances means that “one cannot know in advance the meaning that the other will assign to one’s utterances, what conflict of interpretation may well arise, and how best to adjudicate that difference” (88). The only way to resolve this instability, at least temporarily, is “through a concrete struggle of translation, one whose success has no guarantees” (88). Rather than denying this instability, Butler celebrates it. The fact that there is no guaranteed outcome to a political action or utterance, the fact that identity is never stable suggests not the failure of oppositional politics, but rather the failure of hegemonic power itself (93). Uttering “performative contradictions” is not, Butler argues, a “self-defeating exercise,” rather, it is what leads to revision and change: “performative contradiction is crucial to the continuing revision and elaboration of historical standards of universality proper to the futural movement of democracy itself” (89-90). It is the work of politics itself.

Like Wendy Brown, both Arendt and Butler recognize that rights politics entails a set of paradoxes and conundrums. Neither suggests that rights enable political change absent negative or undesirable consequences. Neither would deny that feminists are correct, then, to do the important work of identifying the limits of rights-based political

opposition. However, both suggest that we can reread the paradoxes of rights so as to recognize their political viability, indeed, their political character itself. While neither Arendt nor Butler pretend to predict or guarantee specific political outcomes as a consequence of rights claiming, they suggest that we should not fear this contingency. It is this contingency that allows for the possibility of contesting and reconstituting the very identity categories that undergird troublesome policies and practices in the first place. And while both thinkers call us to embrace the contingency and instability of rights language, to see these characteristics as the source of rights' political power, both recognizes that this approach to rights is fraught with anxiety and risk. As we will see in the next chapter, the fear and anxiety generated by the contingency of identity and politics finds its antecedents within the liberal political tradition itself, in the work of John Stuart Mill. In John Stuart Mill we find a theorist who simultaneously recognized and tried to run from the political character of rights language. It is this tension, and not Mill's embrace of atomistic individualism, that enables and constrains his feminist politics.

Chapter Three

Cultivating Character:

John Stuart Mill and the Subject of Rights

Introduction

In the 1871, John Stuart Mill was called before Parliament to testify on the operations of the Contagious Diseases Acts (C.D. Acts). These Acts, first authorized in 1864 and reauthorized in 1866 and 1869, were designed to control and contain the spread of venereal disease among military personnel throughout Britain.¹ Concerned that venereal disease was compromising troop readiness, Parliament instituted an elaborate system for the surveillance, regulation, and forced medical treatment of female prostitutes.² Under the Acts, police had unlimited power to watch, apprehend and incarcerate all women suspected of being prostitutes, while doctors had the power to forcibly examine and treat these women for disease.³ Parliament believed that such a system would contain disease at its source: infected prostitutes.⁴ Mill, however, believed otherwise. Questioning the medical rationale for the Acts, Mill reminded Parliament that

¹ According to members of Parliament, the Acts were designed to combat disease among military personnel in an effort "to maintain the health of soldiers and sailors, whose physical efficiency was reported to be very seriously affected by the disease which they contracted at garrison and seaport towns" (Mill 1963a, 351).

²According to Judith Walkowitz (1991), "The medical rationale for a regulation system was predicated on three assumptions: that syphilis was spread through promiscuous sexual contact with diseased prostitutes; that existing voluntary facilities for treating female venereal patients were ineffective as preventive and therapeutic institutions; that available diagnostic and therapeutic methods were adequate to carry out the medical provisions of a regulation system" (48).

³According to Parliament, "The provision of the Act is this, that a woman shall be permitted, if she 'thinks' fit, to acknowledge herself to be a common prostitute upon paper; that is called....a voluntary submission, and she may deposit that in the hands of the police or the authorities of the hospital, and in pursuance of that submission she is examined and subjected to the same examination with regard to periodical attendance as if ordered to attend before the magistrate; that alternative being that if she declines to sign a voluntary submission, she may be taken before a magistrate and the question whether she is a common prostitute, will be a question for the magistrate to try. She may be heard by counsel, and the only difference between that mode of trial and the ordinary mode of trial is the absence of a jury" (Mill 1963a, 353)

⁴Arrested women were asked to submit voluntarily to hospitalization and examination. If they refused they were brought before a magistrate who, upon determining if the women were prostitutes, could order such examination. If found to be infected, these women were then interned in Lock hospitals for up to six months.

men were as likely to transmit disease to women as to be infected by them; a problem that the Acts failed to address. More importantly, however, Mill questioned the principles upon which the legislation was based. From his perspective the Acts were not only ineffective legislation, but also they were an unconscionable and arbitrary use of state power. Arguing that the Acts violated "one of the greatest principles of legislation, the security of personal liberty," Mill demanded their repeal (1963a, 351).

Mill's opposition to the C.D. Acts, like his support for women's right to vote or for married women's right to own property, makes Mill an unusual and celebrated political thinker. As a scholar and political activist, Mill not only challenged the legal basis of gender inequality, but also disputed the cultural underpinnings of gender oppression. In opposing laws that treated women and men differently, Mill disputed prevailing notions of sexual difference that depicted women as inferior to men and therefore less than proper subjects of rights. According to Mill, there were no natural differences between women and men that could justify the denial of women's right to liberty or their right to participate in politics. It was this former commitment to women's right to sovereignty that led to his opposition to both the C.D. Acts and the sexual double standard implicit therein.⁵ Mill challenged conventional notions that depicted the male sex drive as naturally uncontrollable and therefore in need of a safe (undiseased) heterosexual outlet, and he challenged depictions of the female sex drive as pathological and therefore in need of complete constraint.⁶ He called on Parliament to rethink their presumption that women were conduits of infection and that they were, therefore, less

⁵The sexual "double standard," Jeffrey Weeks (1989) explains, "enjoined chastity on the female while allowing a large degree of sexual freedom for the male" (22). Male sexual freedom was considered a necessity, the proper response to a naturally uncontrollable sexual appetite. For discussions of Victorian conceptions of sexuality see also Gallagher and Laqueur 1987, McHugh 1980, Spongberg 1997, and Walkowitz 1991.

⁶In challenging the sexual double standard Mill depicted women as able to control and contain their sexuality. He did, however, slip between recognizing prostitutes as potentially self-regulating and yet wholly degraded and thus unruly and dangerous. Indeed, as Linda Zerilli (1994) argues, Mill's opposition to the C.D. Acts rests on a dichotomous figuration of women reinforcing Victorian ideas about the differences between "upright" and "fallen" women. See Spongberg (1997) for a thorough discussion of the figuration of the prostitute within medical discourse.

entitled to liberty than men. Indeed, he argued that women, more likely victims than the conduits of contagion, would only be protected from disease themselves if their liberty rights were respected.⁷ These arguments, and the many like them used to contest other legal discriminations against women, were essential components of Victorian feminist efforts to tear down the legal and cultural barriers to women's equality and freedom.

Mill's efforts and arguments are often read as marking an important moment in the history of women's struggle for rights. Essential to a number of successful campaigns to change Victorian laws and ideology, Mill's rights arguments are celebrated as examples of the political potential of rights language and of the triumph of liberal rights extended to women. In recent years, however, Mill's feminism has been called into question. Frustrated by contemporary failures to achieve rights-based reforms, feminists have returned to Mill to reexamine the basis and implications of his rights argument. On what basis did Mill defend women's rights? Beyond legal changes, what were the political outcomes of his rights arguments? Should legal victories be interpreted as the triumph of liberal political values extended to women? And what, if any, are the costs and limits of these claims, of this victory? In their answer to these questions we meet the "critique of liberal individualism" I described in Chapter Two.

Revisiting Mill's work from a perspective of skepticism about the political potential of rights language, feminists have found less to celebrate. Though they acknowledge that Mill did help to dismantle legal barriers to women's equality, critics find that his rights arguments did little to displace other sources of women's inequality. Of particular concern to feminist critics like Zillah Eisenstein (1981), Mary Shanley (1989), and Christine DiStefano (1991), is Mill's inability to challenge the economic structures and social norms that constrained women's equality and freedom. These

⁷As Linda Zerilli (1994) points out, though Mill recognized that men could transmit disease to wives and children, he still depicted prostitutes as the source of contagion. In accepting this belief Mill reinforced the divide between fallen and upright women (131). His reliance on the notion of women as victims also "denies whatever social power women held in the working-class family--a power that was, on some accounts, not only considerable but considerably more than that held by middle-class women" (108).

feminists contend that Mill's concern with individual rights and legal reform left him blind to economic causes of inequality. In addition, they argue that despite his attention to women's political equality, he offered no challenge to their inequality in the home. He accepted, indeed reinforced, traditional gender roles and the sexual division of labor in the home. Partly to blame for these shortcomings, feminists explain, is the conception of the subject implicit in Mill's rights arguments. In fighting for women's rights, feminists argue, Mill depicted the proper rights bearing subject as an atomistic individual whose identity was threatened by social relations and responsibilities. Rights, for this individual, were to mark the impermeable barriers between individuals and society necessary for individual development. While feminists acknowledge that this understanding of the proper subject of rights was fundamental to Mill's feminism, they also suggest it is responsible for undermining it in the end. The atomistic individualism of his rights arguments is deemed responsible for failing to combat, indeed reinforcing, various forms of gender discrimination, calling into question the value of rights as a language of political resistance for women.⁸

In this chapter, I revisit the rights arguments of John Stuart Mill. I argue that Mill's conception of rights, and particularly his understanding of the rights-bearing subject, is far richer and more cognizant of the political character of rights than feminist critiques suggest. This is not to deny that Mill's language, particularly in *On Liberty*, suggests that he embraced an "atomism thesis" of the kind described by Charles Taylor. Rather, it is to suggest that this depiction does not capture the whole of Mill's understanding nor even what I take to be his primary insight about the relationship between identity, rights, and politics. I begin, then, with a discussion of Mill's conception of the subject that stands in sharp contrast to the atomistic individualism critique. I argue

⁸Linda Zerilli (1994) advances a critique of Mill's work more in line with the critique of discipline discussed in Chapter Two. I focus here, however, on the critique of atomistic individualism and discuss the discipline critique in Chapter Four. See also Walkowitz 1991 for a critical assessment of the CD Acts repeal campaign in particular.

that there is much in Mill to suggest an understanding of the subject as socially situated and politically constituted. Mill's subject is not separated from others and society by impermeable barriers defined by rights. Rather, his subject is fundamentally connected to others and is constituted in and through these connections. And while Mill's conception of the subject is not marked by quite the radical contingency of the Arendtian subject,⁹ Mill's subject is far more porous and mutable than the atomism critique suggests as it is characterized by a socially constituted and unstable identity, or what Mill describes as artificially cultivated "character."

Following a discussion of Mill's socially situated subject, I turn my attention to his conception of rights. I argue that Mill's theory of the subject is implicated in his understanding of rights. Far from conceiving of rights solely or even primarily as trumps or inviolable barriers between individuals, Mill depicts rights as political claims that engender debate and contestation as well as help to constitute community. Rights are themselves contested claims that take on an unstable and changing meaning in the context of social and political relations. Furthermore, rights provide a language through which "character" itself is constituted and contested. Mill's work, I suggest, is more accurately read as expressing rudiments of a political understanding of rights than embracing atomistic individualism. Though feminists are correct to point out the problematic basis and implications of Mill's rights arguments, their interpretations do not tell the full story. They miss important elements of his understanding of the relationship between identity, rights, and political outcomes that reveal a more paradoxical character to rights-based politics than the atomism critique emphasizes.

Cultivating Character: Mill and the Subject of Rights:

What is the proper scope of state power? The proper sphere of individual freedom? On what grounds should individual rights be asserted against society? In what

⁹The identity of Mill's rights-bearing subject is not produced in the stories told about the actions of that individual. See Chapter Two for a discussion of Arendt, rights, and identity.

instances respected? These are some of the fundamental questions Mill poses in perhaps his most famous essay *On Liberty*. His answer: in those instances in which an individual's action "merely concerns himself" his rights should take precedence over the concerns of society. In such instances ~~an~~ individual's "independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign" (1991b, 14). Despite disagreement over the normative implications of Mill's sovereign subject, as well as over the applicability of the harm principle itself, scholars agree that this statement is evidence of a commitment on Mill's part to what Charles Taylor (1979) has called the "primacy-of-rights" theory and the "atomism" thesis. According to Taylor, proponents of the primacy of rights theory assert that individual rights take precedence over the concerns of society. Rights, according to this view, are unconditional claims. This theory, Taylor explains, rests on a conception of human nature as atomistic, as fundamentally separated and, in fact, threatened by the interference of social relationships and social obligations. The freedom to choose one's own life without interference from society, indeed without regard for the impact such a choice has on society, is a central premise of the primacy of rights theory.

Is Mill a proponent of the primacy-of-rights theory and the atomism thesis? According to feminist critics of Mill, and many other scholars, Mill is very much a proponent of such a position.¹⁰ As Christine DiStefano (1991) argues, Mill's rights arguments are premised upon a notion of the "clearly demarcated" and "independent" subject whose very being is threatened by society. Mill, she explains, presumes that an individual is an isolated entity, self-sufficient and unconnected to others, having an "inviolable ego" and unable "to be qualitatively transformed through its transactional social relations with others" (164). Perhaps more importantly, social forces compromise the development of this individual's capacities as a human being. "[T]he absence of

¹⁰See Wolff (1968) and Feinberg (1973) for discussions of Mill that suggest his embrace of an atomism thesis.

self/not-self demarcation and by means of incursion into its 'space' by the undifferentiated mob," DiStefano explains, threatens the identity of this individual (171).

This interpretation of Mill seems on the mark in light of his arguments in *On Liberty* (1991b). From the language of the text and the circumstances to which he is responding Mill certainly does suggest that human development is threatened by social interferences; that human capacities flourish most when left alone. Looking around his own society, Mill observes social customs and state practices fettering individual development. Prevailing opinion and social tendencies, he argues, are creating a society of intellectually passive, uniform characters. Indeed, according to Mill interferences with free thinking and the liberty of action are corrupting individual character and threatening social progress. "The despotism of custom," he contends, "is everywhere the standing hindrance to human advancement, being in unceasing antagonism to that disposition to aim at something better than customary, which is called, according to circumstances, the spirit of liberty, or that of progress and improvement" (78). By allowing "traditions or customs of other people [to be] the rule of conduct," Mill argues, societies jeopardize individual and social well-being. Well-being, happiness, and progress depend on the flourishing of difference and diversity among individuals. "One of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress," Mill explains, is the diversity that comes from allowing individuals to be sovereign over their minds and bodies (63). Without that sovereignty, without individual freedom, Mill believes that society will become peopled by unthinking conformist individuals, "sheep," and society as a whole will stagnate.

All around him, Mill sees the implementation of social arrangements that are irrational, inconsistent, and ultimately harmful to the cultivation of morally and intellectually well-developed individuals. Mill sees "before him...the spectacle of some men, civilized by any standards, who were kept down, or discriminated against, or persecuted by prejudice, stupidity, 'collective mediocrity': he saw such men deprived of

what he regarded as their most essential rights, and he protested" (Berlin 1991, 153). Legislation, social norms, and political institutions of the time are producing a society of sheep, and engendering ape-like behavior, conformity and uniformity rather than producing an active and vibrant population. Instead of intellectual creativity and diversity, Mill finds self-centered and intellectually atrophied individuals. He sees individuals, particularly men, developing a selfishness and a self-worship that threatens social well-being. He sees a society in which, because of this selfishness and "a want of mental cultivation," life is becoming unsatisfactory. Absent the opportunity to think for themselves, to have their beliefs and lifestyles challenged, individuals, according to Mill were unable to develop "any of the qualities which are the distinctive endowment of a human being" (1991b, 65).

To avoid this situation, Mill urges society to release individuals from the despotism of custom. Individual faculties of reasoning and judgment will improve when unfettered by social norms and policies. Free to make their own decisions and think their own thoughts, free to choose their life plans, individuals will progress intellectually and morally. This improvement, along with the diversity of perspectives and ways of living generated by this liberty, will lead to a happier and healthier society. For society to progress it must, Mill argues, let individuals be sovereign. Mill does not deny that individuals should be accountable to society when their actions harm others. Nor does he deny that children should be subject to social restraints: "Nobody denies that people should be so taught and trained in youth, as to know and benefit by the ascertained results of human experience" (1991b, 64). However, when an individual has "arrived at the maturity of his faculties," respect for his humanity demands that he be allowed "to use and interpret experience in his own way" (1991b, 64). To do otherwise, to constrain this individual's freedom is to harm both individual and social development.

This "celebration of the independent self" is at the heart of Mill's critique of gender inequality (Eisenstein 1981, 117). Mill defends women's rights to liberty, to vote,

to own property when married, and to have an education by reminding society that women's development and the development of society as a whole are put in jeopardy by the despotism of custom. As Mill explains, prevailing conceptions of sexual difference, along with laws, marital relationships, and the lack of educational opportunities are responsible for the mental and emotional inferiority of women. It is not women's natural state to be inferior to men; their mental and moral weaknesses are rather "the natural effect of the differences in their education and circumstances" (1991c, 528). If women were allowed the same freedoms as men to think and act, to choose their own life plans, then they would not only improve their faculties of judgment and perception, but contribute to the progress of society. "The moral regeneration of mankind," Mill argues, "will only really commence, when the most fundamental of the social relations is placed under the rule of equal justice, and when human beings learn to cultivate their strongest sympathy with an equal in rights and in cultivation" (1991c, 575).

Though Mill's defense of women's rights makes him one of only a few historical political theorists to take gender equality seriously, feminists have challenged his theoretical and political commitments for their reliance on atomistic individualism.¹¹ While they acknowledge that Mill's atomistic individualism allowed him both to challenge legal forms of gender inequality and to dispute dominant notions of womanhood, feminists suggest that his atomistic individualism seriously undermines his feminist project. In conceiving of individuals as abstractable, Mill obscures economic and cultural barriers to gender equality. For example, according to Mary Shanley, in opposing the Contagious Diseases Acts as invasions of women's right to liberty Mill fails to account for or challenge the economic structures that forced women into prostitution in the first

¹¹To be fair, feminists, and other Mill scholars, do acknowledge that Mill does not embrace atomism unambiguously. In fact, as many suggest, he quite explicitly recognizes that no individual is entirely isolatable and that it is extremely difficult to determine where to draw the proper boundaries between individuals and society. However, many of these scholars also suggest that despite Mill's awareness of the social dimensions of individuality, the emphasis of his work is on individualism.

place.¹² Nor does a focus on legal reform challenge traditional gender roles in the family. Indeed, as many feminists point out, Mill not only does not contest sexual division of labor in the home, he actively embraces it and uses women's childrearing duties as justification for improving their educational opportunities.

Given these blind spots in a politics of liberal rights, feminists suggest that the atomistic individual is gendered male. In other words, the independent self is exposed as a masculine self premised upon a male model of selfhood and a set of experiences and values that are at odds with women's lives. DiStefano (1991), for example, contrasts Mill's model of the self with one drawn from the work of Carol Gilligan (1982) and psychoanalytic theory. According to this latter body of literature, women experience their sense of self as connected and constituted in and through relations with others. Whereas women's identity develops and is nurtured in a social context, Mill's subject has well-defined boundaries. The subject's "strict ego boundary differentiation and...radical separation from a nature that must be disciplined" suggests to DiStefano an "undeniably masculine" quality (167). Mill's "abstract morality of individual liberty and rights to noninterference" cannot accommodate the experiences and needs of women in their role as wives and mothers. "The 'price' of liberal feminist liberation is transsexualism. Women must be disembodied, desexed, degendered, and made over into the image of middle-class and upper-class men if they are to benefit from the promises of rational liberalism as Mill envisions them" (175-6). Her conclusion, like a number of other feminist critics of Mill, is that liberal rights arguments like Mill's are quite limited, if not in fact dangerous to women, and may suggest that rights language be seriously questioned as the basis of feminist political opposition.

But is Mill's theory of rights and freedom centered around an atomistic, independent self? Is he therefore a proponent of a primacy-of-rights theory? Or might

¹² See Eisenstein (1981) for a similar critique of Mill's work in general.

Mill offer a model of self and society that generates a less impoverished understanding of rights language and political practice? I believe Mill's conception of the subject of rights is far more complicated and much richer than critics suggest. While I do not contest that it is possible to read Mill as a liberal individualist, I argue that this reading obscures the importance of his keen understanding of the socially and politically constituted character of individual identity.¹³ And while this reading is not meant as a refutation of the disappointing political outcomes of Mill's rights arguments, it is meant to suggest that there may be more to his rights politics than is captured by the critique of atomistic individualism.

As I suggested above, in both *On Liberty* and *The Subjection of Women*, Mill argues that human nature, or what he calls "character," can be influenced in quite negative ways by social forces. It is custom and constraint on thought and opinion, he argues, that is turning individuals into sheep. It is a belief in women's inequality, manifest in political practices and social arrangements, that turns women into emotionally and mentally fragile individuals who are concerned primarily with frivolity.¹⁴ Indeed, it is this same gender subordination and domination that make men selfish and self-serving: "All the selfish propensities, the self-worship, the unjust self-preference, which exist among mankind, have their source and root in, and derive their principal nourishment from, the present constitution of the relation between men and women" (296).¹⁵ Our very identity, Mill suggests, is susceptible to the corrupting influences of these "wretched arrangements."

¹³ As a number of scholars have suggested, it is possible to read Mill in radically different ways. According to Graeme Duncan (1973), Mill's work embodies a variety of influences and commitments, not all of which are in concert with each other. These "conflicting sympathies and goals," coupled with "a judicious selection of his ideas can produce a portrait of the communitarian or the individualist, of the advocate of a rational unanimity (or 'moral totalitarian', even) or the committed libertarian, of the welfare statist or socialist or the laissez-faire philosopher, of the democrat or the elitist" (211).

¹⁴ See Shanley (1998) for a good discussion of the various laws that contributed to gender inequality..

¹⁵ There is clearly a tension in Mill's work between a commitment to ambiguity and unpredictability and a commitment to teleology and determinability. There is also a tension, as Shanley (1998) points out, between Mill's argument that nature is the artificial product of social relations and has invocation of "women's nature (that is, their present nature) as a reason for dropping barriers to their wider social and political participation" (405). Shanley argues that this "seemed not only to contradict his earlier assertions that these characteristics were themselves the product of women's subordination, but also to argue that

According to the atomistic individualism argument, Mill's defense of individual rights is meant to hold off the destructive interference of society. Unfettered by social constraints the individual will flourish; the individual will develop his or her capacities of judgment and perception. But Mill's understanding of the relationship between the individual and society is, I believe, more ambiguous. Indeed, it is precisely his recognition that egos are not inviolable and his recognition of the socially constituted nature of "character" that leads him to imagine liberty rights as barriers between people. This alternative way of understanding Mill's defense of liberty rests on an understanding of the artificiality of human nature and Mill's rejection of a belief in some core human nature that has meaning outside of social context. Before turning to a discussion of rights, then, I explore below Mill's understanding of the subject as socially located, socially constituted, and fundamentally mutable.

Mill's clearest articulation of the artificiality of nature comes in *The Subjection of Women* where he rejects prevailing understandings of women's "true" nature. Women, he argues, are not as society presumes naturally inferior mentally or emotionally. As he explains, nature, or what Mill often refers to as "character," is "an eminently artificial thing." It is the product of social forces such as education, legal constraints, social norms, and economic arrangements. In fact, women's "nature" as emotionally unstable, intellectually weak, and easily distractable individuals is not the result of some innate female characteristics but is rather "the result of forced repression in some directions, unnatural stimulation in others" (1991c, 493). Here then Mill rejects the notion that some universal and stable nature is discoverable outside of the context of social relations. "We cannot," he argues, "isolate a human being from the circumstances of his condition, so as to ascertain experimentally what he would have been by nature" (1991c, 544). All that

women be admitted to the franchise and public life not because their humanity entitled them to the same rights as men, but because of various sex-based traits" (406).

we can do is "consider what he is, and what his circumstances have been, and whether the one would have been capable of producing the other" (1991c, 544).

The closest Mill comes to describing a common human nature is in his suggestion that individuals are born with certain faculties and capacities. We may have "faculties of perception, judgment, discriminative feelings, mental activity, and even moral preference" (1991b, 65) and we may have two sentiments—sympathy and self-defense—which "either are or resemble instincts" (1991d, 186). But these capacities and instincts mean only that a human being is born with "a whole world of possibilities" which are "dependent upon eminently artificial discipline for being realized" (1963b, 392-3). In fact, it is only in social context and through social relations, through the "artificial discipline" of education, legislation, and social arrangements that these potentials and capacities come to have meaning. As Alan Ryan explains, through social relationships and in the course of "learning to live with others" individuals' "character" is formed, developed, and transformed (1998, 530). Or as Mary Shanley suggests, Mill's attention to the important effects of equality and friendship in the marital relationship suggests that he recognized the subject as "constituted in important ways by intimate as well as public relationships. . . . as fundamentally constituted in and by interpersonal relationships" (1998, 398).

Mill struggles to articulate what he means by artificiality of character in Book VI of the *Logic* where he stakes out a position between the doctrines of necessity and free will. According to Mill, the doctrine of necessity posits a relation of predictability between social forces and human character. In other words, according to the doctrine of necessity social forces and conditions produce inevitable dispositions and actions on the part of the individual. The doctrine of free will, on the other hand, suggests that the will has "no causes which [it] uniformly and implicitly obey(s)" (1965b, 215). Mill rejects the doctrine of free will, embracing instead a belief in the possibility of predicting human behavior and character, or at least of understanding that "our actions follow from our

characters, and that our characters follow from our organization, our education, and our circumstance" (1965b, 219). Qualifying his embrace of the doctrine of necessity Mill acknowledges that predicting human behavior or determining it completely is quite difficult. Prediction could only occur if one "knew the person thoroughly, and knew all the inducements which are acting upon him" (1965b, 216). And this, according to Mill, is most likely impossible. Not only is it impossible to know all the circumstances that shape an individual's character and thus to determine which influences caused which effects, but it is also impossible to account for an individual's moral freedom. In other words, an individual, Mill explains, has the "power to alter his character" (219). We know of this power because of the unpredictability and diversity of human character, as well as by the feeling that resides in each of us, a "feeling of our being able to modify our own character *if we wish*, is itself the feeling of moral freedom which we are conscious of" (1965b, 220-1). According to Mill, this power is not inconsistent with a doctrine of necessity. Moral freedom, he explains, is one among the many factors that influence character and action. Character "being, in the ultimate resort, formed for him, is not inconsistent with its being, in part, formed *by* him as one of the intermediate agents. His character is formed by his circumstances (including among those his particular organization); but his own desire to mould it in a particular way is one of those circumstances, and by no means one of the least influential" (219). This power to alter our character means that "human beings are engaged in recurrently revising the forms of life and modes of experience which they have inherited, and by which 'human nature' itself is constituted in any given time and place" (1991, 205). As Isaiah Berlin explains, Mill understands that individuals differ "not merely as a result of natural causes, but also because of what they themselves did to alter their own characters, at times in unintended ways [which] makes their conduct unpredictable" (1991, 149).

Involved in this complex process of social formation and self-transformation, Mill's individual has the potential for unpredictability, mutability, and variety (Gray

1991). Indeed, Mill is quite explicit in his appreciation of the “extreme variableness” of human nature, an observation which he contrasts with those who believe that human nature is “supposed to be...universal and uniform” (1991c, 494). The atomism thesis obscures both this variation and the unpredictable quality of human character. The atomism thesis also obscures the valuable function served by variations in character and the productive role played by social forces. While I address this latter issue below, let me first address the value of mutability and unpredictability here. According to Mill, variations in human character are not simply an observable reality nor even just an ingredient in the well-being of society. Variation serves a very particular purpose, particularly when it comes in the form of unruliness. That is to say, variation is good in part because it forces individuals to confront, reflect on, and even challenge their own opinions and ways of living.

Jeremy Waldron (1987) has identified this aspect of Mill's theory as the value of “moral distress” or “ethical confrontation.” Differences of opinion and variation among lifestyles often come into conflict. This “open clash between earnestly-held ideals and opinions about the nature and basis of the good life,” what Waldron calls “ethical confrontation,” is essential to individual and social progress (414). Antagonism, debate, and confrontation force people to reexamine fundamental beliefs and propensities. Through ethical confrontation new and better ideas arise and new convictions and commitments emerge. Individuals develop open-mindedness, a tolerance of difference, and the ability to listen as well as persuade from engagement in such debates (416). Though it may be painful at times to have one's fundamental beliefs and practices questioned, such struggle “is a positive good for Mill: it improves people and it promotes progress” (Waldron 1987, 417). For it is only in the context of debate, discussion, and the collision of ideas that we come to improve mentally. Without the possibility of exchanging ideas with others we would become intellectually lazy and hold on to erroneous ideas. The value of ethical confrontation becomes particularly clear in Mill's

discussion of truth and fallibility in *On Liberty*. As Mill explains, what society believes to be "true" is often either erroneous or only a partial truth. Through debate and disagreement, individuals have the opportunity to rectify mistakes which they would be unable to do on their own (1991b, 24-5). According to Mill, to suggest that certain social norms or practices were above refutation and public attack, as a number of his contemporaries did, was to ignore or obscure the fact that the basis of a social norm is itself opinion. "The usefulness of an opinion," Mill argues, "is itself a matter of opinion: as disputable, as open to discussion, and requiring discussion as much, as the opinion itself" (1991b, 27).

Mill's appreciation of diversity and his understanding of the productive potential of social forces comes out quite clearly in his criticism of Jeremy Bentham's understanding of human nature. Indeed, Mill's critique is an explicit rejection of the utilitarian version of the atomistic individual. As Mill explains, Bentham depicts humans as being rational calculators of pleasure and pain. Bentham's individuals are primarily motivated by selfishness and self-interest to avoid pain and seek pleasure. Self-interest, for Bentham, is the single "spring of action" that determines human character and behavior. A society composed of such individuals is one in which everyone pursues his or her "separate interest or pleasure," protected from the interference of others by "law, religion, and public opinion" (1965a, 265).

According to Mill, this is a highly misleading description of human nature, based on careless observation and "limited experiences" (1965a, 259). "As an analyst of human nature," Mill writes, "I cannot rank Mr. Bentham very high" (1965c, 54). According to Mill, Bentham fails to understand that "motives are innumerable" and human nature profoundly complex and diverse. He is wrong, Mill continues, to believe that the springs of action are, in all locations and at all times, the same. In "assum(ing) that mankind are alike in all times and all places, that they have the same wants and are exposed to the same evils," Bentham, Mill believes, has not only committed an intellectual error but a

moral one as well (1965b, 59). Bentham fails to see, Mill explains, any more than "what the vulgarest eye can see," obscuring all the diversity and unpredictability of human character and undermining both the existence and possibility of public spiritedness (1965a, 259).

Bentham was wrong, Mill argues, not only to identify human nature with a single motivation, but also for equating that single spring of action with selfishness. In fact, according to Mill, selfishness is not the "natural" force that motivates all of human behavior, but rather the unfortunate result of "wretched arrangements." As Mill explains, individuals have an instinct for sympathy that can either be nurtured or stifled, either cultivated into a sense of public spiritedness and fellow feeling or corrupted into a destructive self-regard. There is "no inherent necessity that any human being should be a selfish egoist, devoid of every feeling or care but those which centre on his own miserable individuality," Mill argues (1991d, 145). Indeed, "There is nothing in the constitution of human nature to forbid" feelings of public-spiritedness or a sense of moral obligation (1965c, 58). But like selfishness, public feeling is not something that is an innate and inevitable part of human nature. Like selfishness, care for others is something that must be cultivated through particular social forces such as up-bringing and opportunities to participate in ethical confrontation. As Mill explains, education, legislation, public opinion and social norms shape who we are and how we relate to each other. With proper cultivation, it is possible to turn feelings of sympathy and the impulse to self-defense into a feeling of social solidarity and the creation of a caring society.¹⁶ Through the "artificial discipline" gained from proper education, laws, social arrangements, and institutions, the instinct of sympathy can develop into the apprehension of "a community of interest between [an individual] and the human society of which he forms a part..." (1991d, 1.87). Mill's more careful observations leads him to suggest that "By virtue of his superior

¹⁶For Mill "natural" need not mean pre-social, pre-political or innate. Although "the moral feelings are not innate, but acquired, they are not for that reason the less natural" (1991d, 163).

intelligence, even apart from his superior range of sympathy, a human being is capable of apprehending a community of interest between himself and the human society of which he forms a part, such that any conduct which threatens the security of the society generally, is threatening to his own, and calls forth his instinct (if instinct it be) of self-defence" (1991d, 187).

But just as careful cultivation can enable the development of social solidarity and care for others, poor cultivation, "wretched education and wretched social relations" can lead to the production of bad characters. As Mill warns, the "capacity for the nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance" (1991d, 141). The selfishness that Bentham believes to be innate Mill blames on "hostile influences" and "want of sustenance." According to Mill, selfishness and other socially harmful qualities or motivations are by no means an inevitable part of human character. Rather these qualities are the result of poor upbringing and bad social arrangements. Just as moral feelings can be "brought by cultivation to a high degree of development," so too are they "susceptible, by a sufficient use of the external sanctions and of the force of early impressions, of being cultivated in almost any direction" (1991d, 163). Certain social arrangements and the imposition of social norms can actually destroy affective ties and inhibit intellectual and moral development of individuals, and thus threaten the social cohesion and progress of society as a whole.

Mill's defense of individual liberty, then, is not an attack on social relations in total, but rather an attack on those relations, arrangements, and influences that crush the "nobler feelings." Uncontested acceptance of public opinion, the lack of opportunities for political participation, and prevailing notions of male superiority represent the poor arrangements Mill imagines to be threatening individual and social well-being. For example, in *On Liberty* (1991b) Mill argues that a society that willingly accepts the opinions of a few without contestation or critical engagement becomes a society of

“sheep” who simply follow rules. Such a society not only engenders intellectual passivity and atrophy, but ultimately undermines social progress as well. Without an intellectually vibrant society, incorrect opinions become hardened into truths that lose their meaning. More dangerous than intellectual decay is the destruction of affective ties. These ties result from social norms and institutions that encourage participation in social and political life. In *Considerations on Representative Government* (1991a), Mill suggests that individuals who are denied the right to vote in elections, or a voice in the governance of a society, become indifferent to the social well-being and learn not to care about what happens to others. Under a despotic government, the mental faculties of human beings are deprived of exercise and thereby “stunted,” and social connections are disbanded. “Whenever the sphere of action of human beings is artificially circumscribed,” Mill argues, “their sentiments are narrowed and dwarfed in the same proportion. . . . Let a person have nothing to do for his country, and he will not care for it” (1991a, 240).

Mill's attack on these norms and practices, however, is not rooted in some notion of an innate and inviolable core of the self that needs protection. Rather, it is precisely his understanding of the socially situated nature of subjectivity and the instability of character that leads him to worry about the effects of particular social relations. Just as good laws and customs can engender sympathy and fellow-feeling, bad ones can lead to selfishness, tyranny, and indolence. These changes can occur precisely because the subject lacks impenetrable armor and an inviolable ego.

His anxiety over the mutability of human character is particularly evident in his discussion of poverty.¹⁷ Following on his belief that action and character follow from circumstances Mill portrays the poor as victims of their social environment. Lacking health care, employment opportunities, and education, it is not surprising to find the poor in ill health and unemployed. According to Mill, their environment is partly responsible

¹⁷I am indebted to Linda Zerilli's (1994) account of class imagery in Mill here.

for corrupting their character, for cultivating a group of individuals marked by unruly appetites and uncontrollable desires. Poor individuals, Mill suggests, are the embodiment of the wretched education and arrangements of Victorian England. They live in squalor and filth, they have few job opportunities and thus appear to be lazy; they have little education and thus appear intellectually inferior.

But Mill does not simply represent these individuals as products of harmful social forces. Mill ultimately ends up naturalizing their characters, fixing them in their identity as corrupted and unruly characters rather than recognizing, as his own theory suggests, the contingency of this identity.¹⁸ As naturally or at least immutably unruly, the poor come represent a harmful social influence themselves. The poor become a threat to those individuals whose characters are not yet corrupted. As Linda Zerilli (1994) explains, "[T]he laboring masses are first cast as the victims of larger social and cultural forces and then come to figure as the agents of the very social evils for which they were initially seen to be the effect" (Zerilli 1994, 98). Whether it is because they are associated with uncleanliness and disease or rampant reproduction or even intellectual and physical laziness, it is the poor who are depicted as harmful influences on individuals and society. The poor, with their unruly passions and appetites threaten the cultivation of good character associated with middle-class Victorian values and lifestyles. This sentiment comes out in his response to the Poor Laws. Mill fears that as a result of Poor Law

¹⁸Mill not only denies his own insight here about the mutability of identity, but he also seems to retreat from his recognition of the contingency of social forces. In other words, identity and character are unstable and contingent precisely because we can never know precisely which forces engender what kinds of actions and qualities in individuals. In naturalizing character and determining which forces lead to social harm, Mill suggests that we can actually determine these causes. We can isolate the particular social forces that will harm, or improve, society and individuals. This emphasis in Mill's work stands in tension with his recognition of contingency captured by Waldron (1987): "As much as any of his perfectionist critics, he believed that genuine moral progress was possible. But progress, Mill insisted, was certainly not guaranteed under modern conditions; he rejected as a 'pleasant falsehood' the dictum that truth always triumphs and the good will come out on top in the end" (414). See Shanley (1998) for a discussion of Mill's switch between contingent and naturalized identity categories in *The Subjection of Women*.

practices, which take away certain responsibilities from the working poor,¹⁹ a local community might become "a nest of pauperism, necessarily overflowing into other localities, and impairing the moral and physical condition of the whole labouring community" (1991b, 127). His anxiety about the destructive effects of the poor leads Mill in two different directions. He responds by demanding rights for some while suggesting disciplinary and regulatory state responses and interventions for others. In the end, Mill argues as much for the reduction of state intervention as for its growth.

Mill's concern with the corrupting influences of the poor is often read as evidence not only of his atomistic individualism, but a class bias in his conception of liberty and the subject of rights. In addition to depicting the rights-bearing subject as a masculinist individual, as some feminists suggest, Mill's rights-bearing subject is also said to embody middle-class values and ways of living. The unruly poor, depicted as dangerous social forces, are excluded from the category of rights-bearing subject.²⁰ The individuals who are entitled to liberty, to rights, are those who can prove that they are already constituted as "noble" characters, who already display particular intellectual and moral qualities. Though there is much to this criticism, I want to highlight an important tension in Mill's work not captured by this perspective. While there is considerable evidence that Mill did imagine very particular kinds of individuals as sovereign subjects, and much evidence that the political implications of liberal rights continue to exclude those who do not meet the kind of criteria established by thinkers like Mill, I want to offer a different reason for this than offered by the critique of atomistic individualism. Mill's depiction of the rights-bearing subject as a masculine, bourgeois individual is in tension with his recognition that character is contingent. It is the artificial product of social forces that we cannot always identify, nor can we always determine which social forces are responsible for what kinds

¹⁹"The mischief begins," Mill explains, "when, instead of calling forth the activity and powers of individuals and bodies, it [the government] substitutes its own activity for theirs; when...[it] bids them stand aside and does their work instead of them" (1991b, 127-8).

²⁰See DiStefano 1991 and Zerilli 1994 for a discussion of the gendered nature of the rights-bearing subject.

of characters. In fact, it is this contingency of character, the possibility that who we are and how we behave can change easily and in ways beyond an individual's or a society's control, that makes Mill terribly anxious. His retreat into a notion of natural and immutable identity is constantly undermined by his own insights into the ways in which social relations produce, in both good and bad ways, the very character that is then meant to be freed or constrained.

My point throughout this section has been to show that Mill's theory of the subject is actually a rejection of atomistic individualism. In fact, I would argue that his return to the sovereign subject, in the face of the despotism of custom or the contagion posed by the unruly poor, derive not from a belief in the inviolability of egos, but from his anxiety regarding the contingent and mutable character of human nature. The poor are threatening because individual identity is so mutable and corruptible. But it is this same porousness that undergirds his suggestions for improving society as well, for granting rights to individuals. He needs to embrace the porosity and instability of character for both his critique of society and his suggested alternatives. If the despotism of custom can turn vibrant and diverse individuals into uniform characters and sheep, so too can engagement in public life and discussions with others cultivate public spirited, intellectually creative individuals. Social relations, it seems, are simultaneously that which Mill fears and yet needs most if individual and social progress is to occur. But it is the fact that development is never certain or guaranteed, that social forces do not always nurture the "nobler virtues" and that these forces are often too complex to understand completely that leads Mill to retreat to the seeming safety of the sovereign subject. This sovereign subject is, however, by virtue of Mill's own insight, an impossibility. Mill's recognition that our character is always at risk of corruption can be read as a recognition that the barriers between individuals are never stable and impenetrable.²¹ His

²¹ Alan Ryan (1998) also rejects the notion that Mill is a proponent of atomistic individuals. Ryan identifies important "communitarian" impulses in Mill's work. According to Ryan, "Mill was in several senses of the term a 'communitarian liberal.' He thought social philosophy should begin by contemplating human

understanding of the political location and unstable character of rights claims, I suggest below, provides further evidence that Mill is not promoting a traditional liberal conception of rights.

The Political Practice of Rights

"To have rights," Mill argues, "is to have something which society ought to defend me in the possession of" (1991d, 189). And for Mill, perhaps the most important, or at least most well-known right worthy of society's protection is the right to liberty--the right to freedom of thought, action, and opinion, the freedom "of pursuing our own good in our own way" (1991b, 17). In contrast to natural rights theorists Mill does not believe, however, that these rights are rooted in our nature. These rights do not accrue to individuals by virtue of their humanity. Instead, Mill suggests that rights can be justified by reference to their utility, to whether or not they contribute to individual and social well-being and progress. Mill suggests that the value of a rights claim can be determined with reference to a "very simple principle" called the Harm Principle. According to this principle, one ought to defend an individual's right to liberty when that person's conduct affects no one else. As Mill explains, "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute" (1991b, 14).

Just as the ideas expressed in *On Liberty* have been interpreted as reflecting a commitment on Mill's part to atomistic individualism so too have they been read as representing a "primacy of rights thesis" (Taylor 1979).²² According to this interpretation, Mill's defense of rights reflects a belief in their irresistibility and

beings not in a state of nature or behind a veil of ignorance, but immersed in their social setting. . . . Mill had no doubt that it was an important truth that we grow up in communities of different kinds, and form our ideas and ideals in the course of learning to live with each other. He...wanted to create a *society* of liberals, not a collection of liberal monads" (530).

²²Though Taylor (1979) refers to Nozick as the exemplar of the "primacy of rights thesis," Feinberg's (1973) description of Mill is almost identical to Taylor's description of the "ultra-liberal" primacy of rights theorist. Unlike Taylor, Feinberg celebrates this kind of liberalism.

irrefutability. Rights are claims society must respect in order to protect the integrity of the sovereign subject. But just as Mill's notion of the subject evinces far more ambivalence than the atomism thesis admits, so too is his understanding of rights far more complicated than the "primacy of rights" theory allows. As I suggest in this section, Mill's theory of rights is more accurately read as reflecting elements of a political understanding of rights than as representative of traditional liberal rights arguments. Rights for Mill are not claims made by antagonistic individuals who need separation from each other in order to pursue their own private interest. Rather, rights are partial claims open to debate and contestation whose meaning derives from the social location of individuals and the engagement of political communities. Far from foreclosing political debate, rights engender it and in the process help to create rather than undermine the possibility of community. With Mill, then, we find an understanding of rights as unstable and contingent rather than irrefutable and absolute claims to truth. In addition, rights offer a language and entail a series of social relations through which identities can be contested and reconstituted.

Mill's defense of rights, as I suggested above, is utilitarian. Mill's defends rights not by referring to some notion of pre-political human nature from which rights are supposed to emanate. Rather, Mill posits utility as the justification for rights; rights are important claims to be respected and protected because they increase the general welfare and promote the increase of happiness and well-being. Indeed, as Wendy Donner suggests, Mill would "recoil in horror" if he knew his work was read as a defense of the rights claims of self-interested atomistic individuals who care little for the needs of others (1998, 290). Such a theory of rights would be antithetical to the ends Mill sets out, the increasing happiness and well-being of individuals and society.

In rejecting natural rights justifications Mill places rights claims squarely in the context of political communities. Utilitarian defenses of rights require deliberation and persuasion; they derive their meaning and power from these practices. This is evident in

Mill's statement that the Harm Principle may help us evaluate a rights claim, but it does not take the place of difficult deliberations. While his Harm Principle may help us identify when interference with individuals' liberty is appropriate, it does not offer a definitive answer to the question of what constitutes legitimate interference. Indeed, Mill argues that the Harm Principle only brings the question of legitimate interference to the table. As Mill explains in *On Liberty*, "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question of whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion" (1991b, 83-4). The Harm Principle thus, as Waldron suggests, marks a "threshold," a point which "must be crossed before utilitarian calculations of that sort are even in order, not to elevate every little incident of harm into a pretext for legitimate prohibition" (1987, 412). Once the threshold has been crossed, social intervention, through legislation or public opinion, becomes open to debate. A rights claim, then, like the identification of harm engenders a question about the benefits or costs of maintaining intervention or allowing for liberty. Despite the debates over what Mill meant by a harm that justifies intervention, Mill recognizes that the definition of harm is a question of opinion. He never professes to give a definition of the term, nor does his theory suggest that society is likely to come to a final and decisive definition anytime soon. As Waldron (1987) suggests, the "terms such as 'harm' and 'interests'...have no clear or indisputable meaning awaiting our analysis...they rather pick out concepts whose nature it is to be contested from different evaluative standpoints...."(414). The question on the table then, is whether or not interference and constraint promote the happiness of mankind. A harm is, as Waldron (1987) explains, "a necessary not a sufficient justification for intervention; once harm is established, everything then depends on a calculation of the costs and benefits of preventing it" (412).

Mill's point is to solicit careful consideration of the definition of both harm and rights, and careful weighing of the benefits and costs of either response to a conflict. The

Harm Principle forms the basis of a conversation about the proper scope and limits of individual freedom and social intervention. It does not, once and for all, set those boundaries. It is only by appeal to the particularities of social context and through a public discussion and debate that the proper sphere of individual freedom can be determined. And even then, such a determination is not final. This sentiment is also expressed in *Utilitarianism*. Here Mill recognizes that differences of opinion on moral questions and utility make agreement and decision-making difficult. The Harm Principle will not take the place of these deliberations and disagreements, but may help make the relevant factors more obvious or more tangible. The Harm Principle reminds us what standard should be used in making determinations regarding rights and intervention, offering the possibility of consistency which is absent from contemporary attempts to determine the proper scope of legislative and moral intervention. He offers the utility principle as a response to the absence of a principle, not because it will make debate and disagreement diminish. Indeed, as Berlin suggests, Mill firmly believed in the importance of challenging ideas and his empiricism lead him to admit the possibility that "new observations could in principle always upset a conclusion founded on earlier ones" (1991, 143).

This appreciation of the contestability of ideas and values provides further evidence that rights, for Mill, are not absolute trumps. To make a claim to a right such as the right to liberty or the right to free speech is to call into question the social norms, institutions, and relationships which may be threatening that right. It is to remind society that there is an interest, a good at stake, not just for the individual, but for the social whole as well. As J.C. Rees explains, "It would be consistent with what he [Mill] says...to suppose that when a person can be thought to have interests he is thereby possessed of a right, though not necessarily a right to the unqualified protection of his interests; perhaps only a right to have his interests taken into account" (1991, 179-80). Rees' account of rights claims as claims that we desire communities to take into account

is consistent with Waldron's reading of the Harm Principle. This awareness of the social location of individuals means that rights claims are not trumps for Mill, but rather claims that are open to debate and deliberation in the community.

In fact, it is precisely Mill's recognition of rights as claims that must be weighed in the context of political decision-making that has lead to criticism. Mill's utilitarian defense of rights has left some scholars quite concerned that his defense is too weak. According to these critics, a utilitarian defense of rights can be easily overridden by concerns of the general welfare. As David Lyons (1997) explains: "Critics and partisans alike generally suppose that a commitment to the general welfare means that rights are not to count in our deliberations except as conduct affecting them also affects the general welfare" (30). This has led to a concern that embracing utilitarianism puts rights at risk of being trampled by concerns with the greatest good for even the smallest increase in the collective happiness would necessitate the infringement on individual rights (30-1). If even a slightly greater happiness can be achieved through intervention as opposed to individual freedom a utilitarian would have no choice but to allow the intervention. Any action or practice that increases the general welfare, whether or not it interfered with an individual's right, would have to be accepted. Rights, it would seem, would only be important as legal prescriptions to be considered when calculating the possibility of pleasure or pain. In other words, utilitarians may concede that rights correspond to duties as set out by law, but rights, as the product of law, are not be available as a language with which to criticize institutions or practices.

This was not, however, Mill's belief. For Mill, rights could be simultaneously rooted in utilitarianism and continue to serve as language with which to critique political institutions and social arrangements. This compatibility between liberty and utility derived, in part, from Mill's rejection of Bentham's definition of rights and from Mill's addition of qualitative hedonism. Mill's concern with liberty and individual rights must be understood not only as a modification of Benthamite utilitarianism, but also as a

response to the particular configurations of 19th-century social relations. In fact, he recognized in both English and American society misappropriations of rights. On the one hand, rights were being granted where they should not have been. On the other hand, rights were being denied in situations where their protection was justified. In both cases, social well-being and the general welfare, as a product of the intellectual, moral, and affective development of individuals, were at stake.

Mill's defense of rights has also been criticized for being too strong, for sacrificing political participation and social responsibility to the needs of atomistic individuals. At the heart of this criticism is a rejection of Mill's notion of the self-regarding sphere. In contrast to those who suggest Mill does not build strong enough walls against social intervention, others suggest he was wrong to imagine walls in the first place. Mill has been charged not only with voiding rights of their power by promoting utilitarianism, but also with engaging in flights of fancy for his commitment to a "self-regarding sphere" in which one's actions affect no one. Critics like Mill's contemporary James Fitzjames Stephen argue that Mill is wrong to believe in a sphere of action in which an individual could be rightly independent. Such a belief, Stephen suggests, leads to acceptance and promotion of a selfish individualism (Stephen 1975). Attending not to the possibility of a self-regarding sphere, but to its normative and political implications, Benjamin Barber (1984) criticizes Mill's isolationism as devaluing political participation. Lumping Mill together with social contract thinkers and other liberals, Barber accuses Mill of finding "no affirmation of public values, public thinking, or public action, and [thus] makes the democratic forms of public life seem provisional and thus dispensable" (1984, 9).

While it is clear that some notion of the self-regarding sphere plays a role in Mill's thought, it is neither an unambiguous category for Mill himself nor antithetical to political participation. Taking Stephen's concern first, Mill is clearly conflicted about the possibility, even desirability of a purely self-regarding sphere. He does recognize that no individual is an "entirely isolated being," and that "it is impossible for a person to do

anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them" (1991b, 88). The social state is so natural for individuals, he explains, that they would find it difficult to even imagine themselves abstracted from it. Yet he is so anxious about the mutability of character, particularly in what he believes are harmful directions, that he desperately wants to believe in a sphere of isolation. With regard to rights claims, however, J.C. Rees (1991) suggests a reinterpretation of Mill's claim of absolute sovereignty. Rees argues that Mill was quite aware that there are no actions that are "free of social consequences" (174). What is important and cannot be overlooked, then, is the way in which Mill defines harm and justifies intervention by distinguishing between actions that affect others and actions that affect others' interests (174). What is of concern to Mill, then, is not whether an action affects another, but whether or not it harms another's interests or, rather, another's legal rights (179).

Although Mill clearly fears the influence of the "masses" and raises concerns about the power of the majority and the decent into mediocrity, he highly values individuals' political engagement. Indeed, he believes that it was only through the expression of one's own opinion on an issue, through listening to others' perspectives, and through weighing carefully and with acknowledgment of human fallibility, that individual and social progress could occur. What he attacks, then, was not mass political participation. Nor is he simply concerned about limiting the power of the state and society. Rather, he argues for the revised arrangements and new social norms that do not demand conformity of thought, opinion, or practice. He argues for social arrangements and norms that would engender the creation of an actively reflective and thoughtfully critical society.

In fact, Mill's embrace of participation and his rejection of rights as irresistible truth claims coincides with his discussion of truth in *On Liberty*. According to Mill, even claims we presume to be true are never irrefutable. They are fundamentally the opinions

of fallible individuals who are prone to error and partial perspectives. Mill explains this not as a judgment of individuals, but rather as a way to encourage continued contestation of ideas. Prone to error and at an imperfect state of development, human beings, he argued, would benefit greatly from the free expression of ideas and original thinking. Individuals, in order to develop their capacities as human beings, need lively discussion and challenges to their beliefs. They need their rights to freedom of thought, opinion, and expression. Through debate and refutation of ideas, through acting on our opinions and challenging presumed social truths, Mill suggests, we improve intellectually and we fulfill our human duty. "Judgment," he explains, "is given to men that they may use it" (1991b, 23).

Rights claims, like all other "truth" claims, then are partial and debatable. They acquire meaning and value in the context of debates with others. Were we to accept rights claims as irrefutable we risk making errors of the magnitude evident in the Athenians decision to put Socrates to death. Mill challenges the assumption of infallibility used to justify the silencing of opinions. People make mistakes as individuals, as well as a social collectivity, he reminds readers. They codify these errors through legislation and action. Through encouraging contestation, nurturing the freedom of thought, opinion, and expression, we develop new ideas which may displace older ones. In so doing, we provide a great service to society. As Mill explains, "To discover to the world something which deeply concerns it, and of which it was previously ignorant; to prove to it that it had been mistaken on some vital point of temporal or spiritual interest, is as important a service as a human being can render to his fellow creatures, and in certain cases,...the most precious gift which could be bestowed on mankind" (1991b, 32-3). And thus it is only through the "complete liberty of contradicting and disproving our opinion" that we are justified "in assuming its [an opinion's] truth for the purposes of action; on no other terms can a being with human faculties have any rational assurance of being right" (1991b, 24).

Recognizing both the imperfection of human beings as well as their unique capacities leads Mill to argue for the importance of the freedom of thought, opinion, and expression. These freedoms are, according to Mill, essential to individual and social well-being. They are the necessary, though not necessarily painless ingredients for the development and progress of individuals and societies. As Mill suggests, politics in an imperfect state of affairs is characterized by continued debate and disagreement over ideas. It is a process of struggle and contention. To come to a truth, Mill argues, it is “a question of reconciling and combining opposites,” “a rough process of a struggle between combatants fighting under hostile banners” (1991b, 54). For Mill, this antagonism between individuals and groups holding different opinions is not rooted in an innate competitiveness. Rather, politics as a process of refutation and contestation is a result of the deficiencies of the human mind and the usefulness of such challenges. In politics, Mill explains, opposition is healthy: “it is almost commonplace, that a party of order or stability, and a party of progress or reform, are both necessary elements of a healthy state of political life...” (53). There may come a time in the development of individual and social intellect and morality at which point contestation and interrogation of ideas is no longer necessary, but it would be naive, Mill argues, to believe that truth will triumph over error on its own, or even that “truth” is easily accessed. Until human nature has developed more fully it is essential, Mill suggests, that divergent opinions be permitted as they provide a balance and a complement to the deficiencies of the others’ perspective.

This is not to deny that Mill is concerned about the tenor of public debate. He does argue for temperance and respectful disagreement. “The free expression of all opinions,” Mill suggests, “should be permitted, on condition that the manner be temperate, and do not pass the bounds of fair discussion” (1991b, 59). “Vituperative language” and other unsavory tactics that might stifle certain opinions, Mill continues, must also be rejected. This is not, however, an argument for a passionless politics. Mill denounces a disorderly politics not because he desires harmony or unemotional debates.

Rather, Mill's primary concern is that tactics of bullying and denouncing opponents get used to silence certain ideas, particularly those that challenge and refute the social norms and customs. Passion and contestation have an important place in Mill's politics as long as they are not used to silence the voices of the minority or those who oppose the social norm. The argument for temperance is not an argument for temperance as a good in and of itself, but rather as a tool meant to safeguard the space for different voices and perspectives, to allow outrage and divergent opinions a place in politics, and to make space for that one voice, that one person with a contrary opinion at risk of being muted.

In fact, Mill explicitly denounces the idea of a "frictionless" society. "Without the right to protest, and the capacity for it, there is...no justice, there are no ends worth pursuing" (1991d, 152). The right to protest, in preventing error and even truth from "hardening into prejudice," also helps to prevent the development of passive individuals who lack the courage to think and act in new and different ways. In other words, though mid 19th-century English society did not go as far as Greek society did in silencing unfavorable opinion by threat of death, it did silence free thinking and the expression of ideas through the use of legislation and stigmatization of disagreement. These practices, Mill believed, were responsible for engendering an intellectual passivity among individuals that threatened the general welfare. Passivity or "peace in the intellectual world" is not, according to Mill, desirable if it means conformity of opinion and action. "[T]he price paid for this sort of intellectual pacification, is the sacrifice of the entire moral courage of the human mind" (1991b, 38). Without lively debates over social norms and customs, society will not generate "the open, fearless characters, and logical, consistent intellects who once adorned the world" (38). But this character is not reserved for the geniuses or the elite. As if anticipating charges of elitism, Mill argues that freedom of thought is as important to the individual of average intellect as it is to the great thinkers. In fact, it is "even more indispensable, to enable average human beings to attain the mental stature which they are capable of" (39). A few great minds may be able

to survive in a society in which there is a despotism and uniformity of opinion. But “an intellectually active people” will not be produced under conditions of “mental slavery” (39).

An intellectually active people are also a caring and united people. “The highest aim and best result of improved intelligence,” Mill explains, “is to unite mankind more and more in the acknowledgment of all important truths” (1991b, 49). United around these truths, they come to see that the compatibility between their own interest and the interests of the social whole. They come to learn that care for others that does not devolve into complete self-sacrifice is an essential component of social well-being. And they come to recognize that, under certain conditions that are open to debate and to change, their rights to liberty of thought and action, further the development of this well-being. And through engagement in debate individuals learn to be good citizens. The liberty of thought and discussion demands that individuals keep their minds open and listen to each other. And thus they learn the importance of inviting and weighing others’ perspectives and opinions rather than rejecting them summarily. Through engagement with these ideas wisdom develops.

For Mill, then, rights claims are part of the practice of politics. They are not, as Bentham would suggest, confined to the legal realm or constituted through legislation and circumscribed by law only. Mill suggests that rights derive their meaning and power from sources both within and outside of juridical institutions. Intimations of this understanding of rights appear in Mill’s discussion of justice in *Utilitarianism*, where he posits the existence of legal as well as moral rights. A rights claims, Mill explains, is a demand on society that they protect the individual’s possession of something of vital importance. These rights, however, may be established by law or not. And legal rights may grant rights where they do not belong: the law may have conferred a right when it ought not to have. As Mill explains:

When...a law is thought to be unjust, it seems always to be regarded as being so in the same way in which a breach of law is unjust, namely by infringing somebody's right; which, as it cannot in this case be a legal right, receives a different appellation, and is called a moral right. We may say, therefore, that a second case of injustice consists in taking or withholding from any person that to which he has a *moral right* (1991d, 179).

In distinguishing legal rights from moral rights, Mill makes space for the kind of rights politics I described earlier as a politics of direct address. In other words, though he is clear that a rights claim is a "valid claim on society to protect" the individual in the possession of something, Mill does not require that it be juridical institutions that recognize or even protect that right. Nor does a right depend on juridical institutions for its definition. Rights claims may be addressed to the general public and may be protected through changes in social norms and social arrangements, by law, education, or opinion. Mill's arguments on behalf of individual's right to liberty, in addition to his arguments for particular social and political rights, also make clear that he understands rights in a way not captured by traditional liberal individualistic conceptions of rights. For Mill, in making a rights claim one only partly to address the state. In many cases, rights claims are directed at other members of society and meant to challenge social norms and customs as much as they are directed to the state and meant to challenge state laws. This is of particular importance in his opposition to the Contagious Diseases Acts.

The Contagious Diseases Acts and the Paradoxes of Rights

As I suggested earlier, Mill was called before Parliament in 1871 to give testimony on the operations of the Contagious Diseases Acts, pieces of legislation meant to control and contain the spread of venereal disease among military personnel. Though his opposition to the Acts is an explicit application of his Harm Principle to the realm of public health policy,²³ as I argue here, it is also an example of some of the tensions and paradoxes in Mill's understanding of rights. These tensions are, I believe, indicative of a

²³It is also a good example of the ambiguity of the Harm Principle itself as both supporters and opponents of the C.D. Acts used the Principle to justify their position.

more complicated understanding, indeed a more political understanding of rights than suggested by the atomism critique. Mill does much more than defend atomistic individuals from the dangerous and unnecessary encroachment of state power, much more than attack state power and demand the protection of an isolated individual. Mill's testimony reflects his embrace and anxiety about the contingency and artificiality of character. This tension is manifest in Mill's simultaneous opposition to and encouragement of state intervention and his tendency to denaturalize and then renaturalize identity. Mill, in other words, depicts identity as contingent and constituted through social relations, and yet as fixed and deserving of protection from the state. While Mill uses rights language to challenge the culturally accepted "truths" about male and female sexuality used to justify the Acts, he nonetheless reentrenches by naturalizing other identity categories, once again betraying his anxiety about the mutability of identity and character. We see in Mill's testimony, then, an approach to rights that acknowledges and runs from instability and unpredictability at the level of political outcome and identity. In Mill's politics of resistance, rights language both enables and constrains political change beneficial to women.

The C.D. Acts, first instituted in 1864 and reauthorized in 1866 and 1869, established an elaborate system for the surveillance and regulation of female prostitutes in garrison and port towns throughout England. This system, designed "to maintain the health of soldiers and sailors," created and empowered a special plainclothes police force to identify and arrest women suspected of being "common prostitutes." Arrested women were asked to submit voluntarily to hospitalization and examination. If they refused they were brought before a magistrate, but no jury for a hearing. At this hearing the magistrate would determine if these women were in fact prostitutes, and those deemed prostitutes would be ordered to undergo a medical examination. If found to be infected, these women were then interned in Lock hospitals for up to six months. In 1869, upon threat of the reauthorization and the extension of the Acts to civilian districts, a large repeal

movement formed in opposition. Though it took many years of reiterating their moral, medical, and legal opposition to the Acts, repeated testimonials before Parliamentary commissions, and an unsuccessful attempt to repeal the Acts in 1870, the Contagious Diseases Acts were finally repealed in 1886. Mill, as a former member of Parliament and a well-respected and well-known public intellectual, Mill's opposition was of critical importance to the larger movement to repeal the Acts.²⁴ He not only articulated the liberal opposition to the Acts, but also helped expose the discriminatory social norms and sexual double standard implicated in the Acts as well.

Mill's testimony is an application of his theoretical arguments of *On Liberty* to the realm of public policy. The controversy surrounding the Acts entailed debates over the meaning of harm and social well-being. Were female prostitutes causing harm to soldiers and the larger society as sources of contagion? Was it more harmful to society to provide men with safe outlets for their sexual urges than to force them to change their behavior by having them confront the possibility of infection? Was there more harm in interfering with the personal liberty of women than men? What kinds of interventions were appropriate to alleviating harm and promoting social well-being? Do men have a right to be protected in their sexual promiscuity? Do women have a right to be treated differently than criminals, to be treated as innocent until proven guilty? These questions are indicative of the different perspectives on harm circulating at the time and indicative of differing conceptions of rights. The controversy is, however, precisely what Mill images when he explains that the Harm Principle, far from determining the absolutely appropriate response to a public controversy, teaches us that "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion" (1991b, 83-4). Mill's understanding of what serves the

²⁴ For good histories see McHugh 1981; Spongberg 1997; and Walkowitz 1991.

general welfare reflects the fact that he was torn between promoting individual liberty rights and encouraging state intervention, and between recognizing the mutability of character and ignoring it.

Mill's opposition to the Contagious Diseases Acts begins with a declaration that the Acts were opposed, in his mind, to the general principle of the security of personal liberty, a principle which for Mill was applicable to women as well as to men. According to Mill, the C.D. Acts were allowing the state to interfere with, rather than protect the freedom of all women. By constantly watching a particular group of women and denying them the right to jury trials and proper defense, the Acts, he argues, "intentionally" take liberty away from women of the lower classes who are suspected of being prostitutes. And because of the vague and potentially expansive scope of police power necessary for successful administration of the Acts because the police have and seemed to need the power to watch and arrest any woman they suspected, the Acts take this personal liberty away from all women.²⁵ According to Mill, the Acts granted the police a questionable and potentially abusable power to watch and arrest women who "have not voluntarily declared themselves to be prostitutes," women who have not registered as prostitutes. Mill's argument implies that women's arrest and possible detention rested on the suspect testimony of the police who could detain women "on any grounds of suspicion which appear to [them] to be adequate"(1963a, 361). Once arrested, the Acts further compromised women's liberty, according to Mill, by denying them the power to defend themselves or be heard by counsel, making it difficult, if not impossible to prove oneself innocent (1963a, 352-3). Habeas corpus safeguards--including the right to defend oneself, to be heard by counsel, and to be given an open trial--were, according to Mill,

²⁵As Mill explained to Parliament, "I do not consider [the legislation] justifiable on principle, because it appears to me to be opposed to one of the greatest principles of legislation, the security of personal liberty. It appears to me that legislation of this sort takes away that security, almost entirely from a particular class of women intentionally, but incidentally and unintentionally, one may say, from all women whatever, inasmuch as it enables a woman to be apprehended by the police on suspicion and taken before a magistrate, and then by that magistrate she is liable to be confined for a term of imprisonment..."(1963a, 351)

essential rights which should be granted to all women, to prostitutes as well as modest women, particularly in such cases. "All the protection which is necessary in other cases of judicial investigation," he argues, "would be necessary in this [for] there can be hardly any more serious case to the person concerned than that of being charged with being a prostitute, if she is not really so" (353).

Mill's concern is with the effects that the Acts will have on men and women. Contesting the notion that prostitution was indicative of a thoroughly degraded and permanently fixed identity for women, Mill argues that this supposedly natural character is actually produced, and will be reinforced, by the kind of arrangements instituted under the Acts. He explains that the Acts will undermine any attempts to alter their characters, to "reclaim" these women from a "fallen" life. According to Mill, mandatory examination and detention are actions representative of oppressive and tyrannical behavior. As such, forced hospitalization threatens to undo any efforts to improve the morality of prostitutes that might occur while these women are hospitalized. While hospitalized, Mill admits, prostitutes are exposed to moralizing influences such as clergy, doctors, and other members of reclamation groups. However, by forcing prostitutes to undergo examination, as opposed to allowing them to submit voluntarily, these positive influences are threatened. "What removes [prostitutes] from the streets," he argues:

is the moral effect which is produced in their minds, and the chance of producing this effect is likely to be lessened by subjecting them to an offensive and what must be considered a tyrannical operation by the force of law. I should think that must tend in some degree to counteract the good effect which no doubt was produced by the moral influences that were brought to bear on them during their detention, which are no doubt the real cause of reclaiming them so far as they are reclaimed, and therefore they might be applied more effectually without the machinery of the Acts (1963a, 368).

Mill's support for "reclamation" efforts evinces an understanding that female "nature" is anything but natural and that protecting liberty rights does not mean isolating individuals from social relations. His defense of women's liberty rests on a belief that it is possible to

"rais[e] the lowest and most demoralised portion of that class to a comparatively more decent and more respectable state of life." Improvements in women's morality, he argues, "might be just as well produced by the mere existence of hospitals; by receiving them into hospitals, having proper hospital accommodation for them, and when there having them attended by those benevolent and excellent people who undertake their reclamation" (365). Though he defends women's liberty, Mill's argument for prostitutes' reclamation entails placing women in different webs of social relations, not abstracting them from these relations altogether.

Indeed, Mill's opposition to the Acts is not at all an unambiguous defense of individual liberty as traditionally understood. His defense of women's liberty is coupled with arguments supporting greater state intervention into the lives of men. In response to the claim that the Acts reduced transmission, Mill explains to the Commission that this is not the case. He argues that by allowing men to avoid examination and by assuming that only prostitutes were capable of transmitting disease, Parliament ignores infections in men and their potential to transmit disease to their wives and children. Unless Parliament treats men as themselves sites and sources of contagion, the "innocent" victims of disease, the wives and children, would not and could not be protected from infection. In response to the claim that the Acts reduce prostitution, Mill uses evidence of the effects of similar policies in France. The French practices, he argues, had been shown to actually increase "clandestine" prostitution. By removing diseased prostitutes from the streets and providing men with a sense of security, the belief that prostitutes on the streets were uninfected, such policies created an increased demand for prostitutes, a demand which would be filled by women who may not have been prostitutes originally. In other words, the Acts had, according to Mill, "a decided tendency to increase the class of prostitutes" not only by creating a vacancy but by actually encouraging men to engage in illicit sexual activities. That Acts did not therefore improve the morality of individuals, of either men or women. By removing the threat of potential infection, the Acts remove the natural

consequences of engaging in vice and tacitly accepted such behavior from men. These factors contribute to Mill's opposition to the Acts and belief that they were detrimental to the physical and moral health of society.

The general welfare, Mill believes, might best be served by other forms of state intervention and thus, in addition to his criticisms, he offers suggestions for alternative policies which could promote the public health and social goals of preventing disease transmission and improving morality. These alternatives, though consistent with his concern with the individual liberty, do not hold liberty to an absolute principle. Indeed, Mill is not against interfering with the liberty of individuals when such interventions can be proven to be effective and beneficial to both the health and the morality of society. For example, he suggests that the military men be watched and examined in order to reduce the likelihood of transmitting disease to their wives, women who had not chosen or knowingly put themselves at risk. According to Mill, then:

if prevention is to be applied at all, it should be applied to the man, who alone has the power of committing this offence [transmission to wives and children] in a direct way. When a woman infects anyone the man must always be a consenting party to running the risk: it is only a man who having been infected himself can communicate infection to an innocent person, and therefore if there is any argument for prevention, it should be for preventive measures applied to men who infect these women, and not to the women themselves (1963a, 362).

He also suggests that a law be made to penalize men who were found guilty of transmitting disease to their wives. These men should, according to Mill, be subject to monetary penalties and the women should be granted the right to divorce. Together these policies would have the potential to discourage men from soliciting prostitutes, an action which would have both physical and moral benefits. Mill's testimony suggests, then, that he supports State involvement when it can be shown to benefit the "general welfare."

Mill's definition of the general welfare is, as the language suggests, premised upon a very particular conception of the properly sexual individual. As the language of Mill's testimony suggests, his opposition to the C.D. Acts, his defense of women's freedom, and

his suggestions for alternative public health policies rely on particular understanding of disciplined sexuality. His determination of good policies and bad ones relies upon a clear condemnation of certain forms of sexual behavior. Sexuality outside of marriage is called "vicious," "illicit," a "sin," and "immoral." To engage in such behavior is, for Mill, to succumb to the animal pleasures at the expense of the higher pleasures such as feeling and intellect. Such behavior is harmful to the individual as well as society. Thus Mill's properly disciplined character is one who is in control of his or her sexuality. Of course this also suggests Mill had some idea of what constituted "nobler feelings." Indeed, as many critics have suggested, Mill's definition is laden with class and gender biases, as evident in his concern with the corruptive potential of the poor. His testimony reveals these same biases and concerns--which are both indicative of and in tension with his notion of the artificiality of character.

Mill's understanding of sexuality is both provocative and problematic--it is central to his challenge to a set of beliefs about female identity showing certain "truths" to be artificial constructs. Yet it ends up naturalizing and reentrenching other identity categories such as that of the asexual, morally upright woman. A central component of his testimony, this recognition and rejection of mutable identity categories allows Mill to challenge supporters' position on State intervention and to defend women's liberty, and yet reveals his embeddedness in a Victorian moralism which feminists of his time and today find constraining. Mill's representation of sexuality, when examined in light of his understanding of human nature, thus mark moments of both promise and paradox in his defense of women's freedom. Simultaneously challenging and reinforcing aspects of Victorian moralism, Mill's testimony reveals the extent to which claims for women's freedom, resistance to state intervention with women's liberty, engage with and even rely upon dominant and problematic conceptions of female sexuality.

As an example of the way in which this tension in Mill's work enables political change, we can turn to his exposure and disputation of the sexual double standard implicit

in the Acts. Mill challenges two of the most powerful and important support arguments used to justify and legitimate the C.D. Acts by re-presenting male and female sexuality. He challenges supporters' theory of sexually differentiated sexual instinct and their gender specific theory of disease transmission. Supporters embrace a Victorian theory of sexuality which suggested that men and women had fundamentally different sexual drives rooted in incommensurable biologies. That is, anatomical differences were interpreted as producing or representing the source and evidence of vastly different sexual desires, instincts, and acceptable behaviors.²⁶ According to the supporters' interpretation of biological incommensurability, men had natural and uncontrollable sexual urges whereas women were considered to be asexual.²⁷ Unlike men, then, women who desired to or did engage in illicit sexual practices, such as prostitutes, had their very femininity called into question. The belief that male sexual desire could not be contained and would find whatever outlets were available raised a problem for Parliament in the late nineteenth-century with the outbreak of venereal disease. Parliament, it seemed, wanted to maintain a bachelor army and keep the incidence of venereal infection low among the ranks. In order to do this it could forbid men to visit prostitutes or it could offer a safe outlet for male sexual urges by providing men with uninfected prostitutes. Fearing that the first option would encourage homosexual behavior among the troops, a fate which seemed worse than either promiscuity or venereal infection, Parliament instituted the system of regulation known as the Contagious Diseases Acts. Given the common Victorian belief in the uncontrollability of male sexual desire, supporters found the Contagious Diseases Acts, the provision of an uninfected supply of prostitutes to military men, to be logical and necessary measures which would not only protect the health of military personnel and ensure the safety of the nation, but also save the country money in the long run.

²⁶See Laqueur 1990, 1992..

²⁷This theory of feminine asexuality was contradicted by another Victorian theory which posited the hypersexuality of the female body. On this contradiction see Laqueur 1990, 1992; and Weeks 1989.

Mill, however, rejects the notion that male sexuality is naturally uncontrollable. He believes that through proper laws and public education about the threat of disease transmission or the criminality of transmitting disease to wives, men could be advised and encouraged to change their behavior, to become capable of controlling their sexual desires. Persuasion, advice, and information could and would, in his opinion, lead to important behavior changes. Mill was outraged that Parliament could not understand this and thus rejects both their desire to maintain a bachelor army and their attempts to provide this army with undiseased prostitutes. Calling such policies monstrous and depraving, Mill argues that such policies should be quickly overturned. "The idea of keeping a large army in idleness and vice and then keeping a large army of prostitutes to pander to their vices is," he protests, "too monstrous to admit of a moment's consideration, while the safety of the country could be provided for by the military education of all classes, or until after every possible experiment with married soldiers had been tried and failed." He continued arguing that:

I therefore do not think that this system of legislation which I think utterly depraving to the mass of the population (not to speak of its gross inequality between men and women) is in any way specially necessary for the army and navy. It is a monstrous artificial cure for a monstrous artificial evil which had far better be swept away at its root in accordance with democratic principles of government.²⁸

According to Mill, Parliament, by acting as if male sexuality was naturally unruly, actually makes it so. As he argues, by encouraging illicit activity among men, by making vice safe for men, the state encourages men to act as if they did in fact have an uncontrollable sex drive. Mill contends that by providing men with a safe outlet for their sexual urges, the C.D. Acts would leave "the impression on the minds of soldiers and sailors...that it is not discouraged, that it is considered by Parliament a necessity which may be regulated, but which must be accepted, and that Parliament does not entertain any

²⁸Collected Works, Vol. XVII, 1688.

serious disapprobation of immoral conduct of that kind" (1963a, 360). For Mill, there is nothing naturally uncontrollable about male sexuality. Rather, like women's supposedly natural inferiority or female prostitutes' supposedly natural pathology, men's supposed sexual propensity is actually a product of the very social arrangements that are meant to reflect it. In making "illicit indulgence" safe, Parliament encourages it (355).

In challenging dominant conceptions of male sexuality, Mill also challenges the dominant Victorian sexual double standard. This double standard allowed and accepted male sexual license while it expected purity and virtue from women. By calling attention to the inequality of the legislation, Mill challenges Parliament to rethink its position on the regulation of women and the acceptance of male sexual license. This challenge brought attention to the supporters' position of female sexuality. Supporters' justified the regulation of prostitutes with the argument that, unlike men, women neither had uncontrollable sexual urges nor needed safe outlets for their sexual desires. Women, according to this interpretation, were not only able but expected to control their sexual impulses. Evidence of female sexual license (i.e. prostitution) was thus taken as evidence of the loss of femininity or womanhood defined in terms of the purity and virtue. This interpretation of the female body led to a rather odd and somewhat contradictory position on prostitution. On the one hand, supporters argued that the women who were engaged in prostitution have lost all traces of their femininity or womanhood and were therefore already so degraded that surveillance and examination could not degrade them further. On the other hand, supporters also justified the regulation with the argument that such legislation eventually led to the reclamation of these women, thereby assuming there was some femininity left to be salvaged. These arguments were further complicated by supporters' refusal to allow the examination of men. Whereas examination of prostitutes was not seen as degrading, examination of men was: "while men would be degraded if

subjected to physical examination, the women who satisfied male sexual urges were already so degraded that further indignities scarcely mattered" (McHugh 1982, 17).²⁹

These arguments were not entirely convincing to Mill. While he agrees with supporters that female sexuality could be controlled, that it was not naturally unruly, he also believed that men could control their sexuality. And though he agrees that men could be degraded by the examination, he believes that they would be much less degraded than most women. "Men are not lowered in their own eyes as much by exposure of their persons" as women, according to Mill. And though he would rather there be no forced surveillance, regulation, or examination of men or women, he does argue that "it should be applied to men as well as women, or if not to both, rather to men than to women" (1963a, 356).

Conclusion

Mill's defense of women's rights, like his defense of rights in general, is full of tensions and paradoxes. While he defends women's rights and contests dominant conceptions of female inferiority by describing "character" or identity as something that is artificially and socially constituted, Mill also uses essentialized notions of gender identity to achieve the same purposes. This shift between a recognition of the mutability of identity and the naturalization of character leads Mill not only to argue for women's freedom from state interference, but also to support a host of state and socially-based disciplinary practices. It is, as I have argued, his understanding of the very porousness of the subject, not a belief in impermeable boundaries and inviolable egos, that leads Mill to

²⁹Oddly enough, though, supporters had to change the tune of their argument when asked to identify the benefits of the C.D. Acts. As suggested above, supporters argued that the reclamation of prostitutes was one of the moral benefits of the Acts. The Acts enabled women to move from a life of vice to a life of virtue through exposure to moral individuals like doctors and clergy during the hospital stay. However, in order to argue that these women could in fact be saved, supporters had to presuppose that the women had some element of femininity or womanhood left to be saved in the first place. They were hard pressed to explain how women could be simultaneously thoroughly degraded and potentially reclaimable.

champion individual freedom at the same time that he champions both participation in politics and the intervention of the state.

These tensions in Mill's work are erased when he is read as a theorist of liberal individualism and a proponent of the atomism thesis. Though Mill clearly evinces an anxiety about the detrimental effects that social relations may have on human character, as the atomism thesis suggests, his understanding of what enables human development and how rights can function are, nonetheless, far more complicated than such a thesis proposes. Human beings do not, he teaches, develop their human capacities in isolation, but rather through engagement with other individuals. And rights claims are an essential element of that participation. Not only do rights claims reflect the socially situated qualities of individuals, as they reflect the partiality and plurality of perspectives, but also it is through the practice of rights claiming, through rights-based political activity that individual identity is contested and reconstituted and communities are formed. With John Stuart Mill, then, we learn that instability and mutability at the level of identity, while anxiety producing, can also be a source of political promise. The political potential of the contingencies of rights, identities, and political outcomes do not, unfortunately, always mitigate this anxiety.

In the work of Michel Foucault, however, we meet a theorist who embraces contingency and instability with more ease. In fact, Foucault decidedly rejects the kind of naturalizing of identity that Mill falls back on. Foucault's project, as I suggest in the next chapter, is to place rights—and the relationship between rights, identity, and political change—squarely in the middle of an agonistic politics, to see rights as part of an ongoing struggle over identity categories, relationships, and social and political arrangements.

Chapter Four

In a Blind Alley?

Foucault, Rights, and the (Im)Possibility of Resistance

Introduction

In his 1976 "Two Lectures," Foucault cautioned against using rights discourse as part of a politics of resistance (1980a). Rights cannot, he argued, effectively challenge modern forms of disciplinary power; in fact, rights actually reinforce that very power. This argument, as I explained in Chapter Two, has been central to one particular feminist critique of rights that I call the critique of discipline. Feminists build on Foucault's understanding of the relationship between modern power and rights discourse to explain how and why rights claims made on behalf of women have failed to challenge or displace, and may have even reinforced, certain forms of gender oppression. Feminists who appropriate Foucault's insights and methodology suggest that the disciplinary character of rights language is responsible for these failings. As a discourse of discipline, rights, they explain, reinforce masculine power and resubordinate women by fixing them in particular normative identity categories.

This appropriation of Foucault, however, obscures the second part of his argument. While Foucault did contend that "If one wants...to struggle against disciplines and disciplinary power, it is not towards the ancient right of sovereignty that one should turn," he did not reject rights in their entirety (1980a, 108). In fact, Foucault posed a challenge in addition to his critique: although one can no longer turn to traditional conceptions of rights to resist modern power, one should look to "a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty" (1980a, 108). Though he had little more to say about this "new form of right" in 1976, he offers a few examples of what this new form of right might look like in several interviews given in the early 1980s (1990a, 1990b). There he

develops an idea of rights as relational.¹ According to Foucault, "relational rights" is an alternative understanding of rights that moves beyond the association of rights with either the sovereign or the disciplinary model of power. A politics built around a notion of relational rights would focus on changing and creating new relationships rather than seeking political transformation solely through the state recognition of an individual right and an essentialized identity.

Although Foucault's notion of relational rights is decidedly underdeveloped, preempted most likely, by his early death, he does tell us a few things about what relational rights entail. Relational rights, according to Foucault, involve the right to create new forms of relationships beyond those currently codified in the law and recognized by the state. Relational rights, he explains, would take attitudes and behaviors, not legal institutions and legal formulae as their primary target of concern. Such a conception of rights would shift the focus of political contestation from state power to the normalizing-disciplinary network that constitutes modern configurations of power. In addition to rejecting the state as the primary target of rights politics, relational rights also rejects the notion that rights are reflections of or derive their power from the state recognition of fixed and essential identities. In addition, Foucault suggests that relational rights are part of an ongoing struggle over identities and ways of living. They cannot guarantee political outcomes that are purely progressive and transformative; indeed, they may not be able to bring about the kind of freedom or displacement of politics that some rights-based political movements desire. Rather, they are to be understood and embraced as part of the fabric of an agonistic politics in which contestation and struggle are not only possible, but transformative as well.

¹Foucault does not use the term "relational rights" in the same manner as feminists like Robin West (1997) or Martha Minow (1991). Relationality, as discussed in feminist work, refers to a particular way of understanding the subject of rights as embedded within and influenced by relationships. Relationality is posited as an alternative, indeed, antithesis, to atomistic individualism. Foucault's conception of relationality seeks not to establish the "truth" of human nature, or femininity, as relational, but rather to identify relationships, and the identity categories that are implicated in relationships, as sites of contestation.

Far from generalizing from his critic of juridical or liberal rights to a rejecting rights per se, Foucault presents rights language, particularly as it is manifest in a notion of rights as relations, as a discourse of contestation. This understanding of rights is decidedly political. It acknowledges that rights language may enable and constrain political change. This depiction and embrace of relational rights as a discourse of resistance demands a renewed attention to the multiple of effects and locations of rights politics, and it urges the reassessment of the transformative potential of rights language. Foucault's notion of relational rights not only points the way to a new understanding of rights, but challenges feminist critiques of rights disciplinary character for downplaying, indeed, at times denying, Foucault's own embrace of the fragility and incompleteness of discourse and the paradoxical effects of rights language.² It is the task of this chapter, then, to examine the meaning and implications of Foucault's discussion of rights as relational. As the power of relational rights can best be seen in their contrast to the more traditional conceptions of rights articulated and criticized by Foucault, I begin with a discussion of his distinction between rights as juridical, a conception that is similar to a liberal notion of rights,³ and rights as disciplinary, the notion of rights deployed in feminist critiques of rights.⁴

²I do not mean to suggest that feminists do this intentionally or willfully. Nor do I mean to obscure Wendy Brown's (1995; 2000a; 2000b) explicit attention to the paradoxical nature of rights, a recognition that makes her reading of rights markedly different from that of Carol Smart (1989). However, as I suggested in Chapter Two, what I draw attention to is the "spirit" of Foucauldian feminist critiques of rights. The effect of their rights critiques is to reduce Foucault's depiction of rights to masking and reinforcing disciplinary power, and to downplay, if not outright reject rights' contestatory potential. For a recent discussion of the thrust of Brown's argument, and her response to what she considers a misreading of her work, see Baynes (2000) and Brown (2000a; 2000b).

³See Ivison (1998) for a discussion of the connection between juridical and liberal rights.

⁴Feminists also go wrong in their appropriation of Foucault to the extent that they imagine that there is some alternative to rights language that will enable pure emancipation and political transformation. Such a position reveals a belief in an outside to modern forms of power, in a politics of resistance that no longer reinforces power relations as it attempts to displace them. As I suggest below, for Foucault there is no such place, no such political language or practice.

In a Blind Alley: Rights and the Rise of Disciplinary Power

Feminists, as I discussed earlier, have deployed Foucauldian insights to caution other feminists from investing too much energy and faith in the contestatory potential of rights, from making rights the sole language of political opposition and the primary goal of feminist politics. Arguing that rights undermine rather than advance women's freedom and equality, these feminists urge a rethinking of the basis of feminist political opposition. They suggest that rights not only mask, but also function as an instrument of the very disciplinary mechanisms and techniques that constitute women as docile, obedient, and ultimately constrained subjects.

This argument is not at all inconsistent with Foucauldian insights and methodology. Indeed, it embraces a Foucauldian commitment to the possibility of alternative, non-traditional bases of political resistance, all the while rejecting more traditional bases and conceptions of opposition. It seems, as well, to be the obvious and inevitable outcome of Foucault's quite explicit condemnation of rights-based political resistance. But this appropriation of Foucault does more than simply map Foucauldian insights onto contemporary politics. It also simultaneously embraces and undermines the possibility of resistance that is so essential to Foucault. Feminists' arguments suggest that resistance is both possible, and located in multiple sites. Yet, in rejecting rights as an irresistible discourse of discipline, their reinforce the idea that disciplinary power is so pervasive and hegemonic as to render at least certain forms of resistance completely useless, ultimately calling into question the possibility of politics in the context of a disciplinary society.

While I will suggest later that Foucault does not always present rights and resistance as mutually exclusive, feminist arguments are not without a solid foundation in Foucault's work. He very clearly states that rights, as they have developed within the tradition of liberal humanism, are an ineffective, even dangerous basis of political opposition. Directed toward state power, juridical institutions, and the law, rights do not

address, do not even recognize, modern disciplinary power as it works through other institutions and techniques. Rights, Foucault continues, do more than mask disciplinary power, they function as "instrument(s) of . . . domination" and subordination, simultaneously obscuring contemporary operations of power and reinforcing the power relations they are meant to contest (1980a, 95). Rights as a basis of political opposition, he concludes, leave us in "a kind of blind alley," unable to recognize or contest, let alone limit, the "effects of disciplinary power" (1980a, 108). This critique, as I will detail below, derives from an important distinction that Foucault makes throughout his work between ancient and modern models of power, between sovereignty and discipline.

Rights, Foucault explains in his 1976 "Two Lectures," derive from and are linked with sovereignty, a model of power associated with the development of monarchical structures of governance and other forms of sovereign state power. According to the "ancient theory of sovereignty," individuals possess power in the form of natural rights. This power is transferred from individuals to a sovereign, such as a monarch, and entrenched in juridical institutions and the State. The sovereign deploys this power through laws and codes that delimit what subjects can and cannot do. The sovereign sets up a series of prohibitions and deploys power through practices of violence and repression. Sovereignty is not, however, a model of pure domination. Although individuals transfer their power to a sovereign, they retain the ability to contest sovereign power by recourse to the language of rights. That is, rights function to mark the limit of sovereign power, to identify arbitrary and illegitimate uses of this power. "The essential role of the theory of right," Foucault explains, "from medieval times onwards, was to fix the legitimacy of power" (1980a, 95). According to the theory of sovereignty, then, individuals, also known as "juridical subjects," are able to contest sovereign power when it has overstepped its proper boundaries. Rights allow subjects to limit this power and protect a sphere of freedom, a space of non-interference. Rights, then, "refer to . . . the

extent to which an individual can *effectively* claim something: that is, a protected liberty right other have a duty to allow the exercise of" (Ivison 1998, 136).

According to Foucault, a shift in the form and mechanisms of power occurred in the seventeenth and eighteenth centuries, which undermined rights as a basis upon which to contest relations of power. At this time, he explains, a new type of power developed, a type of power that did not emanate from a single and unified source, a type of power that did not operate through legal commands and prohibitions. This new form of power, what Foucault calls "disciplinary" power, is "antithetical" to sovereignty. These two forms of power work through distinct institutions and deploy different techniques of governance. Whereas sovereign power uses laws and codes, and engages tactics of repression and violence to control the behavior of subjects, discipline works through more subtle forms of control and more varied institutions. If sovereign power could be recognized by its relation to a clearly identifiable and known source--"the juridical edifice of sovereignty, the State apparatuses and the ideologies which accompany them" (1980a, 102)--disciplinary power's source is something unknown. It works anonymously and at multiple locations, at the "extremities." While sovereign power is something to be possessed or lost, disciplinary power "circulates." Working in and through a variety of sites and institutions, disciplinary power also involves the development of new procedures, techniques, and tactics for gathering information and regulating the lives of individuals. Disciplinary power works according to norms rather than laws, surveillance and normalization rather than violence and prohibition.

Discipline, Foucault continues, is concerned about constituting particular kinds of subjects. It is not concerned simply with prohibiting certain behaviors or actions. It focuses on individual bodies, "exercising upon [the body] a subtle coercion, of obtaining holds upon it at the level of the mechanism itself--movements, gestures, attitudes, rapidity" (1979, 137). Disciplinary power, in other words, operates according to a "micro-physics of power," involving varied techniques, tactics, practices, and discourses

which invest bodies with particular kinds of capacities (1979, 29). For example, in the context of the prison, disciplinary power works by carefully managing the space that individuals occupy, maintaining constant surveillance of individuals, and imposing judgments and shaping individual behavior according to a set of norms. Discipline, whether it occurs in the prison, the school, the hospital, the factory, or the military, involves, as Fontana and Pasquino suggest, a "vast system instituted in the seventeenth century comprising the functions of surveillance, normalisation and control and . . . those of punishment, correction, education and so on" (1980b, 121). As Foucault explains in *Discipline and Punish*, "whereas the juridical systems define juridical subjects according to universal norms, the disciplines characterize, classify, specialize; they distribute along a scale, around a norm, hierarchize individuals in relation to one another and, if necessary, disqualify and invalidate" (1979, 223).

One of the primary techniques of disciplinary power, as Foucault explains, is normalization. The technique of normalization developed along with the growth of the social science. With the development of scientific knowledge, with its methods of observational study and its ability to determine statistical averages or norms, it became possible and desirable to distinguish normal from abnormal. "The norm," as one Foucault scholar explains, "is both a statistically determined standard of behaviour administratively required by disciplinary institutions . . . and what is considered as moral law" (Simons 1995, 31). Norms are the "principles of comparability and standards of reference within a society by means of which individuals become intelligible as such, they are created through procedures of observation and surveillance of individuals that . . . allow for knowledge about an average which then enables development of social policy based upon it" (Blasius 1994, 138). The norm, that is, becomes the basis of a set of practices and techniques designed to perpetuate these principles, thereby producing particular kinds of subjects, "normal" individuals. Normalization regulates individuals through "habits, rules, order, an authority that is exercised continually around [them] and upon [them] and

which [they] must allow to function automatically in [them]" (1979, 128-9).

Furthermore, in order to produce normal and obedient subjects, all deviations from the norm are punished.⁵

As these descriptions of disciplinary power imply, the various techniques, tactics, discourses, and procedures instituted are designed to produce certain kinds of individuals, to mold and shape individuals into certain kinds of subjects. "Discipline," Foucault explains, "makes individuals; it is the specific technique of power that regards individuals both as objects and as instruments of its exercise" (1979, 170). Normalization, as it proceeds through the development of knowledge and practices associated with psychology, medicine, the prison, and the school, produces "a certain idea or model of humanity . . . and . . . this idea of man . . . become(s) normative, self-evident, and is supposed to be universal" (1988b, 15). This "idea" is the deployed in practices that create individuals who "serve the needs of power" (Ransom 1997, 59). For example, "Discipline in a factory produces skilled workers; in an army, efficient fighting units; in the classroom, receptive students" (Ransom 1997, 59). Discipline, as Foucault explains, "increases the forces of the body (in economic terms of utility) and diminishes those same forces (in political terms of obedience)" (1978, 138).

According to Foucault, however, modern forms of power do more than regulate and constitute individual subjectivities. Modern forms of power also regulate and manage populations. Foucault calls this second form of modern power "bio-power" or "bio-politics." While disciplinary power, or what Foucault also refers to as the "anatomo-politics of the human body," concerns itself with the regulation and shaping of individual bodies, bio-politics is concerned with the surveillance, regulation, and management of populations. According to Foucault, bio-politics and anatomo-politics, the two poles of modern power, encompass the variety of ways in which power over life is organized and

⁵For a good discussion of normalization see Ewald (1990).

deployed in modern society (1978, 139). The former, anatomo-politics, is "centered on the body as a machine: its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility" (1978,139). The latter, bio-politics, is "focused on the species body, the body imbued with mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity" (1978, 139). Bio-politics complements the micro-level techniques of discipline with its macro-level attention to the health and reproduction of populations. Differentiating bio-power from sovereignty, Foucault argues that "power would no longer be simply dealing with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would have to be applied at all levels of life itself"(1978, 142-3). Life itself--sexual reproduction, health, longevity --becomes a political object through the development of bio-power.

Having taken such a radically different form, modern power, Foucault explains, cannot be contested by recourse to rights. Rights, he argues, are tied up with the model of power and standards of legitimacy posited by the ancient theory of sovereignty. "If one wants to look for a non-disciplinary form of power, or rather, to struggle against disciplines and disciplinary power, it is not towards the ancient right of sovereignty that one should turn," he argues (1980a, 108). In a disciplinary society, then, rights are both an ineffective and a dangerous form of political resistance. On the one hand, they cannot contest because they do not recognize "power at the extremities"--the techniques of surveillance, regulation, and domination that occur in locations beyond the state, and which involve not simply prohibitions, but practices constitutive of subjectivity. These "new forms of power are sufficiently distinct from the questions of rightful resistance to oppression that circulate through the discourse of sovereignty as to preclude effective recourse to the language of rights" (McClure 1995, 150). For example, in claiming a right to privacy to limit state power in the arena of sexual relations, one obscures the way

in which power works through other institutions and techniques to regulate the sexual acts and identities of individuals.

Furthermore, rights simultaneously mask and reinforce the mechanisms and practices that engender domination and subjugation. In other words, modern power does not simply displace the power of sovereignty's juridical institutions and laws, thereby rendering rights discourse an obsolete language of political opposition. Rather, juridical apparatuses and rights discourse are "colonized." Rights and juridical institutions, that is, become a form of and complement disciplinary power. According to Foucault "the theory of sovereignty, and the organization of a legal code centered upon it" are taken up in a disciplinary society, allowing "a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee everyone, by virtue of the sovereignty of the State, the exercise of his proper sovereign rights" (1980a, 105). As Foucault explains in *The History of Sexuality*, in a disciplinary society "law operates more and more as a norm, and . . . the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory" (1978, 144). Once rights, laws, and legal apparatuses are colonized "by the scientific norms deployed in strategies of government. . . even when we believe we are upholding our sovereign rights against the state or the encroachments of disciplinary power, we do so in the name of a right and through a juridical system that has itself been disciplined" (Simons 1995, 53).

These are precisely the concerns of feminist rights critics. Rights, they suggest, are not only unable to contest the disciplinary power that produces norms of femininity, but rights reinforce these norms as well. Rights, as Carol Smart (1989; 1992) illustrates, deployed to protect women's right to privacy with regard to reproductive decision-making produces women as selfish and dangerous individuals, while simultaneously increasing state surveillance of women's bodies. This illustrates Foucault's point that "It is not just

that rights discourse misses the actual workings of disciplinary power, but more strongly, it is itself a particularly efficient mask *and* conductor of this power" (Ivison 1998, 135). What Foucault suggests, then, is that rights discourse is not a "morally pure" language of resistance that can bring about emancipation or liberation from power. For Foucault, resistance is always implicated in power. There are no practices or discourses of political opposition that are "beyond power. . . . There is no such thing as liberation . . . because power is always implicated in liberation as in domination" (Valverde 1999, 667). This understanding of the relationship between resistance and power has been the cause of considerable anxiety and unease among scholars and political activists, feminists and non-feminists alike. If every act of resistance is implicated in domination, is resistance ever effective? Is it only ever neutralized or put in service of disciplinary power? In the next section, I explore the source of these concerns and suggest that while Foucault's earlier works lend themselves to precisely these questions, his later works challenge this despair.

The (Im)Possibility of Resistance: Foucault and his Critics

Concerned about illuminating the problematic effects of rights discourse, feminist critics of rights disciplinary character urge the rejection of rights as a basis of political opposition. They suggest, instead, taking up alternative discourses and tactics of resistance.⁶ This argument, though thoroughly Foucauldian in its continued faith in the possibility of resistance, oddly enough perpetuates an interpretation of Foucault's work that parallels the critiques of Foucault. That is, by presenting rights discourse as a seamless, irresistible disciplinary discourse, feminist rights critics make an argument, the tenor and spirit of which, perpetuates a reading of Foucault as depicting power as ubiquitous and difficult, if not impossible to contest. These feminists, share with critics

⁶For a good review of feminism's engagement with Foucault see Diamond and Quinby (1988a, 1988b); and Sawicki (1994, 1998).

like Charles Taylor, Jurgen Habermas, and Nancy Fraser, a tendency to praise Foucault for helping to illuminate techniques of power obscured by previous scholarship on power, while raising concerns about the possibility of politics in the aftermath of Foucault. If power is everywhere, as Foucault suggests, and every resistance is implicated in the perpetuation of power, is political opposition possible? Are liberation and emancipation from power conceivable, let alone achievable? If not, why resist at all? Foucault, I suggest below, is partly responsible for, though he explicitly refutes these critiques. It is not, that is, without ground that he would be considered normatively confusing and confused.

Foucault has been praised by critics and sympathetic readers alike for revealing the complex relationship between resistance and power, even for calling into question traditional bases of political opposition and notions of political liberation and emancipation. A number of feminists, for example, have appropriated and amended Foucault's methodology and insights to analyze "the social construction of femininity . . . [and] the politics of needs and the politics of difference" (Sawicki 1994, 347).⁷ They have found Foucault useful for illuminating "unrecognized modes of domination," for understanding the body as a "site of power . . . as the locus of domination through which docility is accomplished and subjectivity constituted," and for recognizing that discourse has the "capacity to produce and sustain hegemonic power" (Diamond and Quinby 1988b, x). Even critic Charles Taylor, who finds Foucault's work mostly "disconcerting," admires his ability to illuminate new modes of domination--that "constellation [of power relations] combining modern humanitarianism, the new social sciences, and the new disciplines that develop in armies, schools and hospitals in the eighteenth century"--obscured by previous analyses of history and power (Taylor 1984, 157). Taylor also

⁷I say "amended" to acknowledge that feminists have criticized Foucault for not attending to the gendered dimensions of power, for overlooking, as Sandra Lee Bartky (1988) argues, the way in which power produces women's bodies as more docile than men's. For a good discussion of feminist appropriations and engagements with Foucault see Diamond and Quinby (1988a).

appreciates Foucault's insight that strategies of political opposition thought to engender freedom may, in fact, reinforce relations of subjection. Foucault teaches us something valuable, Taylor suggests, when he shows us that "we may think we are gaining some freedom when we throw off sexual prohibitions, but in fact we are dominated by certain images of what it is to be a full, healthy, fulfilled sexual being. And these images are in fact very power instruments of control" (Taylor 1984, 161). Slavoj Zizek (2000), another critic of Foucault, also locates the power and importance of Foucault's work in his insight that resistance is inextricably imbricated in the power relations it is meant to challenge: "the whole point and strength of [Foucault's] forceful argumentation lies in his claim that resistances to power are generated by the very matrix they seem to oppose" (253).

Despite these words of acclaim, critics raise serious concerns about Foucault's depiction of modern configurations of power. His investigations and depictions of disciplinary power, they suggest, threaten both the basis and possibility of political engagement. Given Foucault's depiction of power as ubiquitous and insidious, given his challenge to traditional bases of political resistance, such as rights or truth, on what basis and in what manner can resistance even occur, these critics wonder. Few find comfort in Foucault's contention that in unmasking the diversity and contingency of modern power he makes it possible to locate resistance in multiple locations. Few find him convincing when he argues that genealogical investigation, in its illumination of the contingency of who we are and what we do, engenders resistance. Foucault may believe that genealogy seeks "to give new impetus . . . to the undefined work of freedom" by "grasp[ing] the points where change is possible and desirable" and, thereby, helps to "determine the precise form this change should take." He may believe that genealogy shows us that "we are always in the position of beginning again" (1984c, 46-7). Critics, however, interpret Foucault's work as illustrating the impossibility of freedom and resistance. As Zizek argues, it is completely "misguided" to interpret Foucault's ideas as "open[ing] up the way for individuals to rearticulate-resignify-displace the power mechanisms they are caught

in" (2000, 253).⁸ Indeed, it is more appropriate to read Foucault, according to Charles Taylor, as undermining resistance completely, as leaving us without an "escape from power into freedom" (1984, 152).

If Charles Taylor finds Foucault's repudiation of truth and other traditional bases of political resistance unsettling, Nancy Fraser finds it terribly confusing. Fraser (1989) interprets Foucault as displaying an inability or a refusal to judge between good and bad kinds of power. This position, she argues, is not only incorrect, it is politically disabling. According to Fraser, Foucault ignores the fact that the constraining effects of cultural practices are not all the same. Foucault, she suggests, "calls too many different sorts of things power and simply leaves it at that," refusing to differentiate between the different kinds of power (32). Indeed, he explicitly rejects liberal humanism as a basis upon which to make these kinds of determinations. Without a normative basis to distinguish between these different kinds of constraints, how does one know when to resist, Fraser wonders. Indeed, if every act of resistance is implicated in the reproduction and reinforcement of power, if there are no effective normative bases of political resistance, why resist at all? Oddly enough, notes Fraser, despite an explicit repudiation of liberalism, Foucault's work may rely on the very normative values of liberalism that he so condemns. Fraser finds that Foucault's inability to successfully "suspend" this liberal framework illustrates a certain confusion in his thinking (30).

Jurgen Habermas (1994), on the other hand, does not read Foucault as sneaking liberal values back in. Indeed, according to Habermas, Foucault's genealogical analyses

⁸Joan Copjec (1990) offers a variation on these criticisms. Rejecting a reading of Foucault as rendering resistance impossible, Copjec suggests that Foucault is not critical enough of resistance. It is not the case, in other words, that Foucault's work leads to the conclusion that "every resistance to law [is] another occasion of its instantiation" (14). Rather, Foucault naively holds out the promise that resistance is located in multiple and contradictory subject positions. According to Copjec, by locating resistance in these discrepancies, Foucault promotes a hopefulness, a belief that there is an outside to or escape from power relations. Unlike the critics who raise concerns about Foucault's depiction of disciplinary power as all pervasive and all powerful, Copjec argues that Foucault does not adequately attend to the process of normalization initiated by these contradictory subject positions. A psychoanalytic perspective on power and resistance would enhance Foucault's interpretation, allowing us to see that "there is no affirmation without a negation internal to it" (15).

offer no bases, not even implicit and unintentional ones, for generating political engagement. Foucault's genealogies may "suffice . . . as a tactic and a tool for waging a battle against a normatively unassailable formation of power," Habermas argues. "But if it is a matter of mobilizing counterpower, of strategic battles and wily confrontations, why should we muster any resistance at all against this all-pervasive power circulating in the bloodstream of the body of modern society, instead of just adapting ourselves to it?" (95). Foucault's work, these critics suggest, renders individuals politically apathetic and disengaged because it depicts power as totalizing and irresistible, and because it undermines all traditional grounds for emancipatory politics.

It is not surprising that critics interpret Foucault in this manner. Their interpretations suggest that Foucault depicts disciplinary power as all-encompassing, totalizing, and completely dominating. Having called into question traditional understandings of the form and meaning of political opposition, resistance, liberation, and emancipation, Foucault, it would seem, presents a very dystopic conception of modernity. In making visible that power is everywhere, Foucault, it seems, shows us that so too is domination, subordination, and subjugation. This reading seems consistent with Foucault's depiction of disciplinary power presented in *Discipline and Punish*, *The History of Sexuality Volume I*, and "Two Lectures." In these writings, he repeatedly suggests an equation between power and domination or control. Foucault continually refers to power as engendering subjection and subordination. Indeed, even Foucault admits that he may be complicitous with this interpretation of his work, having "perhaps . . . insisted too much on the technology of domination and power" (1988a, 19). His tendency to be "a little distrustful of the general theme of liberation" and to question the existence of a "nature or a human foundation" that can be freed from repression, has led critics read Foucault as completely undermining the possibility or value of political engagement (1994, 2).

And while it may be the case that these critics did not have access to some of Foucault's later interviews, even recent scholarship, sympathetic to his project, perpetuates the association of disciplinary power with all-encompassing power. For example, Mark Bevir (1999), a political theorist whose work is meant as a response to Foucault's critics, argues that discipline tends towards domination and violence, presenting us with a "story of ceaseless and unlimited domination of social power over individuals" (71). Discipline, according to Bevir, clearly extinguishes a subject's capacity for agency and forecloses the possibility of freedom. It is not until Foucault introduces the concept of governmentality in 1979 that he begins to explicate the positive aspects of power. Bevir suggests, then, that with his discussion of governmentality, a third mode of governance, Foucault is able to highlight the subject's agency and freedom.

Governmentality, in contrast to discipline, recognizes the subject as having a capacity to constitute himself, rather than being completely constituted by disciplinary mechanisms. "Foucault's final work on . . . governmentality," argues Bevir, "suggests . . . that society need not consist solely of the forms of discipline he had analysed earlier" (73). Foucault's focus on governmentality, Bevir suggests, represents a change in perspective, and a more optimistic interpretation of modern power. Bevir's reading, thus, posits a radical distinction between ideas expressed in the earlier and the later works of Foucault. It rests on understanding disciplinary power as all-encompassing and completely dominating. Rather than dismissing or condemning Foucault for this bleak conception of modernity, Bevir "saves" Foucault, or reads Foucault as saving himself, through his discussion of governmentality, a description of modern power in which individuals are not dominated and controlled, but rather molded and constituted as autonomous individuals capable of exercising freedom.⁹

⁹See Rose (1999) for a detailed discussion of the difference between discipline and governmentality. According to Rose, rather than distinguishing these different modes of governance in terms of domination or freedom, Foucault distinguishes them with regard to their primary target or focus. Discipline focuses on individual bodies while governmentality works on "*bodies en masses*," that is, on "the making of life, the manner of living" (23). See also Burchell, Gordon, and Miller (1991).

Foucault's work, however, may suffer less from a radical discontinuity than from a lack of explication in his early writings. As he explains in some of his later interviews, Foucault never meant to equate power with domination. They are, for him, two very distinct kinds of relations. Power relations, whether they are disciplinary or governmental, Foucault contends, assume the agency and freedom of subjects, as well as the possibility of resistance. While Foucault rejected liberal humanist notions of freedom as involving the absence of power or freedom from power, he did not reject a conception of freedom altogether. Indeed, recognition of freedom as the possibility of change, he suggested, was precisely what marked the difference between power and domination. Relations of power, Foucault explains, may involve relations of domination, but these two are not equivalent. Relations of domination are static, foreclosing the possibility of change. They are "firmly set and congealed. When an individual or a social group manages to block a field of relations of power, to render them impassive and invariable and to prevent all reversibility of movement . . . we are facing what can be called a state of domination" (1994, 3). Relations of power, on the other hand, are malleable; subjects engaged in these relationships have the possibility of transforming and changing them.

As Foucault explains in "The Subject and Power":

a power relationship can only be articulated on the basis of two elements which are each indispensable if it is really to be a power relationship: that 'the other' (the one over whom power is exercised) be thoroughly recognized and maintained to the very end as a person who acts; and that, faced with a relationship of power, a whole field of responses, reactions, and possible inventions may open up (1982, 220).

Within this non-traditional understanding of power is an alternative conception of freedom as well. For Foucault, freedom does not mean a state outside of power, or where domination is wholly absent. As there is no escape from power, no space of absolute freedom in the traditional sense, Foucault reconceives freedom as involving the possibility of making change and engaging in struggle. "Freedom," as one scholar explains, "is less a state of being characterized traditionally by the absence of repression,

domination, and exploitation than a kind of activity in the nexus of opposing forces. . . . Freedom emerges as the product of this symbiotic relationship" between resistance and power (Thiele 1990, 907).

Foucault may have been remiss for not making this distinction explicit in his earlier work, and is therefore partly responsible for misinterpretations, but these ideas are not, as Bevir argues, new or particular to his later work. Foucault did not change his view on modern power or subjectivity later in his life. As Paul Patton (1989) explains, "Foucault [may have] only offered a systematic account of his approach to power well after the publications" of *Discipline and Punish* and *The History of Sexuality Volume I*. Moreover, it is only at this point that he begins to speak at all of freedom. Nevertheless, . . . he does not so much change his position in [his later works], as much as render explicit some of the presuppositions of his earlier work" (261). Indeed, Foucault always meant his work to engender political activity, what he calls "hyper-activism," rather than political apathy (1984b, 343). According to Foucault, genealogical investigations, of the sort presented in *Discipline and Punish* and *The History of Sexuality*, illuminate how modern power developed and functions, in part, by revealing the discontinuities and contingencies in history. It illustrates that what we take to be the natural results of "a comprehensible and progressive history" are, instead, the results of "a cobbled patchwork of heterogeneous elements" (Ransom 1997, 88). Disrupting our assumptions about the linearity and inevitability of history, genealogies challenge our "conventional accounts of ourselves--our sentiments, bodies, origins, futures" (Brown 1998, 38). To engage in genealogical analyses, then, "is to identify the accidents, the minute deviations . . . the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us; it is to discover that truth or being does not lie at the root of what we know and what we are, but the exteriority of accidents" (Foucault 1984a, 81).

Understanding the contingent nature and undetermined character of who we are and what we do, Foucault suggests, engenders the possibility of change, of being other than we are. While genealogy may show that there is no outside of or complete freedom from power, it does suggest, Foucault contends, that change is possible through the varied and multiple sites of resistance. For Foucault, then, genealogy allows us to realize "not that we are always trapped, but that we are always free--well, anyway, there is always the possibility of changing" (1990b, 167). Genealogy, Foucault explains, does "not deduce from the form of what we are what it is impossible for us to do and to know; but it will separate out, from the contingency that has made us what we are, the possibility of no longer being, doing, or thinking what we are, do, or think" (1984c, 46). It engenders and enables resistance by showing us that we can be, think, and do in other ways than we might expect. Genealogy is not meant to depict power as totalizing and seamless. As Foucault explains, he never meant to promote "the idea that power is a system of domination that controls everything and which leaves no room for freedom" (1994, 13). Resistance is, in other words, an essential component of power relations, "for were there no possibility of resistance . . . of strategies that reverse the situation--there would be no relations of power" (1994, 12). Resistance, however, involves more than undoing "these repressive locks so that man can be reconciled with himself..."(1994, 2).

A New Form of Right: Relational Rights and the Challenge to Disciplinary Power

For many years it seemed as if Foucault's theoretical work and his political activism were at odds. While he supported causes that engaged rights discourse and spoke of emancipation for marginalized and oppressed individuals, his work seemed to suggest the impossibility of effective political opposition. Though always convinced about the positive political implications of his work, it was not until the last few years of his life that Foucault connected these two realms more explicitly. Indeed, in many of his later interviews, Foucault responds to the confusion generated by his earlier critiques of

rights. There he explains that rights, even as traditionally understood as limits against abuses of sovereign State power, are an essential component of politics. But he also urges those who want to challenge modern configurations of power to rethink the goals and content of a rights-based politics. That is, Foucault argues that a new form of right is needed in order contest the more insidious forms of modern normalizing-disciplinary power. He calls this new form of right "relational rights." This gesture towards the possibility of resistance through rights language has, unfortunately, not received nearly as much attention as his critiques. It is, then, the focus of this next section.

As he suggests in interviews towards the end of his life, in many cases, traditional rights claims, such as the right to liberty or notions of human rights, play important roles in contestatory politics. Though Foucault urges oppositional political movements to extend both their strategies of contestation and their political goals beyond rights, he does not believe that we "have to get rid of what we call human rights or freedom" completely (1988b, 15). While he challenges us to recognize that rights may not be able to contest disciplinary power completely, Foucault does recognize that traditional juridical rights, those rights recognized by the state and supported by dominant cultural attitudes and behaviors, play an important role in the struggle against oppression and domination. Speaking about gay rights in particular, Foucault acknowledges support for attempts to gain privacy and anti-discrimination rights through the state: "It is important, first, to have the possibility--and the right--to choose your own sexuality. Human rights regarding sexuality are important and are still not respected in many places" (1990b, 164). However, Foucault believes that human rights cannot be the whole of oppositional politics: "I think we have to go a step further" (1990b, 164). That step further entails rethinking the meaning and target of rights-based political efforts. It means considering that "new form of right," relational rights.

According to Foucault, juridical rights, like the right to equal protection, or other rights meant to prevent discrimination and to promote toleration of homosexual relations,

often do little to actually prevent discrimination and promote toleration. State sanctioned rights must be supported by a set of attitudes and behaviors for them to have any real value as a tool against domination. Additionally, Foucault suggests that traditional rights reinforce existing and accepted relationships and identity categories. Directed against the State in order to limit its power, traditional individual rights are meant to free individuals to do, be, and act as they want without state intervention. This approach to the struggle against domination is not enough, he argues. It has not solved the problem or stabilized tolerance of sexual difference. What is needed is the creation of a new set of relationships, "the creation of new forms of life, relationships, friendships in society, art, culture, and so on through our sexual, ethical, and political choices" (1990b, 164). The right to this creative process, Foucault suggests, will better contest discrimination against homosexuals.

But what does Foucault mean when he suggests that we struggle for the right to create new relationships? He means that we work to change the attitudes and behaviors toward homosexuality, for instance, by imagining and enacting new ways of living. According to Foucault "We live in a legal, social and institutional world where the only relations possible are extremely few, extremely simplified, and extremely poor" (1990a, 158). To win a right, then, is to win the possibility of existing within the confines of this paucity, to do as one desires within the limits of accepted norms, relations and identity categories. For example, in arguing for the right to marriage, gays and lesbians do little to create new forms of intimate relationships, accepting and reinscribing instead the relationships--and the attendant categories of identity and ways of living--already in existence. We must, Foucault urges, struggle "against [this] impoverishment" (158) and create new ways of living, new kinds of relations. "Let's escape as much as possible from the type of relations that society proposes for us and try to create in the empty space where we are new relational possibilities"(160). Instead of confining resistance to traditional rights politics, Foucault suggests that we "try to imagine and create a new

relational right that permits all possible types of relations to exist and not be prevented, blocked, or annulled by impoverished relational institutions" (158).

Foucault provides several examples of these "new relationships" or "new cultural forms" in his interviews. Among the examples he gives are the of adoption of adults and S/M relationships. Currently we have no way of thinking about and understanding relationships of care and obligation among adults except in terms of marriage and the family. Adult adoption would bring into existence a new way of understanding intimate relations of care and dependency. It could become a legal, state sanctioned right or it could simply be a relationship the acceptance of which is manifest in new social attitudes and practices. The S&M subculture, Foucault explains, also provides a good example of newly created relationships. Rejecting the notion that S&M is the reflection or manifestation of natural sexual drives or tendencies toward violence, Foucault argues that "it's the real creation of new possibilities of pleasure, which people had no idea about previously" (1990b, 165). According to Foucault, through practices of S&M, individuals come to relate to each other and to their own bodies in new ways. These practices create a new set of attitudes about pleasure and sexual relationships; these practices create new notions of identity and new kinds of behavior absent from more traditional relationships of marriage and family.

Through relational rights, Foucault suggests, marginalized individuals, like gays and lesbians, can challenge the norms and disciplinary mechanisms that maintain their subordination. They can call into question heterosexual norms such as heterosexual marriage. Through relational rights, homosexuals, or other individuals who find themselves subjugated because they deviate from the norm, can challenge the attitudes and ways of living that perpetuate subordination. "The relational right," he explains, "is the right to gain recognition in an institutional sense for the relations of one individual to another individual . . . It's a question of imagining how the relation of two individuals can be validated by society and benefit from the same advantages as the relations . . . which

are the only ones recognized" (1990a, 162). Relational rights, then, bring into existence new ways of living not captured by existing juridical rights. Relational rights, as well, may or may not entail recognition from the state. Instead, through these creative practices, gays and lesbians, or other marginalized individuals, can work to change attitudes and behaviors, contesting norms outside the realm of the law. Gays and lesbians, he continues, should "struggle to establish homosexual lifestyles, existential choices in which sexual relations with people of the same sex will be important" (157). Relational rights involve precisely these kinds of struggles.

Challenging both state power and cultural codes, contesting categories of identity as well as legal practices, relational rights, it would appear, may be the "new form of right" Foucault envisioned in his 1976 lectures. It is a right which is "anti-disciplinarian, but at the same time liberated from the principle of sovereignty" (1980a, 108). Liberated from the principle of sovereignty, relational rights reject the notion that rights naturally accrue to individuals by virtue of their humanity, and reject the notion that rights challenge state power alone. Relational rights no longer revolve around the notion "that rights are fundamental and natural to the individual" in the sense of deriving from fixed and essential identities (1990a, 158). Liberated from disciplinary power, relational rights, seek to challenge and reconceive relations among individuals, contesting the cultural codes and social norms that constitute individual subjectivity.

Through relational rights, traditional images of the "proper" subject of rights are called into question. Identity categories are contested rather than consolidated. As Foucault explains, by using rights discourse to struggle against power, one challenges "the effects of power which are linked with knowledge, competence, and qualification," calling into question the very mechanisms by which identity categories are constituted and policed (1982, 212). Rights language, then, involves questioning the knowledge and practices that produce individuals by imprisoning them within particular identities and norms. Foucault's notion of relational rights allows for, indeed demands, that a politics of

rights be premised upon and constitutive of a multiplicity of rights bearing subjects. If a politics of rights is to be anti-disciplinary it must contest attempts to naturalize and solidify identity. When anti-disciplinarian struggles turn to the language of rights, to be contestatory in a Foucauldian sense, they must denaturalize identity and attempt to cultivate generosity towards a plurality of identities and lifestyles. To struggle against submission to subjectivity involves, Foucault argues, the assertion, on the one hand, of "the right to be different," a right which "underline(s) everything which makes individuals truly individual." On the other hand, these same struggles "attack everything which separates the individual, breaks his links with others, splits up community life, forces the individual back on himself" (1982, 211-212). The difference between traditional rights and relational rights, as Leslie Paul Thiele (1990) explains, is that, in the former, "the humanist defends free speech as intrinsic to human dignity, as a constitutive part of what it means to be a human being capable of fulfilling its political and moral nature," while in the later, "the defense . . . does not rest on a definition of what humanity is, what its dignity consists in, and therefore what the requirements of its safeguarding are. Rather, it is based on an understanding of humanity as involved in the struggle of becoming, of creating itself" (919), as involved in continuous debate and recreation.

Mark Blasius illustrates the effect Foucault's understanding of rights might have on gay and lesbian politics. As he explains, by understanding and engaging rights as relational, one "shifts the balance of power away from the state as the sole guarantor of rights belonging to a juridical subject toward a plurality of sites for the recognition of rights" (1994, 148). Rights, according to this model, may address explicit forms of state power and interference, but they also address the norms that produce and regulate individuals. Unlike traditional conceptions of rights, which obscure the techniques and discourses that constitute subjects and identity categories, relational rights contest these normalizing practices. According to Blasius, this new politics of rights might entail engagement with the state, it might "employ legal codification, but its principal mode of

expression would be with respect to the normalizing-disciplinary relations of power that are often camouflaged by the juridical model (134-5).

"Coming out" is one example of the kind of practice Blasius imagines is called for by Foucault's notion of relational rights. Coming out, he explains, challenges the heterosexual norm not by turning to the state to redress a harm or recognize an essential identity. Rather, it is a process in which claims and demands are made to other individuals in a variety of political sites, to their attitudes and behaviors. Blasius contrasts coming out to the traditional juridical approach to resisting oppression—the struggle for privacy rights. Although the privacy rights approach "has been useful in convincing nongays to decriminalize homosexual expression, and even to support equal-treatment and nondiscrimination laws," it can, when used as the sole means of resistance, "exacerbate the oppression of gay people" (136). Because it does not challenge heterosexual normativity, because it does not challenge accepted and legally sanctioned relationships, it leaves in place heterosexuality as a "normalizing-disciplinary ordering of power" (137). Coming out is a way to reconstitute gay and lesbian relationships and challenge the disciplinary power by "invoking different relational norms" (137). Coming out "makes visible the structural constraints on sexual choice embedded in the social order as compulsory heterosexuality" and challenges what is taken as "truth" and deployed as the norm (146-7).

A politics of relational rights, however, requires more than shifting attention toward non-state centered sites of power, or contesting categories of identity. It requires a new understanding of the goal of rights-based politics. An anti-disciplinarian politics of rights, that is, cannot expect rights to function in a traditional way. Rights are no longer understood as tools by which one brings about freedom, where freedom is defined as the limit of power or a sphere of noninterference. To engage in a politics of rights, for Foucault, is to engage in a practice of freedom as agonistic struggle. Rights are not the first step in guaranteeing freedom, as traditionally conceived. Rather, rights discourse is

better understood as a discourse of resistance in an ongoing struggle over categories of identity and configurations of power. We may want our political struggles to ensure the eradication of discrimination and exploitation, but "we can never be sure" that this will happen. Indeed, what we can count on, according to Foucault, on the opposite, "that everything that has been created or acquired, any ground that has been gained will, at a certain moment be used in such a way" as to perpetuate domination (1990b, 166-7). But rather than finding this to be a cause of despair, Foucault is considerably matter-of-fact. This is simply the way political struggle works. We do have to be aware that practices of resistance may reentrench power, that the relationships and identities constituted through practices like S&M, may be used to reinforce disciplinary power. However, this, Foucault argues, is not an adequate objection to the practices of resistance themselves. As Foucault's work illustrates, no language or style of resistance can bring about the end to political debate and struggle, the very displacement of politics, desired by a conception of rights as trumps or absolute claims to power. For Foucault, rights are meant to protect or create "the political, social, and cultural conditions under which individuals are allowed the possibility of struggling to change these same conditions" (Thiele 1990, 919).

It is the struggle, not the particular judicial achievement or most obvious effect of rights, which is of utmost importance to Foucault. For Foucault, "politics is . . . less about the achievement of goals than the struggle to transform the conditions of their conception and articulation. Politics is the confronting of the conditions under which we come to define ourselves by these same goals" (Thiele 1990, 922). This is not to say, however, that Foucault is unconcerned with changing laws or winning certain rights. What is important for Foucault is "not how to overcome or avoid power as a traditional understanding of rights might suggest. Instead, we want "to know how you are to avoid in these practices . . . the effects of domination which will make a child subject to the arbitrary and useless authority of a teacher or put a student under the power of an abusively authoritarian professor, and so forth" (1994, 18). But in order to avoid

domination, Foucault urges a reconceptualization of the problem, posing it not only in terms of individual rights and judicial decisions, but also "in terms of . . . relational techniques and of *ethos*, of practice of self and of freedom" (18-19). The politics of rights are not, therefore, antithetical to Foucauldian practices of freedom, but nor are they a simply return to conceptions of power and the subject found in traditional liberal humanist thought. Rights are, for Foucault, one aspect of anti-disciplinary, agonistic politics of resistance.

In Foucault's understanding, to be free is to be able to engage in struggle, to be a creating and creative being. "Rather than speaking of an essential freedom, it would be better to speak of an 'agonism'--of a relationship which is at the same time reciprocal incitation and struggle; less of a face-to-face confrontation which paralyzes both sides than a permanent provocation" (1982, 221-2).¹⁰ A politics of rights, cognizant that agonism, not the absence of power as domination, characterizes freedom, works to resist and refuse the imposition and naturalization of identity. Anti-disciplinarian struggles, articulated through the language of rights, involve questioning the status of the individual and the naturalness of identity. Such a struggle attacks attempts to tie an individual "to his identity in a constraining way" (1982, 211-12). Foucault's discussion of relational rights suggests, then, one way to take up the challenge he identifies. Through relational rights, we can address "the political, ethical, social, philosophical problem of our days [which] is not to try to liberate the individual from the state, and from the state's institutions, but to liberate us both from the state and from the type of individualization which is linked to the state" (1982, 216). Through relational rights, we can "promote new forms of subjectivity through the refusal of this kind of individuality which has been imposed on us for several centuries" (1982, 216).

¹⁰As Thiele (1990) reminds us, Foucault believed that notions of absolute freedom and liberatory politics, both of which were to provide a space of the absence of power, were not only illusory, but ultimately "contribute to our further entanglements in...webs [of power]" (918). Foucault's appreciation of agonism, according to Thiele, derives, in large part, from Nietzsche's influence on his thinking.

What Would a Relational Rights Politics Look Like?

Although Mark Blasius, as I mentioned above, offers one example of relational rights in the context of gay and lesbian politics, I turn now to another illustration from what might be an unlikely source, an essay by Kirstie McClure (1995). In "Taking Liberties in Foucault's Triangle," McClure (1995) argues that the historical narrative upon which Foucault bases his critique of rights is flawed.¹¹ It does not take into account alternative histories that suggest that rights language was a language of dissent and contestation long before the development of the state. Indeed, by equating rights with the discourse of state sovereignty, and defining the subject of rights as a juridical subject, Foucault, McClure suggests, represents rights as a far more settled and uniform, and hence ineffective, language of political opposition than it really was or is. Through a re-examination of the history of rights, within the Anglophone context, McClure reveals a much more fluid, contingent, contested, and, therefore transformative, language of rights than depicted by Foucault.

McClure, to be fair, is offering a corrective to Foucault's historical narrative not so as to reject his perspectives on rights completely. In fact, her corrective draws inspiration from Foucault's call to rethink the relationship between rights, politics, and the subject of rights. It is meant to respond to his call for a "new form of rights." McClure, that is, suggests that Foucault gives little information about what an anti-disciplinarian form of right would look like. Furthermore, Foucault's association of rights with sovereignty, and

¹¹McClure is not the only one to take issue with Foucault's historical narrative for obscuring the multiplicity and contestatory potential of rights discourse. For example, Alan Hunt argues "Foucault's derivation of the law from monarchical power eliminates a more adequate history of law as emanating from dispersed sites of royal power, popular self-regulation, customary rights, competing specialized jurisdictions (ecclesiastical, guild, commercial, etc.), local and regional autonomies, and other forms of law" (8). Like McClure, Hunt suggests that Foucault posits rights as deriving solely from a monolithic form of monarchical power and, thus, ignores the more fluid character of rights discourse, even under monarchy. "Laws' project of coordinating and unifying the new technologies of power requires further attention," (9) Hunt argues, if we are to appreciate and make sense of Foucault's assertion that resistance is possible.

his depiction of shifting modes of governance, she suggests, undermine his ability to imagine such a right. His association of rights with sovereignty, and of the subject of rights with juridical, subjected individuality, McClure contends, leads Foucault to obscure the contestatory potential of rights. That does not mean, however, that no such right is possible. McClure turns to the work of three nineteenth century scholars, Malthus, Owen, and Hazlitt, to reveal that Foucault was correct to imagine that an anti-disciplinarian form of rights was possible. Although McClure positions her project as keeping in the spirit of Foucault's work, but offering something absent, if not undermined, by his own work, I would suggest that her work is less about filling a gap in Foucault's work and more about providing a more detailed illustration of precisely what he envisioned with relational rights. Thus from my perspective, McClure's work is important less for the alternative history it provides, than for illustrating what it means to recognize and deploy rights as relational.¹²

McClure suggests that Foucault exaggerates the disciplinary character of rights through his historical narrative. She suggests that his equation of rights with sovereignty, and the subject of rights with a subjected individual, "might elide the contestatory possibilities of the language of rights" (171). Looking at the Anglophone history of rights language, McClure finds a notion of rights that is not invested wholly in a conception of sovereignty. Rights, she contends, had been a language of political dissent well before the development of the state. "As artifacts of common law and custom . . . the centrality of rights to political discourse was established significantly before the rise of the modern state and the institutions through which its statutory law was made, promulgated, and enforced" (169).¹³ Having identified a rights language antecedent to the state, McClure

¹²These, of course, are not mutually exclusive. For McClure, the alternative history of rights not only illustrates their contestatory potential, but is foundational to their continued potential as a language of resistance. I do take issue, below, with her reading of Foucault's triangulation of sovereignty-discipline-governmentality to suggest that his historical narrative may engender, rather than pose an obstacle to, the contestatory potential of rights McClure identifies.

¹³Jeremy Waldron (1997) lends further support to this alternative history. He suggests that the rights language of 17th century theories can not be subsumed wholly under the law. "In seventeenth -century

also argues that the subject of rights need not be conceived of as wholly a creature of the State. The juridical subject, "birthed from the womb of the state," is not the only subject of rights embedded in rights language (169). The existence of this alternative language of rights, she explains, can and has been used to contest the power of the State and reveals a "more complicated, less settled, and more contestatory" history and potential than Foucault's argument admits (169-70).

The problem with Foucault's historical narrative, however, goes beyond mislocating the origins of rights in the development of the modern state. In fact, according to McClure, Foucault may also foreclose the contestatory potential of rights when he explains the shifts and transformations that occur in modes of governance from the Middle Ages through the nineteenth century. He identifies three modes of governance that developed during this time-- sovereignty, discipline, and governmentality. In a 1979 essay entitled "Governmentality," Foucault (1991) distinguishes these modes of governance, identifying their ascendancy with different moment in time, and suggesting that each "economy of power" posits a different understanding of power and the proper object of governance. Each mode of power develops distinct techniques of governance to coincide with these differing objectives and understanding of the source and function of power. Sovereignty, as I suggested earlier, involves State power deployed through juridical institutions and laws, to prohibit or legitimate certain actions on the part of subjects. While sovereign power focuses on maintaining power and territorial control through the imposition of laws, disciplinary power, deployed in schools, factories, and prisons, seeks to create docile and obedient subjects through the surveillance and regulation of bodies. Governmentality, the third economy of power, is more concerned

theories of natural rights, the term was used whenever one wanted to draw attention to duties imposed by God, nature, or reason for the benefit of human individuals. It is true that rights were associated with natural law, so the concept remained juridical to that extent. But natural law simply comprised the most fundamental standards that reason could deploy: there *were* no basic principles that were non-'legal' in that sense" (89). And though "legal" in the sense of reasonable, rights were more associated with revolution than courts at the time.

with the "right manner of disposing things so as to lead . . . to an end which is 'convenient' of the things that are to be governed" (95). Governmentality, developing in the late eighteenth and early nineteenth century, according to Foucault, works through the management of the population and the economy, producing free subjects rather than disciplined ones.¹⁴ With the discovery of the population as a problem, government comes to concern itself with "employing tactics rather than laws, and even of using laws themselves as tactics--to arrange things in such a way" (95).

Despite a narrative that locates the rise of a mode of governance in a particular historical period, Foucault is careful to dispel the idea that he is depicting a successive, progressive history. Indeed, according to Foucault, these three modes of governance co-exist. As he explains, "we need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government; in reality one has a triangle, sovereignty-discipline-government" (1991, 102).¹⁵ According to McClure, despite his protests to the contrary, Foucault's narrative, this triangulation, tends to render each economy of power distinct, static, and totalizing. His depiction of nineteenth century techniques of governance, for example, suggests that individuals were unaware of the tactics being used to shape and mold them in particular ways. Or by identifying rights with the theory of sovereignty, Foucault "presuppose(s) law . . . the objective right of the state--as the singular source and privileged origin of 'rights' in any meaningful sense of the word" (163). This depiction,

¹⁴Foucault's discussion of these three modes of governance is somewhat confusing. One imagines that, had he lived longer, he would have been more explicit about the distinctions between these techniques. As it stands, the secondary literature reiterates some of this confusion. For example, bio-power is sometimes considered a mechanism of discipline, as is suggested by its placement in *The History of Sexuality, Volume I*, while at other times it is considered a technique of governmentality. See, in particular, Foucault 1991; Burchell, Gordon, and Miller 1991; and Rose 1999.

¹⁵Foucault's notion of governmentality allows him to attend simultaneously to micro and macro level politics and power. It also allows him to elaborate in greater detail his understanding of power relations which are distinct from relations of domination. As McNay (1994) explains, "The idea of governmentality broadens the category of power by distinguishing more clearly between violence, domination and the type of power relations that characterize relations between individuals" (85). Power is conceptualized not as unidirectional nor totalizing, but as involving the agonistic struggles of free individuals.

according to McClure, fails to appreciate the unsettled character of rights language at any one time, and obscures the multiplicity of subjects of rights encoded within rights language. In contrast to Foucault, then, McClure, focusing on the nineteenth century, seeks to illustrate that "the public discourse and political polemics of the period not only registered cognizance of the new techniques of power, but did so in ways that variously engaged and articulated the question of their relation to the language of rights and liberties" (1995, 172). Careful attention to the articulation of the subject of rights in writings of the period in which governmentality has its birth, for example, suggests that the subject of rights may not owe the totality of its existence to the law, the sovereign, or the state. Writings of this period, McClure argues, reveal that "at least some articulations of the 'subject of rights' at the turn of the nineteenth century posed a problem for the new techniques of power that Foucault triangulated as 'sovereignty-discipline-government'" (1995, 181).

In an effort to illustrate the multiplicity of subjects of rights articulated in this political discourse, and to identify the contestatory nature of this language more clearly, McClure begins by identifying three different kinds of rights, each associated with a distinct notion of subjectivity. Rights language, she suggests, posits at least three kinds of rights—positive rights, such as the right to participation in politics; negative rights, such as the right to be left alone or to have one's body and property defended; and entitlement rights, such as the right to financial assistance or other goods. Positive rights, McClure continues, invoke a conception of the subject as autonomous, willing, and actively engaged in the creation of laws. Negative rights produce a conception of the subject as protected, as disengaged, but defended by the State. And entitlement rights encode a dependent subject who relies on the State to meet certain basic needs. These rights and subjects, McClure explains, are not mutually exclusive, and certainly undermine a belief in the uniformity of rights language or the singularity of the proper subject of rights. To more explicitly illustrate the contestatory potential of this multiplicity, McClure turns to

the work of nineteenth-century writers Malthus, Owen, and Hazlitt who deploy very different conceptions of the rights-bearing subject for decidedly different political purposes.

Malthus, a scholar concerned with the relationship between population growth and poverty, uses rights language to challenge the more popular population management policies of his day. In particular, he takes offense to the Poor Laws, a system of laws regulating the population through procedures of public assistance. Despite the benevolent aspects of the Poor Laws, as McClure illustrates, Malthus believes them to be a tyrannical and dangerous form of regulation. His opposition to the Poor Laws, a form of entitlement rights legislation, revolves around his deployment of negative liberty rights and the valorization of individual independence. Malthus repudiates, that is, the dependent subject embodied within the legal codes, cultural attitudes, and norms undergirding the Poor Laws. Positioning these laws as threats to the independence and active political engagement of individual citizens, Malthus offers, according to McClure, a new expression of negative liberty rights, and "the complication of juridical power by the problem of population" (1995, 174). Through his "rearticulation of negative liberty rights in a new, or at least different, idiom," Malthus not only repudiated entitlement rights and its conception of the dependent subject of rights, but transforms juridical power as well (174-5).

While Malthus calls sovereign and disciplinary power into question through the idiom of negative rights, Owen uses the language of rights in a counter-intuitive fashion, to support the growth of disciplinary power. Unlike Malthus who believes that individual autonomy is threatened by the growth of State power and the decreasing realm of independence, Owen believes that individuals need the guidance and control of the state. Owen rejects Malthus' faith in the private individual believing, instead, that individuals are fashioned and shaped by social institutions. He is, McClure explains, scornful of the idea that "individuals form their own character and command their own affections" (178).

In fact, Owen urges the growth of disciplinary power, calling for "the creation of new social institutions and practices, based on the recognition that only rational training through rational institutions could constitute new individuals properly attuned to their social capacities and responsibilities" (178). Protecting individuals' negative liberty rights, Owen suggests, would be hazardous to society's well-being. For Owen, then, "the 'interested' juridical subject of negative liberty rights as conventionally conceived" poses "an obstacle to the reforms envisioned by the Owenite popularization of the new human science" (181). According to McClure, what Owen illustrates, is that rights language can be contestatory in less obvious ways. By positing the conventional rights-bearing subject as a threat to social well-being, Owen contests sovereign power while supporting the growth of disciplinary mechanisms and the constitution of disciplined subjects.¹⁶

Hazlitt offers yet another articulation of the subject of rights, that challenges not only different norms, but different mechanisms of power than those contested by Malthus and Owen. Unlike Malthus' independent, but uniform subjects or Owen's disciplined ones, Hazlitt, posits rights-bearing subjects as unruly, "wary and willful" and "undisciplined." This conception of the subject leads Hazlitt to condemn social regulations and norms that constrain individuals' ability to judge for themselves and make decisions according to their own individual wills. Hazlitt's subject, as McClure explains, is "a subject for which the language of rights offers an open space for private judgment--a 'subject of rights' for which 'subjective right' is neither a permission of law nor a product of sovereign largesse," but an understanding of a right that each individual embodies differently (186).

These vignettes provide evidence, McClure suggests, of the multiplicity of subjects of rights embedded in rights language. This multiplicity coincides with the illumination of multiple objects and sites of contestation, all of which suggests the

¹⁶According to McClure, Owen suggests that disciplinary power was not as pervasive or established in the nineteenth century as Foucault's triangulation suggests.

transformative potential of rights language. These thinkers reveal, as McClure puts it, a "scent of subjectivities variously at odds with the equivalential logic by which Foucault joins the subject of rights and the modern individual under the sign of 'subjected sovereignty'" (187). Their articulations of rights reveal "differential appropriations, redeployments, and condensations as [the language of rights] comes into historical contact with other discursive constellations" and thus illustrate that rights language can be "a site of multiple and by no means mutually consistent significations" (187). While Malthus emphasized negative liberty and the independent subject in ways "complicitous with the development of governmentality," he offered a challenge to the disciplinary effects of the Poor Laws. Owen, on the other hand, challenged the conception of the autonomous subject of negative liberty rights to defend the value and function of disciplinary mechanisms. And finally Hazlitt called both governmentality and discipline into question, positing instead, an appreciation of the excessive and unconstrainable aspects of individuality (188-189). Foucault's triangle erases or obscures the variations among these thinkers, McClure contends. It does not acknowledge the possibility of deploying and amending rights language in distinct ways that result in "significantly different and yet internally heterogeneous political effect(s)" (188). Foucault's historical narrative, as McClure explains, cannot recognize the various ways in which Malthus, Owen, and Hazlitt take up the language of rights.

While McClure may offer these examples to illustrate an understanding of the contestatory potential of rights that she finds missing from Foucault's work, I find her research to be more of an elaboration of something Foucault hints at with his understanding of relational rights. Relational rights, in contrast to more traditional liberal conceptions of rights, challenge cultural norms and attitudes, rather than direct their challenge solely at contesting State power. They pose a challenge to identity categories and accepted relationships by refiguring both, by creating new ways of conceiving of subjectivity and relationships. This is precisely what Malthus, Owen, and Hazlitt offer.

Through the language of rights, they challenge more accepted conceptions of the proper rights-bearing subject, and traditional articulations of normal identities. They oppose not only laws, but cultural practices and styles of existence through their depictions of what threatens or what enhances individual and social well-being. And though they may use a language of rights associated with more traditional conceptions of negative or positive liberty rights, as McClure suggests, they redeploy this language in ways that suggest, if not an entirely different, than perhaps a somewhat revised, and therefore new, "idiom" of rights.

As these writers posit subjects who are "at once indebted and excessive to forms of subjectivity and self-assertion made licit by legal arguments" (McClure 187), they engender the transformation, though not always the displacement or eradication, of modes of governance. Rights language, in other words, despite its contestatory potential, never achieves political emancipation as traditionally understood. It can engender change, but it does not end political debate and contestation. Nor does it entirely displace mechanisms of discipline or governmentality. As McClure reminds us, and as the Owen example illustrates, "various apparatuses of discipline and governmentality have been historically articulated through one or another element of the language of rights" (189). But while it is important to make visible, with Foucault, the ways in which rights language reinforces disciplinary and governmental tactics, the more important argument both McClure and Foucault helps us recognize, is that this effect does not exhaust the ways in which rights function. Reading McClure back through the lens of Foucault, the scholar of relational rights, it becomes clear that McClure's challenge, to focus our attention beyond "the institutional sites and discursive practices through which more docile, more disciplined and dependent subjects are produced," is Foucault's as well.

Indeed, I would argue, contra McClure, that Foucault's triangulation of sovereignty, disciplinarity, and governmentality, actually engenders, or at least hints at, precisely the kinds of disruptions that McClure illustrates. Rather than reading Foucault's

historical narrative as reinforcing the notion that different modes of power have stood alone and been without contestation, seamlessly creating particular kinds of subjects, as McClure's reading suggests, I believe it is possible to read Foucault's narrative as gesturing towards the possibility of using these modes of power against one another. In other words, when the triangle is read in conjunction with his somewhat paradoxical insight that, while there is no outside of power, there is the possibility of resistance, change, and new beginning, it would seem to make sense that Foucault imagined the new being created in precisely the ways McClure identifies--through the appropriation and deployment of existing, but perhaps less, dominant or accepted norms and ideas, to challenge the dominant modes of governance and mechanisms of power, creating something resembling, but not identical to the old regime of power. Foucault's insistence on the co-existence of sovereignty, discipline, and governmentality suggests, to me, that he believed it possible to use certain aspects of sovereignty against discipline or discipline against governmentality, as McClure's research illustrates. As Nikolas Rose (1999) explains, Foucault's writing is partly responsible for the very interpretation that McClure provides. Foucault sometimes presents his analysis of power as if there were a succession from sovereignty to disciplinarity, to governmentality. Yet at other times he cautions against precisely this chronology. I want to agree with Rose here that Foucault's notion of co-existence, his triangulation, encourages us to explore "the ways in which the discovery of new problems for government--and the invention of new forms of government--embraces, recodes, reshapes those that pre-exist them" (24) in precisely the way McClure suggests. Turning back to Foucault, then, we can think with McClure, about the ways in which rights, a discourse and technique particular to an older form of governance, may not be completely colonized by newer forms of governance, but rather recoded, and reshaped, and malleable in ways that provide the basis for a counter-discourse and an effective politics of resistance.

Conclusion

As feminists, or members of any oppositional political movement, evaluate and create their strategies of resistance, they might do well to revisit the lessons of Foucault. Though an important critic of traditional conceptions of rights, with their exclusive focus on the state and faith in the illusory notion of absolute freedom and emancipation, Foucault is far from a thinker who rejects rights completely. As I have suggested throughout this chapter, not only did Foucault firmly believe in the possibility, indeed, the very necessity, of resistance as an element of power relations, he also embraced rights as a language of that resistance. His somewhat vague, but nonetheless important discussion of relational rights suggest that Foucault is interested in both the limits and the potential of rights discourse. His insights about the importance of expanding the sites and focus of rights-based resistance beyond the State and state-sanctioned categories of identity do not amount to an uncritical embrace of rights discourse. Rather, what he offers is a self-conscious and important rejoinder to those for whom rights appear to be either wholly emancipatory or wholly bankrupt.

Maintaining the tension between an acknowledgment of rights' limits and rights' transformative potential is not easy. Foucault does not always do an adequate job of balancing the two, hence the number of misreadings of his work. Nor does he suggest that it is easy to keep the tension alive in practice. As Keenan (1987) explains, Foucault's attention to the paradox of rights leaves us with a "permanent political predicament. It does not avoid or transcend, but only repeats with emphasis, these difficulties" (29). To appreciate the contestatory potential of rights, one must also do the difficult work of shifting from a conception of politics as a means to the end of debate, contestation and struggle, to a conception of politics as ongoing struggle and agonism. Rights have contestatory potential within this conception of politics. For such a politics recognizes that we can only imagine transformation through rights language "by making reference or gesturing to the 'rights' we have. There is 'no way out,' because there is no 'out'--not

because the present is somehow self-enclosed or self-identical, but on the contrary precisely because it differs itself and thus makes politics necessary" (Keenan 1987, 29).¹⁷ Foucault saw his job as offering ideas and analyses that make political struggle possible, rather than providing a blueprint for a kind of politics that could guarantee predictable results. Not believing that the latter was even possible, he offered his genealogical investigations and insights about rights as a kind of "tool kit" of ideas and inspiration that could respond to the task of the philosopher as he understood it: "not to try to liberate the individual from the state, and from the state's institutions" but rather "to promote new forms of subjectivity" by refusing state-based categories of identity and the techniques of individuation. The language of relational rights, his works suggests, provides one tangible form, one approach to this kind of struggle. Interestingly enough, it is, as we will see in the next chapter, already present in the political practices of feminists who oppose mandatory HIV testing of pregnant women and newborns.

¹⁷Leslie Paul Thiele (1990) captures Foucault's agonistic politics by talking about the "sanctity" of struggle. According to Thiele, freedom for Foucault is defined in terms of struggle. "The pathos of struggle that characterizes Foucault's work provides its own best defense. For the co-optation of discourse is only disconcerting if its participant looks with anxious and tired eyes to the end of the struggle of which his writings partake" (919).

Chapter Five

Unsettling Mothers:

Rights, Motherhood, and Mandatory HIV Testing

Introduction

In the mid 1980s, with the licensing of the first HIV antibody test, it became possible to identify individuals with HIV infection. Around the same time, it became clear that approximately one in four HIV positive pregnant women transmit the virus to their fetuses. These twin discoveries have resulted in more than a decade of debate regarding the appropriate response to mother-to-child, or perinatal, HIV transmission.¹ Should all women of childbearing age be forced to take an HIV test? Should only certain women be targeted for testing? Should all pregnant women be mandated to take the test? Or should newborns undergo a mandatory test instead? And what, in the absence of a cure for HIV, are the benefits of knowing one's HIV status? What do we expect HIV positive pregnant women or new mothers to do with information regarding their HIV status? If prevention of transmission is the goal of such regulatory health policy proposals, might voluntary measures be more effective than mandatory ones? Might such mandatory testing policies also violate women's rights? Implicit in these specific questions are larger ones concerning the proper scope of state power and of individual freedom in times of public health crises.² For feminists, not surprisingly, these questions must be answered with an eye towards protecting women's rights while promoting their health. While feminists fully agree that preventing perinatal HIV transmission is a vitally important public health goal, they argue that mandatory testing policies are neither the legally nor the medically appropriate response to this particular public health problem.

¹Perinatal, also known as vertical transmission, refers to transmission of HIV which occurs at any time in the process of reproduction. Doctors and scientists are not quite sure exactly when or how transmission occurs in the reproductive process, though they know that HIV can be transmitted in utero, during delivery, or through ingestion of breast milk.

²In these questions one can hear echoes of the Contagious Diseases Acts debates. See Chapter Three.

Voluntary testing measures that respect women's rights to privacy and medical decision-making, policies that respect women's right to bodily integrity and preserve the trust in the doctor-patient relationship, feminists argue, provide more appropriate and effective responses to the problem of perinatal HIV transmission.³

In 1997, to the dismay of feminists⁴ and despite their vocal opposition, New York State became the first, and currently the only, state in the nation to implement mandatory HIV testing of newborns. Following several years of intense debate, the New York legislature agreed that testing all newborns for the presence of HIV was a morally, medically, and legally appropriate response to perinatal HIV infection.⁵ Passage of the testing law, also known as the "Baby AIDS Bill," however, puts New York at odds with what has been considered the lesson of the AIDS epidemic--that voluntary testing measures are better suited to the task of preventing HIV transmission than state coerced testing policies.⁶ In fact, in 1999, following a year of hearings on the advantages and

³As I explain in more detail below, feminists argue that mandatory testing alone cannot reduce perinatal HIV transmission. Reduction involves medical interventions and behavior changes that, unless forcibly mandated by the state, require the voluntary participation of women and this participation depends on having built trusting relationships between women and medical professionals. According to opponents of mandatory testing, state regulation of the medical decisions of pregnant women and new mothers undermines the doctor-patient relationship and may even scare women away from prenatal care. Instead of targeting women for testing, a practice which figures women as vessels or vectors of contagion or keys to newborn health, opponents suggest involving women in the health care decision making process. Respecting women's rights by offering voluntary testing of pregnant women and newborns, they argue, provides a less intrusive means to reduce perinatal transmission and enables the well being of women and children.

⁴Though I speak about feminists in this chapter, as I explain below, feminists are not alone in their opposition to mandatory HIV testing. They have formed coalitions with and are supported by public health experts, lawyers, AIDS activists, and other women's health advocates.

⁵The Baby AIDS Bill is the outcome of four years of debate that began with a call to unblind results of seroprevalence studies. Assembly bill #6747 called for the CDC to end its practice of blinded surveillance testing, a practice which, begun in 1987, provided important information on the prevalence of HIV in New York State. After the CDC ended its blinded testing in 1995 (Purnick 1995), Mayersohn revised the bill as version A. 4413, which ultimately became the basis for the new law. The current law mandates that all babies born in the state are tested for HIV and that the test results are disclosed to the baby's parents.

⁶This was the common wisdom of the 1980s and early 1990s and the widely accepted response to mandatory HIV testing of gay men, medical professionals, and other targeted groups. As of the mid 1990s, however, support for voluntary testing has begun to wane. With advances in medical interventions, formerly ardent supporters of voluntary testing have begun to reconsider their position. For example, in June of 1996, the American Medical Association (AMA) reversed its long time opposition to mandatory testing policies. They voted to support not only mandatory HIV testing for newborns, but also for pregnant women. Robert McAfee, former AMA president, explained that the shift in position was related to new medical advances which made it possible to prevent perinatal transmission and provide medical care for the

disadvantages of mandatory HIV testing of pregnant women and newborns, a Congressionally convened committee made up of members from the Institutes of Medicine (IOM) decidedly rejected mandatory testing in favor of universal routine HIV testing. The committee recommended that HIV testing become part of routine pre-natal care for all women provided that all women be given the option to refuse the test if they so desire (Stoto et. al. 1999).⁷

Despite the IOM recommendations, feminists fear that as advances are made in HIV testing and medical interventions more states will enact mandatory testing laws that further erode women's already fragile privacy and reproductive rights.⁸ As feminists continue to challenge the testing policy in New York State⁹ and prepare for the possibility of future mandatory testing proposals, it may be a good time to revisit their strategy of opposition. Should feminists continue to rely on the language of rights in their politics of resistance? Will arguing that mandatory testing violates a host of rights including

infected. See Shelton (1996). For information on these debates, often framed in terms of "traditionalism" (should HIV be treated in the same manner as previous public health threats?) versus "exceptionalism" (should it be treated differently considering the populations affected, the contemporary commitment to civil liberties, and the nature of the disease itself?) see Bayer 1991, 1994; Brandt 1985, 1988; Durr 1997; Gostin 1993; Isbell 1993; and Rotello 1997.

⁷Not all feminists are pleased with this outcome. In conversations with feminists active in the policy debates, I learned that the committee making the recommendations included very few women's health advocates. This may have been in a factor in the IOM's recommendation of the "opt-out" version of universal testing rather than the "opt-in" version feminists wanted. The former requires that women refuse to be tested for HIV rather than asking women to make the affirmative choice. Feminists worry that this places women at a disadvantage in an already unequal and often uncomfortable power relationship with medical professionals.

⁸Illinois, Michigan, Pennsylvania and Florida are among the states in which legislation has been introduced on mandatory testing of newborns or pregnant women. In Connecticut they are debating mandatory prenatal HIV testing. And, in California, along with 29 other states, it is a crime to knowingly transmit HIV. Already there have been court battles regarding HIV positive mothers' right to make medical decisions regarding child care. For example, in Maine a mother was recently taken to court when she refused to give her child drug treatments for his HIV. Though she won, her case and the passage of more and more HIV-related criminal laws suggests a shift in public opinion toward stricter regulation of HIV infected individuals, making the climate more hospitable to the passage of mandatory testing laws (*The Washington Post* 1998).

⁹The HIV Law Project of Manhattan has filed a suit on behalf of a group of low-income HIV positive women. In *RZ v. Pataki*, they argue that the New York program violates the constitutional rights of pregnant women and newborns because it fails to enforce regulatory protections for the class. At the time of writing the case was pending and the court file close. See McGovern 1997 for a review of the arguments. Visit the HIV Law Project's website for more information: <http://www.hivlegalnyc.org/manhatta.html>.

women's right to informed consent, their right to bodily integrity, their right to make medical decisions on behalf of themselves and their children, and their right to equal protection bring about the kind of political changes feminists' desire? The feminist critiques of rights that I described earlier would say otherwise. The critique of liberal individualism would suggest that rights language might undermine efforts to make visible and protect the needs of women. Rights language, this critique suggests, posits the rights-bearing subject as a self-interested, separated, and isolated individual abstracted from social context. But as feminists suggest, considering social context is absolutely essential to understanding why women need rights in the first place, and the abstraction of individuals from social context may actually contribute to women's subordination as manifest, for example, in the passage of regulatory policies like the Baby AIDS Bill (Sinton 1997). From the perspective of the critique of discipline, rights language may be condemned for reinforcing gender oppression in a different manner. Critics of discipline might point out that feminists' rights arguments figure women less as atomistic individuals and more as victims or self-sacrificing mothers. In drawing attention to women's identity as injured parties or as good mothers, rights language, these critics might suggest, reinforces a set of normative identity categories that may enable the further regulation and subordination of women.

In this chapter, I examine the rights language deployed in the context of mandatory testing from the perspective of a political reading of rights. From this perspective, a different answer to the question of rights' value in a feminist politics of resistance surfaces. Whereas the critique of liberal individualism and the critique of discipline tend to focus solely on the way in which rights language engenders negative political outcomes and reifies individual categories of identity, a political reading attends to other dimensions of rights-based politics obscured by these critiques. Using a political reading of rights as a lens of analysis, I identify the ways in which feminist opponents of mandatory testing have deployed the language of rights to contest and reconstitute

women's identity as rights-bearing subjects in multiple ways. These various and often contradictory figurations of women attest to the instability and mutability of identity. In addition, I attend to the use and import of rights language outside the realm of the state. While feminist opponents of mandatory testing clearly sought to challenge state policy, much of their energy was focused on challenging the attitudes, behaviors, and relationships that accompanied concerns about perinatal HIV transmission. As I suggest below, feminist opponents of mandatory HIV testing addressed their rights claims not only to the state, but to other citizens as well, engaging in the kind of direct address politics that Lisa Bower describes. In using the language of rights outside the realm of the state, opponents also imagined, as well as created, new relationships for HIV positive women beyond those encompassed in traditional understandings of relations of privacy, and thus engaged in the kind of relational rights politics that Foucault discusses. This is not to suggest that feminists were wholly successful in their campaigns to change policy and practice. In fact, a political reading of rights reveals rights language to be far more paradoxical in both its assumptions and implications than either the critique of liberal individualism or the critique of discipline would suggest. However, from the perspective of a political reading of rights, these paradoxes are to be expected rather than lamented. Paradoxical underpinnings and political outcomes do not mark the failure of rights language, but rather mark the unpredictability and uncertainty that, as Arendt suggests, characterize any language or practice of politics.

In an effort to throw into relief the more expansive and more optimistic understanding of rights-based politics captured by a political reading of rights, I begin by suggesting what critics of liberal individualism and critics of discipline would say about rights-based opposition to mandatory testing. Though rights-based opposition to mandatory HIV testing has not generated the kind of feminist critical analysis as surrogacy or fetal protection policy has, for example, I apply feminist critiques of rights to this case in a manner consistent with their application in other policy areas. As feminist

opposition to mandatory testing, and hence the different interpretations of the language of rights, draws heavily upon ongoing debates about the state regulation of individual bodies in general and women's bodies in particular, as well as upon important developments in medicine, I begin with a brief background of the testing debates before turning to a more detailed discussion of the specific rights-based arguments feminists deploy.

Mandatory Testing and the Politics of Identity

Feminist opposition to mandatory testing, particularly in terms of its reliance on rights language, is rooted in larger debates about the appropriate state response to the AIDS epidemic specifically, and public health threats generally. As feminist rights arguments make use of this context and history, implicitly and explicitly, I begin with a review of the context in which the controversy over testing arises. I focus here on two themes in particular--the debate over "traditional" versus "exceptional" public health policy, and the relationship between identity and policy. Both support for and opposition to mandatory HIV testing, a traditional form of policy employed in public health crises, turns on particular conceptions of the HIV positive individual.

When policymakers began to propose mandatory HIV testing of women of childbearing age in the mid 1980s, women found themselves in a position similar to that of gay men, the first group of individuals to be targeted for mandatory HIV testing. Like gay men, women were depicted as the source of contagion and mandatory testing was meant as a first step in preventing the spread of disease. Feminists, challenging mandatory HIV testing of women of childbearing age, were therefore able to look to the experiences and arguments of gay men who had successfully fought off the institution of mandatory testing. Gay men had joined forces with public health experts and civil liberties organizations to challenge similar proposals on medical, moral, and legal grounds. While supporters of mandatory testing argued that mandatory testing was consistent with the "traditional" approach to public health threats, an approach that had proven successful in the past, opponents argued that the circumstances surrounding the

AIDS epidemic were different enough to warrant a new approach. This new approach, often labeled "exceptionalism," demands that the state be more cognizant and respectful of individual rights than in previous health crises.¹⁰ Unlike previous health crises, mandatory testing could do little on its own to prevent disease transmission. Without a cure for AIDS, infected individuals would have to engage in voluntary behavior changes in order to prevent transmission. As opponents argued, these voluntary behavior changes would be undermined by coercive state policy. In addition to this public health argument, opponents made strong rights arguments to challenge the constitutionality of mandatory HIV testing. As the AIDS epidemic was the first major public health threat to emerge in a post-Civil Rights Era United States, arguments about individuals' right to privacy, to informed consent, to medical decision-making autonomy, and to confidentiality had a power not previously granted in past health crises. Proven to be a violation of individuals' civil liberties and ineffective public health policy, mandatory HIV testing of gay men was resoundingly defeated in the 1980s.

Proposals for mandatory HIV testing of pregnant women, women of childbearing age, and newborns, like proposals for mandatory testing of gay men, have been both vigorously supported and opposed. Although only 25% of HIV positive women transmit the disease to their children, and though the incidence of HIV infection is considerably lower among newborns than among women themselves, tremendous energy and resources have gone into figuring out ways to prevent perinatal transmission, particularly through the promotion of mandatory HIV testing. According to supporters, mandatory testing is a practice that reduces the possibility of perinatal transmission and enables the public health establishment to provide necessary health care for newborns. It not only has precedents in previous public health crises, but it has precedents in the routine prenatal care of pregnant women. Supporters, in other words, suggests that mandatory HIV

¹⁰For good discussions of these issues see Gostin 1993; Bayer 1989, 1994; and Isbell 1993.

testing would be just one addition to the numerous diseases and birth defects for which pregnant women were already tested.¹¹ Given these arguments, and the easily generated public sympathy for HIV positive infants, opponents of mandatory HIV testing have had a more difficult time gaining support for their position than gay men had. Although only New York mandates HIV testing of newborns, pregnant women have been at the center of AIDS policy debates almost every year. In fact, the 1996 reauthorization of the Ryan White CARE Act, the federal policy that provides AIDS-related funds to states, turned on inclusion of a provision concerning pregnant women and newborns. Although the amendment did not demand that states receiving CARE Act funds implement mandatory testing, it set up criteria that some opponents believe encourages such policy.¹²

Since the early years of the epidemic, opponents have tried to show that mandatory testing is an unnecessary, ineffective, unconstitutional, and morally suspect policy. In contrast to supporters of mandatory testing who believe that knowledge of one's HIV status could and would lead to behavior changes and disease transmission prevention, opponents have argued that mandatory testing actually undermines these goals. In the early years of the epidemic, it was believed that mandatory testing of women of childbearing age would reduce perinatal transmission by leading to the identification of HIV infection in women. With knowledge of their HIV status, infected women could then make the decision to forgo or delay pregnancy. Prior to the discovery

¹¹ See Stoto et. al. (1999) for a detailed discussion of the difference between AIDS and other diseases like syphilis or phenylketonuria for which pregnant women undergo routine tests.

¹² In 1996, the federal government finally reauthorized the release of federal dollars under the Ryan White CARE Act after months of heated debate. Though general reauthorization occurred in 1995, it was not until 1996 that the law took effect. The delay revolved around the controversial amendment entitled the "Provisions Concerning Pregnancy and Perinatal HIV Transmission." The resulting amendment authorizes funds for states to implement mandatory counseling and voluntary testing of pregnant women, provides funds for states to implement mandatory newborn testing, and requires that states meet several criteria in order to receive this funding. It requires that states show either a 50% reduction in perinatal transmission rates from the year 1993 to the year 2000 or knowledge of the HIV status of 95% of women receiving prenatal care. If they are unable to meet these criteria, states can either forfeit their federal dollars or implement mandatory newborn testing laws. See *Women's AIDS Network Newsletter* 1996; Maldonado 1995, 1996; Representative Studds, Congressional Testimony, 142 Cong Rec H 4355, H4359; and statements by Representatives Morella and Akcerman in 142 Cong Rec H 4355 and by Senators Kennedy and Kassebaum in 142 Cong Rec S 4646 for a review of the CARE Act debates.

that zidovudine, better known as AZT, taken during pregnancy could reduce the likelihood of transmission, there was little that an HIV positive woman could do once pregnant other than choosing to have an abortion or avoiding breast feeding once the baby was born.¹³ Support for mandatory pre- and post-natal testing thus received a significant boost in 1994 with the announcements of findings from AIDS Clinical Trial 076 (hereafter 076). The 076 study revealed that AZT, when taken during pregnancy and given to infants upon birth, could reduce the likelihood of perinatal transmission from 25% to 8%. Supporters of mandatory testing were now able to argue that knowing one's HIV status while pregnant was essential information that opened up options for pregnant women. According to supporters, once women knew their HIV status, they could take AZT and reduce the odds of transmitting HIV to their newborns. Or if newborns were tested upon birth, the babies could receive an AZT regimen that was supposed to reduce their chances of being infected.

Though at first glance it appears that mandatory testing is a commonsensical policy that few women would oppose, it has met with considerable resistance. This resistance, like the policy itself, draws on the history of state response to public health crises to make its case. This history, and the state's initial response to the epidemic in women has led feminists, in coalition with AIDS activists, public health experts, ethicists,¹⁴ and legal experts, to voice extreme suspicion of the motivation for early

¹³There is considerable controversy over the numbers of infants infected through breast feeding. Worldwide approximately 14% of perinatal infection is attributed to breast milk, but the numbers vary by nation and research sample and can be as low as 7% or as high as 22% (Stoto, et.al. 1999, 46).

¹⁴Ethicists have traditionally been involved in similar controversies, drafting guidelines regarding genetic testing in cases where diseases could be passed from parent to child. In the case of AIDS policy, ethicists were among the most vocal critics of mandatory HIV testing of pregnant women and newborns. Many prominent ethicists argued that mandatory testing was an attack on the moral decision making of HIV positive women. Instead of determining the morality of a woman's decision based on the fact of birth or even perinatal transmission, ethicists argued that it was essential to consider the context of women's decision making, the social, economic, and religious factors that inform their pregnancy and birth experiences. They supported voluntary testing and non-directive counseling, policies that reinforced followed ethical standards of autonomy and beneficence, instead, and argued that such policies were consistent with standards set in cases like Tay-Sachs and Sickle Cell Disease. HIV infection in women, ethicists argued, should not be singled out and treated differently than other transmissible conditions. The proper response must be based on a careful assessment of the treatments available to respond to perinatal

proposals for mandatory testing. Prior to the 076 study, there was little that could be done by HIV positive pregnant women to prevent transmission. As opponents pointed out, there were many reasons for women to be opposed to mandatory testing, not the least of which were concerns about breaches of confidentiality and continued discrimination of HIV positive individuals. In fact, with no real way to prevent perinatal transmission once a woman was pregnant, other than through abortion or bottle feeding, there were neither ethical nor legal justifications for mandating HIV testing (e.g. Bayer 1990, 1995; Levine and Dubler 1990). Legally, opponents argued, mandatory testing would unnecessarily encroach upon women's privacy rights, including, but not limited to their right to bodily integrity, their right to make medical decisions for themselves and their children, and their right to informed consent. On public health grounds, opponents argued that mandatory testing amounted to an ineffective public health policy. Mandatory testing of pregnant women could not, by itself, prevent perinatal transmission and mandatory testing of newborns would come too late to prevent that infection. Moreover, they argued, mandatory testing policies would jeopardize the health of children and women by deterring women from obtaining prenatal care and compromising the trusting relationship that develops between a woman and her health care provider. Prevention and treatment goals, opponents suggested, would be best achieved through voluntary health measures that respected a woman's right to make medical decisions in conjunction with her health care provider, a less restrictive means to achieve important public health ends.¹⁵

In the aftermath of 076, opponents of mandatory testing voiced concern about the possible slide from mandatory testing to mandatory treatments. Though cognizant of the fact that AZT regimens would offer pregnant women an opportunity to reduce the chance

HIV transmission. See Acuff and Faden 1991; Bayer 1990, 1995; Levine and Dubler 1990; and Stoto, et.al. 1999.

¹⁵This, of course, is just a very brief overview of the legal and public health arguments used to challenge mandatory HIV testing. For good reviews see, for example, Cooper 1996; Curin 1994; McGovern 1997; and Mayersohn 1997. See also the testimony of public health experts and AIDS activists responding to Rep. Gary Ackerman's proposal to unblind the CDC's seroprevalence study of newborns (HR 1289). For example, Dr. Louis Cooper, Dr. Helen Gayle, Miguelina Maldonado, and Rep. Connie Morella.

of HIV transmission to their newborns, women's health advocates raise concerns about the motivation for and implications the 076 findings. Women's health advocates expressed concern that the study provided no information on the long-term effects of AZT on both the child and the mother. They also expressed concern that AZT, a highly toxic chemotherapy, could have detrimental effects on fetal development or children in the future. This was of particular concern given that more than 75% of the babies who would receive AZT were perfectly healthy to begin with. And though nothing is known at this time about the long-term effects of AZT on children, it is common knowledge that AZT monotherapy represented substandard care for infected adults. In the age of drug cocktails and combination therapy, women's health advocates are particularly attentive to what appears to be the privileging of the infant's health care needs over those of the mother. Subsequent research also suggests that AZT may be linked to the growth of cancerous tumors in mice (Banzhaf 1997a; Cooper 1996; and McGovern 1997).

In addition, opponents challenge the continued representation and identification of women as vessels and vectors of contagion. Pointing to women's treatment as subjects of research, targets of regulatory health policy, and media subjects, opponents suggest that class, race, and gender biases motivate mandatory testing proposals. These biases, they contend, are simply contemporary manifestations of the historic tendency of the medical community and the state to treat poor women and women of color as subjects to be contained. Opponents of mandatory HIV testing argue, in other words, that the regulatory health policy are not in the best interest of the women themselves and thus repeat a long-standing tendency to demonize women whose pregnancy may be deemed risky.

Opponents' allegations are not unfounded. Since the beginning of the AIDS epidemic, public health policy makers had been more concerned about "protecting the general public" from the disease than caring for those already infected or members of populations at high risk of infection. As Gena Corea's (1992) groundbreaking work has shown, media stories, research agendas, and public health practices have continually

figured women as vessels or vectors of contagion rather than as individuals suffering from an illness themselves. Research agendas and public policies, it seemed, have been less concerned with women's illness, than with the possibility of their transmitting HIV to the men with whom they had sex or to the children they carried. Despite statistics showing that women are ten times more likely to become infected by men than men are to be infected by women, and despite statistics showing that 3 out of 4 infants born to HIV positive women are HIV negative, policy makers continue to focus on how to control and contain the possibility of women's contagion. Furthermore, this attention is often coupled with the castigation of those women who continued to "put themselves" in positions whereby they could possibly transmit HIV to others. For example, as one commentator argues, "the media's persistent portrayal of a health-failing infant or toddler with AIDS pushes the concept of 'innocent' versus 'guilty' to the extreme," marking women as guilty and obscuring their own suffering (Denenberg 1992).

In addition, opponents of mandatory testing suggest point out, the women who are likely to be HIV positive are the same women, the poor women and the women of color, who have traditionally been targeted for coercive state public health policies. As medical ethicist Ronald Bayer (1990) argues, mandatory HIV testing, if it is meant to dissuade certain women from having babies, has a eugenics tenor: "the reformist zeal that so frequently has attended efforts to save children from their parents' misdeeds may merge with the eugenic tradition of challenging the absolute right of parents to bear children at high risk for congenital disorders, since only a decision not to bear children can prevent the birth of infected infants to infected mothers" (181-2). A similar sentiment is echoed by women and AIDS activists who see mandatory testing of pregnant women as a continuation of coercive state health practices long visited upon women of color. For example, they argue that Puerto Rican women may find mandatory testing practices and public health messages to forgo childbearing to be extremely suspect. After being the

victims of forced sterilization they may see childbearing, even under risky conditions like HIV, as an important way to prevent cultural genocide (Banzhaf et. al. 1992, 205).

Despite these arguments, supporters of mandatory testing remain firm in their convictions. Supporters question the morality of the opposition depicting the women who refused to be tested as "bad mothers" who make "irrational," and "illogical" choices. New York State Assemblywoman Nettie Mayersohn, sponsor and leading supporter of the Baby AIDS Bill, for example, has argued that there is no reasonable or compassionate reason to oppose a policy that could enable the identification of HIV positive women and newborns. Mandatory testing, she believes, allows women to change behaviors and seek out medical attention for themselves and their children. Why would any woman not want to know her HIV status or the HIV status of her child, she has asked. Why would any woman oppose being given information that could lead to the prevention of perinatal transmission? What woman, what "caring" person in general, would not support mandatory HIV testing? For those who believe in the public health potential of mandatory testing, there is no other compassionate, morally responsible, medically necessary, or constitutionally justifiable response to perinatal HIV transmission.

In fact, supporters of mandatory testing are so convinced of the legitimacy of their position that they have tended to depict the women who oppose such policies as "bad mothers" who, through intentional or unintentional choice and action--their decisions to become pregnant, their failure to take AZT, or their opposition to mandatory testing--jeopardize the rights and health of their children. This is particularly evident in supporters' framing of the mandatory testing debate. Within this context women are represented as neglectful, abusive, and selfish at worst or as misdirected and uninformed, at best. Supporters of mandatory testing often depict the controversy over mandatory testing as a conflict or clash between an infant's right and a woman's right. The infants, supporters argue, have a right to health care and a right to life, both of which are placed in jeopardy when testing practices privilege women's privacy rights, and both of which

would be protected under mandatory testing policies which privilege infants' right to health care and protection from infection. These rights would be protected under mandatory newborn testing practices because newborns in need of medical attention would be identified and mothers could be warned not to breast-feed.¹⁶ But this cannot and does not happen if infants are not tested or if their test results are not disclosed. The rights of newborns to medical care are ultimately violated when the privacy rights of women are allowed to nullify mandatory testing policies, according to New York State Assemblywoman Nettie Mayersohn (1997). This is an instance, according to Congressman Gary Ackerman, when the medical needs of "helpless children" are subordinated to the privacy rights of women (Sack 1995).

And what happens when opponents of mandatory testing win their legal arguments, when women's rights effectively hold off the implementation of mandatory testing? According to Nettie Mayersohn (1997), such a practice reduces infants' chances at life, sentencing them to a "premature death." Failure to test newborns and disclose the results, she argued, is not only a rights violation, but is a "cruel," "irrational," and "criminal" act. And these infants, according to supporters, are unable to fight back. It is up to the state, according to Mayersohn (1997), "to stand in place" of these infants, to protect them from neglect and abuse. "These babies," she argued, "if they were able to give consent, would be pleading for protection just as adults living with AIDS are insisting on state of the art medical treatment. We in the State Legislature decided to stand in place of the infant" (727). Standing in their place, heeding the imaginary pleas of these infants means, for Mayersohn, that legislatures adopt mandatory newborn testing policies at least. Voluntary testing practices cannot and have not protected the helpless infants, according to Mayersohn. She based her ardent support for mandatory testing on research that suggests that only 40% of HIV infected newborns are identified through

¹⁶Only pre-natal testing allows for medical interventions to prevent perinatal transmission. This has been one of the arguments used by those who oppose mandatory testing of newborns.

programs which offer voluntary testing. These numbers, she argues, are "dismal," and thus suggestive of a failure that must be and can only be rectified through mandatory testing practices.¹⁷ From Mayersohn's perspective, it is the moral and legal duty of the state to institute mandatory testing. As she and other supporters of the policy contended, the failure of voluntary testing practices suggests that infants, who are helpless to defend themselves and claim their right to health care, are being neglected and discriminated against. Only state intervention can alleviate this threat to infants' health.

Despite presenting infants as neglected and at risk, neither Ackerman nor Mayersohn come right out and say that it is women who are threatening the lives of their children through their "irrational" or "unacceptable" behaviors and decisions. Yet implicit in the narrative of support for mandatory testing is the implication that children need state protection because "mothers will not act to best preserve the welfare of their children" (Cooper 1996). By framing the debate as one in which infants' rights to life and health care are in jeopardy, supporters of mandatory testing raise the question of who is to blame for the potential violation, of who is responsible for neglecting these infants, and denying them access to health care and life. According to Mayersohn, the state is to blame if legislators refuse to implement mandatory testing. But if failure to pass the mandatory testing bill implicates legislators in what Mayersohn sees as "the crudest and most obscene violence--the abuse and neglect of the most neglected children in our state," who is implicated in the failure of voluntary testing practices? (quoted in Hentoff 1995). What responsibility does Mayersohn imply accrues to HIV positive women? What, in other words, is the implicit characterization of HIV positive woman who are concerned

¹⁷Opponents argue that because HIV transmission from mother to child can be reduced if the mother receives proper treatment during pregnancy, focus should be on counseling and voluntary testing in the prenatal period. According to some studies, with proper counseling voluntary testing rates may be as high as 95% (New York Task Force on Women and AIDS 1995). Other research suggests that testing acceptance rates vary dramatically. They can be as low as 23% and as high as 95%. The research suggests that a variety of factors including previous testing, language and cultural barriers, misinformation, and fear of discrimination influence a woman's willingness to be tested. For examples of these arguments see Cooper 1996, McGovern 1997, and Ploughman 1995.

about their privacy and, therefore, decides not to be tested? Is she violating the rights of an infant? Mayersohn's criticism of the state, it would seem, holds true for these women as well. Like the state, women, if they do not support mandatory testing policies, behave in a cruel and irrational manner, a manner that leads to the neglect of their children.¹⁸

Supporters' arguments suggest, then, that women are responsible for neglecting infants, for sentencing babies to a premature death. Her danger and threat reside not only in her ability to transmit the virus to her newborn, but also, and perhaps more importantly, in her decisions to favor voluntary testing measures. In other words, it is a woman's choice, her decisions and actions, that is called into question and figured as a threat to her child, marking her as a dangerous individual. Rights claimed on behalf of infants thus call into being the identification of HIV positive pregnant women with the bad mother, the deadly vector of contagion. That is, as Sarat and Kearns (1995) explain, rights "constitute us as subjects" by authorizing some "expressions of personhood" while delegitimating others (7-8). Within the particular strand of rights discourse, women are defined in terms of the danger they pose to their infants. It is this identification that supports infants' rights claims and demands the implementation of coercive testing measures. It is in positioning HIV positive women as bad mothers that their ability to make rational and thoughtful reproductive decisions is questioned, as are their intentions.

It is this figuration of women as "bad mothers," and the continued focus on women as vessels and vectors of contagion, that feminist opponents of mandatory testing attack in their legal challenges. As I suggest below, feminists have used several different strategies in their rights arguments to challenge both the policy and this identification of HIV positive women as bad mothers. They have demanded women's rights on behalf of women as autonomous individuals, victims of circumstance, good mothers, and

¹⁸In a 1995 editorial entitled "AIDS Babies Deserve Help Now," the editorial board of *The New York Times* urged the state to do something about HIV infected infants and those at risk of being neglected. Though the editors did not come right out and accuse pregnant women and HIV positive mothers of negligence, the tenor of their argument and the fact that they identified no other responsible party suggested that HIV positive women were culpable sources of contagion and neglect.

conflicted adults. These different depictions of women suggest, I argue, the mutability and instability of identity, and they are implicated in the paradoxical political outcomes engendered by feminist rights-based political opposition. This instability and these paradoxes are not, however, acknowledged by either the critique of atomistic individualism, with its focus on the conception of the autonomous individual, or the critique of discipline, with its attention to the fixity and normativity of identity categories. In the next two sections, I examine the differences highlighted by these two critiques. Following these discussions, I offer a third possible interpretation of the HIV testing debates that illuminates features obscured by the other two approaches.

Autonomous Individuals and the Critique of Liberal Individualism

It should come as little surprise to people familiar with feminist rights arguments that opposition to mandatory HIV testing has relied heavily on a notion of women as autonomous, independent, and rational decision makers. Feminists have long struggled to disaggregate women's identity, and thus their rights, from their role as childbearers and caretakers, and to get the state and society to recognize women as individuals with important needs and interests of their own. As in other rights controversies, feminist opponents of mandatory testing struggle to depict women as individuals whose rights to privacy and bodily integrity, to medical decision making and informed consent, are to be respected regardless of their role of reproducers. Mandatory testing, feminists argue, compromises these rights and thus threatens undermines the autonomy and independence essential to women's dignity as human beings (e.g. McGovern 1997). It is thus imperative, they contend, that policy makers "start with the assumption that women have the same rights to autonomous determinations of life choices as do men" (Hunter 1992, 30) and begin to treat women "like other adults in the level of autonomy and privacy afforded them in making" decisions regarding HIV testing and treatment (Hanssens 1996, 1).

These arguments are firmly rooted in legal precedent. In fact, feminist lawyers draw on a host of court cases to bolster their arguments. For example, lawyers like Theresa McGovern (1997), former Director of Litigation at the HIV Law Project in New York City, turns to the privacy rights cases of *Griswold v. Connecticut* (1965), *Planned Parenthood v. Casey* (1992), and *Roe v. Wade* (1973) to justify opposition to mandatory HIV testing.¹⁹ According to McGovern, these cases protect the privacy rights of individuals in matters concerning personal and life-altering choices such as whether or not to terminate a pregnancy or whether or not to use contraception. According to the Supreme Court, matters concerning "the most intimate and personal choices a person may make in a lifetime" are "central to personal dignity and autonomy," and thus protected under the Fourteenth Amendment of the Constitution.²⁰

While these cases may bolster feminists' challenge to mandatory testing of pregnant women, feminists turn elsewhere to find justifications for their opposition to mandatory testing of newborns. According to feminists, mandatory newborn testing violates of women's right to informed consent and fails to meet criteria set out by the Court with regard to coerced blood test.²¹ According to the Court, such blood tests are constitutional to the extent that they meet a compelling state interest and entail means that are "narrowly tailored" to meet this interest. Opponents of mandatory testing do not deny that there are compelling reasons to consider mandatory HIV testing. They agree with supporters that preventing HIV transmission to the fetus or newborn is a very important public health goal. They argue, however, that mandatory testing fails to meet the

¹⁹*Griswold v. Connecticut*, 381 U.S. 479; *Planned Parenthood v. Casey*, 505 U.S. 833; *Roe v. Wade*, 410 U.S. 113.

²⁰*Griswold v. Connecticut*, 381 U.S. 479 (1965). See also Cooper 1996 for similar arguments.

²¹ Both HIV testing of pregnant women and HIV testing of newborns have been contested as violations of women's right to informed consent. Both entail coercive blood tests of women. Because the newborn test reveals the presence of maternal HIV antibodies in the newborn's blood, it thus determines the HIV status of the woman only. Currently the most widely used HIV test determines the presence of HIV antibodies in an infant's blood. However, since all newborns carry their mothers' antibodies until 15-18 months of age, the test results reflect the HIV status of the mother, not the child. It is only once an infant begins producing its own antibodies that the test can reflect its HIV status. There are, however, attempts to put into more widespread use HIV tests which detect presence of the actual virus rather than antibodies.

"narrowly tailored" criteria established by the Court. Citing statistics suggesting that under certain circumstances pregnant women overwhelmingly consent to voluntary prenatal testing, feminists argue that voluntary, rather than mandatory testing, is a more narrowly tailored means to prevention of perinatal transmission. In addition, they argue that voluntary testing is consistent with the notions of personal dignity and autonomy encompassed in our constitutional understanding of liberty and privacy (Cooper 1996; McGovern 1997).

The HIV Law Project of New York is currently challenging the constitutionality of the Baby AIDS Bill on precisely these grounds.²² As the Law Project explains, since the most common HIV test determines the presence of HIV antibodies and all babies are born with maternal antibodies, the initial HIV test accurately determines only the HIV status of the mothers. Only an antibody test done 15-18 months after birth accurately reflects the infants' HIV status. What appears to some, then, as a minor and potentially life-saving blood test, not unlike other newborn blood tests, appeared to opponents to be unconstitutional and unnecessary. Thus it raises issues regarding the justification for interfering with a woman's right to privacy, to informed consent, and autonomy with regard to health care decision-making for herself and her child. At the heart of these rights violations are, according to opponents, stereotypical representations of HIV positive women as unfit mothers and conduits of contagion.

Feminists find additional support for their rights claims in cases supporting women's right to make medical decisions on their own behalf and on the behalf of children. For example, drawing on precedents set in cases such as *Cruzan v. Director, Missouri Department of Health* (1990)²³ and *Roe v. Wade*, among others, opponents challenge mandatory testing on the grounds that it violates a woman's right to bodily

²²The HIV Law Project filed a class action lawsuit in 1997 on behalf of a number of low income women claiming that the law is unconstitutional and asking the Court to order the State to address deficiencies and problems with the existing regulations. See McGovern 1997 for a review of the arguments. Press releases on file with the author.

²³*Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261.

integrity. According to opponents, these cases suggest that pregnant women have a right to refuse testing or the administration of medical treatment when making a decision regarding their own health or the health of the fetus. According to Theresa McGovern (1997), given the Court's recognition that individuals, including pregnant women, have a right to refuse lifesaving medical treatment, mandatory HIV testing of pregnant women amounts to a violation of women's right to privacy and medical decision-making. "Any effort by states to mandate specific courses of behavior for pregnant women, particularly for the benefit of their fetuses, raises grave concerns for the remaining degree of reproductive autonomy left for women by increasingly less sympathetic courts," McGovern explains (499).

Returning to the question of the relationship between means and ends, feminists warn that mandatory testing fails to meet the narrowly tailored test for a second reason: it actually undermines prevention. According to opponents, mandatory testing, in overriding a woman's right to determine health care provisions for herself and her child, could jeopardize the trust essential to the doctor-patient relationship. By enacting coercive public health policies that interfere with the doctor-patient relationship, the state, feminists contend, could frighten women away from testing and prenatal care.²⁴ Instead of mandatory testing, opponents like Elizabeth Cooper (1996) argue that "The best way to ensure necessary health care for the child--and the mother is to work with the mother, providing her with counseling and the option to test" (21-22). Opponents also argue that voluntary, rather than mandatory testing, constitute the approach most consistent with the notions of personal dignity and autonomy encompassed in individual liberty and privacy rights.

²⁴Like many other opponents of mandatory testing, Cooper (1996) cites a study of mandatory pre-marital HIV testing in Illinois which drove approximately forty-thousand people to other states for licenses (21-22).

Central to opponents' rights arguments is an attempt to represent HIV positive women as individuals who have rights, needs, and interests that would be best met by limiting the power of the state over their lives. The language of individual autonomy and human dignity not only undergirds legal arguments, but is echoed by women and AIDS activists in their engagements with HIV positive women themselves. For example, publications from WORLD (Women Organized to Respond to Life-threatening Disease) and NJWAN (New Jersey Women and AIDS Network) emphasize women's independence and autonomy. Both organizations seek to empower women to take control of the patient-provider relationship and to remind women of their own importance and their right to have their own needs met. As WORLD Executive Director Rebecca Denison (1995) argues in an article recounting her own decision to become pregnant despite being HIV positive, a woman "should not feel pressured or forced to accept a treatment she doesn't want, and the final decision about what HIV drugs to take is up to her. She should not be punished or refused health care if she decides not to take AZT or other HIV drugs" (4).

NJWAN offers similar arguments in their own in their "Pregnancy, HIV, and You: A Handbook for Women with HIV" (Banzhaf 1997a) and its companion publication, "HIV and Pregnancy: Information for Service Providers" (Banzhaf 1997b). In the former, NJWAN introduces women to the handbook by offering it as a tool for their education. The handbook is designed, they suggest, to empower women: "Use this handbook to educate yourself so that you can feel confident asking questions and making decisions for yourself. You have the RIGHT to be informed and to be a part of all the decisions made about your body. You also have a RIGHT to be treated with respect and to receive good health care, education and counseling" (1). The importance of women as autonomous decision makers is emphasized again in the discussion of creating a health care team. HIV positive women, according to NJWAN, are the most important members of the team. Not only do women have the right to ask questions and understand the

processes occurring around them, but perhaps more importantly women have a right "to say no and to make decisions that you feel are best for you "(14). For example, NJWAN reminds health care providers to recognize women as "people with their own needs."(Banzhaf 1997b, 2) And they remind women that "it is YOUR body and YOUR decision and YOUR right."(Banzhaf 1997a, 5) In both cases, NJWAN expresses the view that all women have a fundamental right to choose to bear or not bear children. (1997b, 1) The arguments offered in these publications tend to individualize women in an attempt to contest the depiction of women as conduits of contagion.

Given the language used to challenge mandatory HIV testing, it is not surprising that the opposition has come under attack for perpetuating atomistic individualism. Feminist privacy rights arguments seem to presume a subject who is independent, unencumbered by social ties, and self-interested. Where a right is identified, then, the state is expected to be neutral, to allow rational and autonomous individuals to choose actions and identities without interference (Sandel 1996, 92-3). Critiques of this conception of the rights-bearing subject, interestingly enough, come from both supporters and opponents of mandatory HIV testing who have very different understandings of the political implications of rights language.

Supporters of the policy, like Communitarian scholar Amitai Etzioni (1999), argue that rights language not only depicts women as individuals with separate interests and needs that may be distinct from and in conflict with the needs of fetuses and newborns, but the language also promotes a culture of irresponsibility and disregard. Etzioni, a late comer to the newborn testing debates and a participant in the Institute of Medicine's 1998 hearings on the issue, draws heavily on his own communitarian commitment to prioritizing notions of the common good above individual rights, along with statistical and anecdotal information supplied by Nettie Mayersohn, to make his case in support of mandatory newborn testing. He believes that rights talk, and in particular the privacy rights arguments, of mandatory testing opponents have led to the rejection of

mandatory newborn testing everywhere but in New York State. From his perspective, this is a tragedy. Hundreds of infants could be spared devastating illness, even HIV infection itself, if the HIV status of the mother and the infant were known. Voluntary testing policies may identify many HIV positive women and infants, but because not all women receive prenatal care nor understand the implications of refusing an HIV test, the state must take responsibility for protecting infants from HIV. According to Etzioni, justification for mandatory testing is rooted in the shared value of life. To reject mandatory testing is to privilege the privacy interests of a few individuals over one of the most important commonly agreed upon values. The rejection of mandatory testing is proof that privacy rights, are being taken as absolute values and allowed to "trump" the shared value in life and well-being, tipping the scales away from and overwhelming communal concerns with an "emphasis on personal autonomy and individualism"

(Etzioni 1999, 5).²⁵

²⁵Etzioni also draws on the scholarship of Glendon (1991) and (Sandel 1996) in his argument. According to Etzioni, in times of public health crises and, particularly, in the context of transmissible diseases, privacy rights must yield to other communal values. Thus he attacks opponents' rights arguments for their reliance upon this individualistic ideology and its conception of human nature. That is, implicit in his argument for mandatory testing is a critique of the very conception of the subject which he believes undergirds opponents' rights claims. Rights-based opposition to mandatory testing reinforces "the classical liberal view of a person," a "free-standing agents, able to form and follow their own preferences at will," unencumbered by social ties (1999, 163). According to Etzioni, this conception of personhood is not only empirically inaccurate but morally and physically detrimental. Not only are individuals not isolatable and abstractable from communal ties, but to believe so, and to make rights arguments on behalf of such a subject, is to promote self-interest while rejecting or ignoring social responsibility and communal ties.

In the case of AIDS testing debates, Etzioni argues that rights-based opposition to mandatory newborn testing damages the "communal bonds and responsibilities" that emanate from the "mother-child bond and the mother's responsibility to attend to her child's welfare" and demeans the community by disrespecting its shared notions of the common good (1999, 42). Though he recognizes that opponents raise important concerns in their legal challenge to mandatory testing, he believes they have gone too far in their commitment to privacy rights, rights which, in his opinion, must not only yield in times of health crisis, but be recognized as breeding a dangerous culture of irresponsible behavior. The rejection of mandatory HIV testing of newborns, Etzioni continues, is proof that rights discourse breeds a dangerous culture of irresponsible behavior that can threaten the lives of infants and the moral and physical health of the community at large. The rejection of mandatory testing is yet another instance of the disturbing results of our propensity to value rights above all else and to think of individuals as first and foremost rights bearing subjects who are unencumbered by social ties and responsibilities.

Interestingly, Etzioni is not opposed to rights altogether. His concern is not with rights per se, but with the current conception of the rights bearing subjects. Rather than presuming that individuals are free and autonomous, as liberal individualistic right talk does, Etzioni believes that we should recognize that subjects are products of social institutions and culture and revise our understanding of rights accordingly. "[F]ar from being free-standing agents, able to form and follow their own preferences at will, [people] are

Feminist opponent of mandatory testing Jennifer Sinton (1997) offers a decidedly different interpretation of the implication of rights' atomistic individualism. According to Sinton rights language is not to be blamed for holding off mandatory testing, as Etzioni suggests, but rather for enabling the passage of the Baby AIDS Bill itself. Sinton argues that rights language is not an obstacle to a politics of the common good, but rather an obstacle to feminist political goals. Rights talk, she contends, is an obstacle to making visible and addressing women's needs. Sinton presumes that it is the implicit individualist ideology of rights talk that is the problem. Drawing theoretical insight from the work of feminist and critical legal theorists, among others, Sinton suggests that rights discourse, with its tendency to abstract individuals from social context and render them antagonistic, "constructs opposition between women and children, results in the blaming of women for larger societal problems and veils the racist impetus behind mandatory testing" (191). Rights discourse "serves to...obscure gender and racial subordination by positing an individual without context or community, to sink or swim on her own, regardless of the numerous obstacles that dominant culture and ill-conceived political and regulatory schemes have placed in her way" (243). The result is "a circular discourse which precludes consideration of the harmful effects of mandatory testing on Black and Hispanic and low-income women and children, who are disproportionately effected by HIV infection" (189-90). For Sinton, then, the concern is not that women learn to

profoundly affected by *prevailing social institutions*"(1999, 163). Unfortunately, the "prevailing social institutions" and individualistic ideology, perpetuated through rights talk, have produced the irresponsible and dangerous individual. What we need, he suggests, is "a fundamental change in civic culture, policymaking, and legal doctrines" that teaches individuals what constitutes the common good and its importance, thereby shaping individual character differently (1999, 4). Such changes, he believes, will produce responsible subjects, subjects who respect the common good and thus who are worthy of their rights. Without the necessary institutional changes which "encourage people to do what is right in the first place" we will have threats to the common good (164). With the right conditioning we can produce subjects who exercise their rights in morally responsible ways which respect the common good. What concerns Etzioni, then, is the possibility that a reliance on rights talk will not only reinforce, but may actually perpetuate and sanction the HIV positive women's "self centered" and "willful[ly] hostile" indifference to their fetuses. Rights talk, equated with traditional liberal conceptions of persons as unencumbered and independent, will not enable women to be good caring mothers, and thus it is an obstacle to the acceptance and implementation of public policies that serve the common good.

disregard their responsibilities to their children because of the influence of rights talk and liberal ideology. Rather, it is that others, the state or society, will presume that women want to be regarded as individualistic and independent. In turning to rights language, it seems, women undermine their own ability to be recognized as relational and responsible to others.

Though Sinton, unlike Etzioni, seems to suggest that opponents unintentionally represent women as atomistic individuals, she is clear that opponents must abandon rights language in their fight to shape health policy accountable to women and their children. Though she realizes that rights have played and will continue to play an important role in debates about HIV testing, she is less than convinced of their usefulness for women's health advocates. Sinton thus suggests that opponents reframe their arguments taking a public health policy approach, an approach which would draw our attention away from a maternal-fetal rights conflict to an awareness of the harmful consequences of coercive testing and the larger context in which infection of women occurs. A public health approach, she argues, can make visible women's relationality and social situatedness, as well as their health care needs and mothering experiences, in a manner impossible in the individualistic language of rights.²⁶ Sinton's argument, then, is a good example of the feminist critique of liberal individualism applied to the case of mandatory HIV testing.

²⁶Unlike Sinton (1997), who suggests that public health claims can be separated from legal claims, I believe that opponents' argumentation suggests that the two discourses are inextricably linked. In order to make a claim for women's rights, opponents of mandatory testing have to engage public health data and ideas about appropriate goals and the efficacy of particular practices. Rights language is, then, not simply about the particular rights claims and legal precedents invoked in support of or opposition to mandatory testing, but rather rights claims function as the site at which a "constellation" of discourses converged. Rights claims rely on and call into play particular narratives and representations regarding mothering and the delivery of health care which might, at first glance, seem distinct from rights language. I take my cue here from Alan Hunt (1992) who reminds us that right discourse, as a form of legal discourse is not unitary. Rights discourse, understood, as a discursive constellation or bloc, is actually comprised of a plurality of sometimes complementary and sometimes contradictory discourses including legal and extralegal discourses. "Legal discourses and institutional practices increasingly incorporate or are themselves incorporated into and interpenetrate with a continuum of other discourses and apparatuses (medical, administrative, and so on)" (31).

Though, for Etzioni, rights discourse derails the acceptance of lifesaving policy and engenders irresponsibility on the part of women and the community as a whole, whereas for Sinton it obscures our ability to recognize and understand women's experiences, thereby leading to mandatory testing, both agree that rights discourse should be abandoned. Though they disagree on what should replace rights discourse--notions of the communal good and responsibility or public health arguments--both fault the individualistic ideology and conception of the rights bearing subject implicit in opponents' rights arguments. And though Etzioni suggests that opponents seek to represent women as unencumbered by social ties and self-interested while Sinton suggests that rights language hinders opponents' ability to present women in a different light, both agree that rights discourse, particularly privacy rights claims, is inextricable from such assumptions about subjects. Further complicating the issue is the assumption, in both Etzioni's and Sinton's arguments, that maternal identity, because it involves relations of care and the privileging of the child's needs over those of the mother, is incommensurable with such a notion of the rights-bearing individual. For both, the relationship between motherhood and rights bearing subjectivity is tenuous and fraught with difficulties at best. For Etzioni, it is incomprehensible and irrational that women would want to privilege their privacy rights at the expense of infant health care. Such a decision strikes him as completely disregarding, indeed damaging, the mother-child bond and its attendant responsibilities. For Sinton, on the other hand, women's engagement with rights language does not suggest irrationality and irresponsibility. Rather, the problem of rights discourse lies with the fact that rights language cannot adequately capture the experiences of women as mothers, particularly as mothers infected with HIV. Because rights claims reinforce the independence, atomism, and separateness of this subject, they ultimately obscure the needs and experiences of women and make it difficult to advance women's interests.

But is the language of rights as contaminated and bankrupt as these critiques suggest? Does it only serve to reinforce the problematic assumptions about human nature that we associate with the traditional liberal subject of rights? Is it so antithetical to the very meaning of motherhood that it must be abandoned, and quickly? In the next section I take another look at the subjects of rights implicit in the challenge to mandatory HIV testing.

Good Mothers, Poor Victims, and the Critique of Discipline

Although opponents of mandatory HIV testing use rights language to challenge state policy and to make women visible as autonomous individuals with rights and needs of their own, implicit in their rights arguments are alternative conceptions of the subject of rights. These alternatives, which I call the "victim" and the "good mother," share far more with notions of subjectivity imagined in feminist revisions of rights than in traditional liberal individualistic conceptions of rights (e.g. Minow and Shanley 1997; Roberts 1997; West 1997; Hirschmann 1999).²⁷ As I discuss below, the victim and the good mother are identity categories used to justify feminists' claims for women's rights. Through these identity categories, feminists depict women as socially located and socially constituted, encumbered by their social context and relationships. In making rights claims on behalf of women as victims or good mothers, opponents of mandatory HIV testing not only challenge the law, but contest both the traditional conception of the rights-bearing subject and the demonization of HIV positive women.

In making these arguments, and figuring women as encumbered and relational subjects, opponents of mandatory HIV testing reveal certain benefits and limits of rights language obscured by the atomism critique. Centering rights claims around such a

²⁷Of course, these critics have important differences. Shanley and Minow (1997), for example, distinguish their understanding of relationality from communitarians. For Shanley and Minow, recognition of relationality is always tempered by an appreciation of individuals as distinct, a distinction that gets lost in communitarian notions of relational rights. See my discussion of feminist revisions of rights in Chapter One

conception of the rights-bearing subject allows opponents to unsettle, contest, and reconstitute particular identity categories.²⁸ In demanding that women of childbearing age be recognized as rights bearing citizens, opponents of mandatory testing challenge depictions of women, implicit in supporters' arguments, as unfit, irresponsible, and irrational mothers. In presenting women as simultaneously mothers and rights bearing subjects, opponents' arguments attempt to shift our images of HIV positive childbearing women--from guilty party to victim herself and from victim to empowered participant, from uncaring bad mother to nurturing good mother. With their arguments justifying women's claim to rights, opponents contest and attempt to transform the long standing representation of HIV positive women as bad mothers, and work to recognize socially located and socially constituted subjects, rather than the atomistic subject as the proper subjects of rights. But this attempt to unsettle both the traditional liberal subject of rights and the depiction of HIV positive women as bad mothers, comes with a price. Indeed, within the context of rights discourse, these arguments may dislodge women from their identification as bad or dangerous mothers, only to reinstate women in the role of self-sacrificing mothers, an identity which may once again obscure the health and prevention needs of women. As critics of discipline would argue, and as I explain below, these alternative conceptions of the rights-bearing subject lead to the naturalization and codification of otherwise contingent and normative identity categories. In addition, these normative identities categories are then used to justify certain kinds of regulatory and constraining policies and practices.

Since the early days of the epidemic, HIV positive women of childbearing age have had their decision-making skills and actions scrutinized, challenged, and condemned. Whether it was James Curran of the CDC implying that HIV positive women would be "illogical" if they choose to become pregnant or carry a pregnancy to

²⁸See my discussion of Lisa Bower's work (1994, 1997) in Chapter One for a more detailed explanation of this process.

term (Bayer 1990), or Nettie Mayersohn, New York State Assemblywoman, implying that only cruel and irrational individuals would refuse to do everything in their power to prevent perinatal HIV transmission, policymakers have represented the women who oppose mandatory testing, and their supporters, as perpetuating irresponsible and dangerous behavior (Etzioni 1999). Opponents of mandatory testing have thus worked hard to challenge not only the mandatory testing policies, but the implication that women's rights and the interests of infants were somehow at odds.

This is the intent of the story of Rosa, a 27-year-old Dominican woman, currently a plaintiff in the HIV Law Project's suit against the New York State's mandatory newborn testing law. As a plaintiff, she agrees with the Law Project's assessment that mandatory newborn testing violates women's rights. However, Rosa is not demanding to be recognized by the state or by others around her as an atomistic individual. She is not arguing that her rights should take precedence over the needs and interests of her child's. She is not asking that she be considered an individual whose social context and social relationships are irrelevant to her status as a rights-bearing subject. To the contrary, Rose is asking to be recognized as encumbered by and embedded in a series of relationships. In fact, it is the specific nature of her relationality that necessitates her rights claim.

Her story, according to one Law Project employee, is typical of the plight of the HIV positive women and children who serve as primary targets of the New York law. Rosa did not know that she was HIV positive when she was pregnant (Cynn 1999). She only learned of her illness several weeks after the birth of her daughter, when a health care worker called to report that the results of her daughter's mandatory HIV test were positive. Though she had received prenatal care prior to her delivery, Rosa had not known that her daughter would be tested upon birth, nor that she could have had a prenatal HIV test, nor even that her daughter's test would actually indicate her own HIV status. Knowledge of the test results did, however, lead to immediate changes in her practices. She stopped breastfeeding when she had learned that breast milk was a known,

though somewhat uncommon, route of HIV transmission, and she shared her test results with her boyfriend. The latter decision had devastating consequences. Her boyfriend's reaction entailed such physical violence that it forced Rosa and her baby to move to a shelter.

Had Rosa been offered HIV testing prenatally, had she been told that taking AZT during pregnancy might reduce the likelihood of perinatal transmission, and had she been told that breastfeeding increases the likelihood of perinatal transmission, she would have and could have made different decisions, taken different actions. "I would have wanted to increase the chances that my child would not have the virus," she tells us. Rosa's story reveals many of the problems facing HIV positive women, problems which opponents suggest make a right to privacy essential to meeting the needs of both the woman and her child. Rosa, like many other HIV positive women, can thus been seen as, and is positioned in rights arguments, as a victim of a health care system that has failed her. The system, in failing to provide her with necessary information and services, constrains her ability to make the decisions that society associates with good mothering practices. Far from making selfish and irresponsible decisions as supporters of mandatory testing suggest, Rosa's choices and actions had been, to a great extent, determined by a health care system and a society that has long devalued the decision making capacities, and thus the participation of poor women of color. She is the victim of a system that produces the very "irrational" and "irresponsible" behaviors that it simultaneously presumes to be natural but unacceptable. And she is the victim of domestic violence, a result which, like housing and employment discrimination, is, according to opponents, a response to HIV infection closely tied to the demonization and devaluation of HIV positive women embedded in our current health care practices.

Rather than supporting mandatory testing policies that perpetuate the continued policing and regulation of these women's bodies, opponents demand recognition of Rosa's right to privacy. Acknowledging this right to privacy, they suggest, would not license

irresponsibility or abstract her from social context. Rather it would serve to both empower and protect her. Acknowledging Rosa's right to privacy would mean putting energy into voluntary testing programs and improving health care services. It would mean encouraging her participation in the health care decisions that affect her life and the life of her child, providing her with information and access to services. And it would mean a shift away from the continued stigma and disdain that HIV positive pregnant women experience, a stigma not associated with other high risk birth situations.²⁹ In granting Rosa's right to privacy, Rosa would not necessarily be entrenched in the identity of victim. Rather, according to opponents, claiming Rosa's status of victim enables the transformation of her status from victim to empowered participant in crucial health-care decisions, in part, because it demands and seeks practices that would engender and support the development of a trusting relationship between doctor and patient. For this woman, already presumed, by her victim status, to be socially situated and influenced in both positive and negative ways, granting the right to privacy would prevent the discrimination that is implicit in and an effect of mandatory testing. As one Law Project employee explains, they are not defending selfish and purely self-interested individuals. Quite to the contrary, according to affidavits from the other HIV positive plaintiffs in the lawsuit, all said that "they would have tested if they had known the importance of prenatal testing and had been offered voluntary testing. All would have taken medication to reduce the chances of passing the virus to their children. None of the women would have breastfed" (Cynn, 1999).

But implicit in this story is another argument for women's rights. HIV positive pregnant women or mothers, like Rosa, are not represented simply as victims who are dependent on the state for assistance, information, and protection. Indeed, as Rosa's

²⁹According to Rebecca Denison (1995) high risk HIV pregnancy is treated very differently than high risk pregnancy of women in their early 40's; "there is no social condemnation of them like what we experience as HIV + women"(1).

statements suggest, women of childbearing age are willing and able to "do the right thing" if given the chance. Thus we find that women's rights claims are premised upon an additional conception of women as good mothers, as individuals who can and do want to do what is in the best interest of their children.³⁰ And though their decision to go through with a high risk birth may challenge what some consider to be the proper decisions of "fit" or "good" mothers, opponents suggest that in all other ways, HIV positive women are living up to the dominant norms of motherhood--doing what is in the best interest of the child, sacrificing their needs and health concerns for those of the child, nurturing, caring for, protecting their children. We meet the good mother, or rather good mothers, in the story of Harlem Hospital's successful voluntary testing program. This widely cited study reports that 90-95% of women who are offered an HIV test during pregnancy will voluntarily accept it. This study proves that there are less intrusive means than mandatory testing available to prevent perinatal HIV transmission. And it proves that women do not need the state to tell them how to be good mothers, that women do not lack the strength or concern to protect their children from harm.³¹ As ethicists Levine and Dubler (1990) concluded some years ago, HIV positive women have "no intent to create harm; in fact, the intent is just the opposite-- to bring good into the world" (346). And as Rebecca Denison (1999) suggests in her testimony before the Committee on Perinatal Transmission of HIV, most women "are deeply concerned about protecting the health of their babies" (281).

To acknowledge the good mother's right to privacy, for example, is thus to reject the depiction of HIV positive women as illogical or morally bankrupt. It is to see women, not as selfish and irresponsible, but as already always in relation to others and living up to dominant ideals of motherhood. Respecting women's rights would mean supporting

³⁰As I suggest below, there is a fourth image of women as rights-bearing subjects that complicates the notion that all women are or want to be good mothers as defined by the subordination of their own needs to that of their child's.

³¹A number of Mayersohn's (1997) arguments suggest that women lack these essential qualities and that the state must, therefore, make decisions on their behalf. See Mayersohn's 1998 interview (SerVass 1998).

voluntary rather than mandatory HIV testing practices. It would mean recognizing women subject as deeply embedded in and respectful of the social ties and responsibilities we traditionally associate with motherhood. The right to privacy should be an easy right to grant in this case for to leave the Good Mother alone entails little risk. Whether she has learned to act in accordance with dominant norms of mothering or is guided, as some scholars suggest, by some kind of "natural maternal instinct," she already acts in ways and makes decisions that many consider to be proper and moral, decisions which suggest a harmony between maternal-fetal interests.³²

These narratives about women as good mothers or victims are consistent with feminist attempts to revise the subject of rights discourse to reflect and represent a socially constituted and socially located or relational subject. According to those who propose this revision, a relational subject, a subject who is embedded in and responsible to a web or network of relationships, represents both a more empirically accurate portrait of human nature and a better model for the behavior of democratic citizens.³³ Yet, as the foregoing discussion suggests, there may be a danger in celebrating the fact that women as encumbered by their relationships which the critique of rights' disciplinary character captures.

To review that perspective briefly, the critique of discipline builds on Foucault's argument that the political efficacy of rights language is limited, less because of its reiteration of classic liberal subjectivity, than because of its complicity with various practices of governance and discipline. In other words, according to Foucault rights are caught up with and imbricated in the practices of disciplinary power. To struggle against regulation and disciplinary power, one should turn, not to rights, according to Foucault

³²As Catherine Hanssens (1996) of the Lambda Legal Defense and Education Fund argues: "The needs and interests of the newborn are not in conflict with those of the mother; they're interdependent. A proposal to address the needs of infants as segregated from those of their parents and their families reflects either a fundamental misunderstanding of the mother-child relationship and the broader needs of the child, or a belief that somehow those women most affected by the HIV pandemic are fundamentally different, less motivated by concern for their children than other parents"(9).

³³See Chapter Two for a fuller discussion of this project of revision.

(1980), but to a form of right that is "liberated from the principle of sovereignty." Some feminists have taken up Foucault's perspective to explore the extent to which rights discourse is complicit with the regulation and surveillance of women and their bodies. These critics read Foucault as arguing that rights are an ineffective, even dangerous tools of political contestation and resistance. As I illustrated earlier, Wendy Brown draws on Foucault's insights to argue that we should not confuse "the domain of rights with the domain of political contestation" (133). Rights, she suggests, function as a "regime of truth" which produces subjects, "rather than simply suppressing or positioning them," but then obscures this very process of production (117). To produce subjectivity through the discourse of rights is simultaneously to obscure the process of that construction, and to naturalize and entrench what is otherwise a contingent identity. Thus, according to Brown, through the discourse of rights we depoliticize contingent identities rather than challenge or loosen them (118).

The "good mother," the most dominant subject of rights to inhabit opponents' arguments, may do just that. Though one of several subjects of rights constituted and deployed in opponents' arguments, the good mother is clearly the most prevalent. And though a more complicated nurturer than the one who is guided by "natural maternal instinct," the good mother may ultimately undermine the very contingency and contestability of both the subject of rights and women's identities as mothers that is suggested by opponents' rights language. The good mother image, then, despite the important work that it does to challenge both the medical/legal justification for mandatory testing and the reductive public health-individual rights frame, may ultimately reinforce the troubling norm of self-sacrificing maternalism. Through the continual invocation of women's desire to do what is in the best interest of their children, through the erasure of moments of ambivalence or of concern with the self, opponents may simultaneously depoliticize and naturalize mothering, obscuring women's needs and making it difficult to think of women apart from their status as mothers. At the moments when they do not

question women's ability to be good mothers or the societal expectation that women should always do "what's in the interest of the child," opponents run the risk of reducing women to conduits of care, rather than vectors of contagion. And what began as an attempt to contest state power through the representation of women as good mothers, becomes a means of "more deeply articulating [that] identity by forgetting the social norms and regulatory discourses that constitute it" in the first place (Brown 1995, 120).

This occurs when good mothering, as presented in opponents rights arguments, is figured as an instinct that all women have and that it is society's duty to support--through good counseling and the timely provision of information and services. For example, opponents often cite the Harlem Hospital study on voluntary testing to prove that women are voluntarily choosing to be tested for HIV during pregnancy. According to the study, 95% of women receiving prenatal care agree to be tested, thus suggesting that under the proper circumstances and with the proper support, that women will act in ways exemplifying good mothering practices. However, in citing the Harlem Hospital study, opponents of mandatory testing do little to explain why it is that women choose to be tested. That is, we are led to believe pregnant women get tested so that they can receive treatment and prevent perinatal transmission, because they are and want to be good mothers. We are not told that these women choose to be tested because they want health care themselves. We are not told that upon testing these women choose to abort or decide to forgo AZT treatment because they do not want to compromise their own health or because they fear the long term effects of AZT on their child or even that they've decided to risk the 70% chance that they'll have an HIV negative child. We are also not told if and when a woman does what may be in her best interest, though not the child's. Nor do we always know what the "best interest" is or who decides how to determine that interest. The good mother narrative thus seems to present self-sacrificing maternalism as natural, the natural outcome of proper education and information.

Forced to counter the implicit message of mandatory testing that 'the state is a better caretaker than the mother' and to protect HIV positive women's right to reproductive decision-making, opponents of mandatory testing are compelled to argue that women's rights are consistent with her ability to care for her child. This may have, however, some problematic consequences, enabling a less explicit manner of the policing and the surveillance of women's bodies. That is, opponents have long feared that mandatory testing policies are the first step towards mandatory treatment policies and that counseling can easily become directive and coercive. The Harlem Hospital study could very easily become the basis for aggressive, directive counseling programs that direct women to adhere to the societal norm of already defined good mothering. In such a case, it would appear that a rights based argument, intricately tied up with a particular representation of women in their role as good mothers, enables both the contestation and the consolidation of identity categories and cultural norms.

This is not to deny opponents' recognition of the tendency to reduce women to their role as carriers of fetuses and keys to child welfare. Unfortunately, however, the ideals implicit in the "ideology of motherhood" seem to haunt and constrain even the most powerful statements on behalf of HIV positive pregnant women as autonomous decision makers and appropriate subjects of rights.³⁴ No strong statement for women's autonomy and individuation seems to go without a statement of reassurance that, even though women should be seen as people with their own health needs, their health care decisions are still determined by the needs of the infant. This happens in statements like the Coalition for Women's Choice in HIV Testing and Care's "Statement of Principles." Though a group strongly committed to promoting women's reproductive rights and

³⁴According to Marlee Kline (1995), the dominant ideals of motherhood include the expectation that women, as mothers, will sacrifice or subordinate their needs and interests to their children. This expectation is part of the process of individuating motherhood and the practice of mothering. In other words, the "dominant ideology of motherhood" presumes that individual mothers will and should be expected to take full responsibility for their children's well-being and place the well-being of the child before concerns of the self. Individual mothering practices are thus subject to intense scrutiny and individual mothers are often made responsible for any neglect of children.

recognizing women as individuals with needs apart from their children's, the Coalition's literature follows a discussion about empowering women to make their own health care decisions with a quick reminder to policy makers that women will get tested if given the opportunity. To argue that women "who come to understand" the benefits of testing will agree to test is not so far removed from James Curran's 1988 statement presuming that "logical" women will forgo pregnancy when they learn that they are HIV positive. This tendency to presume or imply that women will make a particular decision reinforces expectations about what "good mothers" should do and perpetuates the tendency to see women as simply the bridge to an infant's health care, and may it more difficult to carve out a space for women as (self-interested) individuals, as women who might, can, or should put their own health concerns and needs before their children. For example, the New Jersey Women and AIDS Network's (NJWAN) handbook for pregnant women (Banzhaf 1997a) states that "Every HIV+ woman thinking about pregnancy worries about whether her baby will be HIV-infected" (3). This statement seems to respond to the implicit criticism that HIV positive women do not worry about infection. It is unclear, however, to whom the statement is directed, particularly since the handbook is for pregnant women, not physicians or policy makers.

This retreat to a traditional form of maternal ideology, whereby women are represented as "good" and "fit" mothers are self-sacrificing who do whatever they can to prevent harm to their children, occurs in a Lambda Legal Defense Fund position paper as well as the Coalition's writings (Hanssens 1996). Despite arguing against mandatory testing, Catherine Hanssens, author of the position paper, continually depicts women as the "keys" to infants' health care, arguing extensively that voluntary testing promotes infant health care. Despite an early depiction of women as autonomous adults, Hanssens ends the paper by arguing that voluntary testing "promote[s] a treatment environment which encourages women to take early measures to decrease the chances of transmission, and ensure that mothers are informed and effective caretakers of their children's health"

(9). It is as if opponents cannot risk policymakers thinking that women's health care and reproductive decision-making is or should be, even initially, about women's needs first. Attempts to represent women as something more than simply the "keys" to their child's health care thus seem very difficult to sustain, and, as such, there is always an implicit questioning of women's morality and their decision-making.

Arguing for women's rights by continually identifying women as important bridges to their children's health and reinforcing the notion that women as good mothers is, of course, a logical and even necessary response to attempts to wrest the control of reproductive decision making from a particular group of women. Opponents' rights claims and representations of HIV positive women as good mothers are, in many ways, a radical critique of the historic tendency to position poor and minority women as unfit mothers. However, basing claims for women's rights on assertions or evidence of women's good mothering practices places these women, and the opponents who fight on their behalf, in the precarious position of always having to prove themselves as good mothers, as proper and qualified subjects of rights. Though the articulation of women's rights, when premised on the maternal subject, contests state power and the identification of women as dangerous, threatening, and irresponsible, the good mother image may ultimately undermine attempts to make space for women as (self-interested) individuals, as women who might, can, or should put their own health concerns and needs before their children. Indeed, in much of the testimony against a national mandatory testing proposal in 1995, public health officials had a difficult time sustaining attention to women as individuals in need of health care and better prevention efforts. This was due, in part, to the fact that they were extremely busy countering the representation of women as bad mothers and making the case against mandatory testing. Unfortunately, presenting women as good mothers, while perhaps an accurate reflection of women's actions, reinforces social values which subordinate women's needs to the needs of the infant and naturalizes women's role as mothers. As such the maternal subject of rights does little to

diminish the desire to punish those women who do not do as the "good mother" does. It does little to remind us that these are women at risk too. What we may be seeing in oppositional arguments is a tendency which Cindy Patton (1993) identified in public health and policy makers' discourse as "the tendency to see women as either vaginas or uteruses" (177). This tendency, she argues, enables us "to avoid the issue of how and why women are infected in the first place" and thus makes "women responsible both for protecting men from disease and for avoiding the consequences of transmission to a man's child" (177).

The problem with this tendency to fix women in normative identity categories, critics of discipline suggest, is that it may enable the further regulation and subordination of women. Evidence of this political outcome is suggested by the events in New York State where supporters of mandatory HIV testing have taken up the good mother identity to lend support for their cause. The notion of good mothers has been used by individuals like Nettie Mayersohn and Nat Hentoff, two ardent supporters of mandatory testing, to support coercive state intervention into women's lives. Not only have these supporters of mandatory testing countered the claim for women's privacy rights with claims for infants rights to health care and life, but so too have they appropriated the image of the caring mother. For example Mayersohn and Hentoff argue that it is opponents, not supporters of mandatory testing, who are failing to recognize women as good mothers. The argument that mandatory testing will scare women away from prenatal care, Mayersohn argues, is quite patronizing and implies that poor women of color are incapable of handling bad news. Mayersohn argues that it is her position that best women's good mothering practices. Her argument is that since women, all women, want to be good mothers it is the state's duty to provide them with the information to act on these desires. The "Baby AIDS" bill is about giving women "the information they needed to make vital healthcare decisions." Indeed, Mayersohn argues that underlying the argument for voluntary testing and privacy rights is a conception of poor women as incapable of handling and

responding to bad news about their own and their child's health. Mandatory testing is not, Mayersohn argues, in its motivation or implication, a racist or paternalistic policy. Not only does it not view women as bad mothers, but in fact it respects that all women--women of color, poor women--want to be good mothers.³⁵ Nat Hentoff (1995) provides anecdotal evidence to support Mayersohn's contention, writing that he has "told [opponents] that they have a patronizing attitude toward many black and Latino women in this situation. The stereotype is that these women do not care as much about their children as whites do and, accordingly, would remove them from health care." His findings suggest otherwise.

Although the good mother subject enables opponents to contest the reduction of women to their uteruses, posits a rights bearing subject as something other than competitive and self-interested, and helps to illuminate the underlying and organizing assumptions implicit in arguments for support mandatory testing, the good mother subject may ultimately reinforce the narrow representation of women's role as that of carrier and deliverer of newborn, a representation that they have long been trying to contest. Mandatory testing opposition suggests, then, that while rights arguments cannot be reduced to the adversarial public health-individual rights frame, even with a revised subject of rights, rights claims are still a paradoxical tool for women's political struggles. In their attempt to represent women as subject in relation, subject who are entitled to rights by virtue of their status as maternal beings, opponents of mandatory testing may actually reinforce gender norms and political practices that resubordinate women in their oppression.

I raise this critique of the good mother not because I think it captures all the nuances of opponents' rights language, nor because I think it proves the political bankruptcy of a socially located and socially constituted subject of rights as valuable to

³⁵I'm not arguing that this is not the case. Rather what I'm trying to show is that a representation of women's identity is not, in itself, a necessarily transformative or reactionary thing.

feminist politics of resistance. Indeed, in the next section I discuss the limits of this critique. However, the critique of discipline engaged here reveals important problems with feminist revisions of the subject of rights. As I discussed in Chapter Two, attempts to posit replace a traditional liberal individualistic conception of the rights-bearing subject with a conception that more accurately reflects the experiences and needs of women can be as detrimental to feminist goals as the autonomous individual image. If a particular version of the rights-bearing subject is allowed to function as a monolithic conception of woman as mother, obscuring women's different experiences and feelings regarding motherhood, to "suppress" what Lisa Bower (1992) describes as "the complexity and contradiction surrounding the conception of mother and the meaning of the maternal," we are no better off than we were with the atomistic subject of rights (33-4). And thus it is important to heed Bower's (1991) reminder that "that concepts such as nurture, care, and 'relationship'...not be invoked on the basis of a similarity or equality between all women" (35).

Reading Rights as Political

Both the critique of liberal individualism and the critique of discipline suggest that, in the context of mandatory HIV testing, it might be wise for opponents to forgo or significantly revise their engagement with rights language. Rights, both critiques suggest, are more likely to undermine than advance feminist political goals. Critics of liberal individualism suggest that rights language fails women because it depicts the rights-bearing subject as an atomistic individual and thus makes it easy to exclude certain women from this category. Critics of discipline suggest that rights language fixes women in their identity as victims or good mothers and thus enables women's further regulation. At the heart of both critiques is a suggestion that a particular identity, fixed within the process of rights-claiming, results in political outcomes contrary to what feminists hope to achieve. But even if feminist critics are correct to say that rights language may be responsible for the institution of undesirable policies, such as mandatory newborn testing

in New York state, or regulatory public health practices, such as coercing pregnant women to take AZT, these outcomes need not be taken as evidence of the complete failure of rights language. And even when rights-based opposition produces desired legal outcomes, these moments should not be interpreted as the sum of rights contestatory potential or promise. As Lisa Bower reminds us, it is often the very consolidation and naturalization of identity at the state level that creates the conditions from which new political subjectivities and political practices emerge. And as Michel Foucault warns, political contestation requires much more than a successful challenge to a law or policy; it requires challenging the attitudes, norms, and behaviors, even the culturally accepted forms of relationships, that perpetuate individuals' regulation and subordination. These practices, as I have suggested throughout this project, are part of more expansive understanding of the politics of rights, practices that are often obscured or devalued by critiques of rights language.

A political reading of rights, I argue, best illuminates these political practices. A political reading of rights throws into question the relationship between identity and political outcome posited by rights critiques and acknowledges rights' contestatory potential as well. A political reading of rights revisits the notion of identity implicated in rights language to reveal identity as something that is multiple, unstable and mutable. In other words, a political reading of rights highlights the multiple subjects of rights posited within rights discourse and reads this as evidence of an instability and contestatory potential erased by the critiques of liberal individualism and critiques of discipline.³⁶ In addition, a political reading of rights looks beyond the role of rights in the state realm to examine rights as they are deployed in the everyday interactions of individuals to challenge social norms, to reconstitute identity, and to create new relationships. Rights language, when used to address other citizens, functions to contest attitudes and

³⁶I am indebted to Kirstie McClure's argument about the multiplicity of the rights-bearing subject. See my discussion of her work in Chapter Four.

behaviors, and offers a language through which to reconceive identity and relationships. Yet central to a political reading of rights is a recognition that the outcome of rights politics is never completely predictable or guaranteed. All that can be guaranteed, as Foucault argues, is that the outcome of rights-based politics will be paradoxical, enabling and constraining political change. In this section, I use a political reading of rights as a lens through which to analyze rights language in the context of mandatory HIV testing debates. As we will see, the rights-based opposition to mandatory testing entails precisely the style of rights politics that such an approach endorses.³⁷

As I have suggested throughout this chapter, feminist opponents of mandatory HIV testing deploy several different identity categories in their depictions of women as rights-bearing citizens—the autonomous individual, the victim, and the good mother. Despite critiques that suggest the consolidation and codification of these categories, I have suggested that each category corresponds to a different understanding of the right to privacy and has been used to contest different aspects of state power and various cultural definitions of womanhood. The fact of these multiple subjects of rights, I would argue, is evidence that rights language is a language through which identities are contested and reconstituted. In this process of negotiating identity categories, through claims made to the state as well as prior to a legal challenge or outside the realm of the state, identity is not fixed, but rather unsettled. This multiplicity, as Kirstie McClure (1995) suggests, enables rights language to be contestatory rather than simply disciplining or atomizing.

But opponents of mandatory HIV testing recognize the instability and mutability of identity in another way as well. They deploy a fourth image of the female rights-bearing subject in their rights claims—the conflicted adult. This understanding of the subject captures the very unsettled nature of individual identity. The conflicted adult is a woman who is guided less by uncomplicated and transparent feelings of maternal

³⁷While I propose the idea of a political reading of rights a lens of analysis, conceiving of rights as political also entails an alternative understanding of the style or practice of politics.

responsibility than she is torn between complicated and less than satisfying options. The conflicted adult is struggling to make sense of what, in the realm of complicated and difficult choices, would make the most sense for both herself and her child at a particular time. She is the woman who may not be doing what would be considered to be in the "best" interest of the child, such as refusing to be tested or deciding to forgo the AZT regimen. The conflicted adult may express complicated and conflicted feelings about her pregnancy and her role as a mother in an attempt to see herself as both a distinct individual and a subject in relation. She may struggle with what society sees as a "selfish" decision, but yet decide that her desire for a child is more important than the social stigma associated with an HIV positive women giving birth (Denison 1995). Upon learning that AZT is substandard care for herself, she may decide that it is better to expose her child to several highly toxic drugs rather than jeopardize her own health by ending a combination drug protocol.³⁸ She may decide that it is too risky for her to be tested for she fears that the results will not be kept confidential and may eventually lead to job or housing discrimination or abuse at home. Whatever her decisions may be, they are neither predetermined nor self-evident.

According to Catherine Hanssens (1996), of the Lambda Legal Defense Fund, we must treat women "like other adults in the level of autonomy and privacy afforded them

³⁸In response to those who questioned women's decision to refuse the AZT regimen and to challenge those who spoke of mandating treatment, opponents raised a number of important questions about the dangers of AZT and women's attitudes towards the drug. For example, opponents challenged the findings of AIDS Clinical Trial 076 for providing no information on the long term effects of AZT on the infant. They also criticized the Public Health Service's willingness to recommend AZT treatment for women when research showed that monotherapy was substandard care for infected adults. Opponents also explained women's decisions by referring to studies and anecdotal evidence which revealed that women had negative attitudes towards AZT and feared that the drug would do more harm than good. For example, Rebecca Denison (1995), in an article chronicling her decision to become pregnant, expressed reservations and explained her decision to delay AZT treatment until her 33rd week of pregnancy saying that in the context of warnings to pregnant women not to smoke, drink, or even eat chocolate, taking AZT, a highly toxic chemotherapy, seemed like a dangerous and ludicrous thing to do."

Opponents' also explain the failure of voluntary testing or AZT acceptance by attributing it to misinformation or lack of information. At this point, the good mother who would be tested or take AZT if she'd known meets the Victim who's behavior is, in many ways, determined by social factors. As Elizabeth Coooper (1996) argues, "when HIV-related counseling is offered universally in pre-natal and delivery settings, and testing is voluntary, confidential, and linked to available care and services, pregnant women and parturient women overwhelmingly consent to be tested" (22).

in making" decisions regarding HIV testing and treatment. But to treat women like other adults means allowing them to decide complicated issues in ways we would not necessarily expect or even always accept. Thus whereas the good mother image is perhaps most prevalent in opponents' rights arguments, the conflicted adult is perhaps the most challenging. What distinguishes the conflicted adult from the good mother is her expression of conflict, her struggle with the responsibilities of motherhood and her confusion about her own interests and needs. As such, the conflicted adult poses a greater challenge to dominant norms of motherhood, which often presume that the very definition of a fit mother or a good mother is the absence of such conflicts. To acknowledge her right to privacy is to treat her as an distinct individual apart from her role as mother and source of HIV infection, yet simultaneously to place her within a social context that has great impact on who she is and what she values.

As both Bower and Brown argue, it is not easy, in fact it may be impossible to get the state to recognize an unsettled identity. Brown reminds us that despite feminists' best efforts to articulate identity as complex and unstable, the law tends to reduce this complexity and diversity, replacing it with a monolithic identity category (2000b). This is precisely what happened in the *Ulane* case described by Bower. In this case, attempts to get the state to recognize the fundamentally unsettled identity of a transsexual as a rights-bearing subject met with disappointing results: the judge hearing the case decided to collapse the complexity and ambiguity of Karen Ulane's life into the monolithic and stable identity category of male (Bower 1994, 1997).³⁹ However, as Bower suggests, this tendency need not lead to utter despair among marginalized groups seeking political change through the language of rights. A political reading of rights, as suggested in Bower's work and throughout this project, suggests that there is much more to rights

³⁹ See my discussion of the case in Chapter One.

language than getting the state to recognize unsettled identities, a project that Arendt warns we have no control over anyway.

Whether or not the state recognizes unstable and mutable identities as consistent with rights-bearing subjectivity, such categories have considerable value outside the realm of the state. In the context of HIV testing debates, unsettled categories of identity are continually invoked in the publications and press releases of organizations active on behalf of HIV positive women. These categories of used, as well, as members of these organizations engage in outreach and education to local communities. It is in these realms that identities are continually renegotiated as cultural norms and attitudes are challenged and new relationships are formed.

The codification of identity in the law, as Bower points out, may not be a purely negative political outcome either. In fact, as she suggests, the courts can never control their own legal signifiers, allowing these categories to become the basis upon which new political subjectivities and political practices are created. As I suggested earlier, organizations like WORLD and NJWAN were created in response to the AIDS epidemic in women. A considerable amount of their energy has gone into opposing mandatory testing policies. In the process, they have created a space for the political engagement of HIV positive women and the possibility of their political subjectivity. Most HIV positive women have been disempowered politically in a variety of ways. In addition to their illness, these women are often poor women of color who have been traditionally ignored, coerced, and / or penalized by the medical and political establishments. Through newsletters, pamphlets, hotlines, and support groups, AIDS activist organizations bring these women together and offer them an opportunity to engage politically, to act in concert through speech and action, as Arendt would say. Through the possibility of mandatory HIV testing and the rights-based opposition to it, women who prior to the epidemic never conceived of themselves as rights-bearing subjects and public actors come to have a political identity, an identity as part of a community engaged in civic

practices. It is the demonization of their actions and lives, it is the threat of state regulation and their exclusion from rights-bearing subjectivity, that brings these women into the political arena and offers them the opportunity to see themselves as participants in the political process. NJWAN and WOLRD publications, as I described earlier, address themselves to HIV positive women and use the language of rights to help create that political subjectivity. As in the case of queer activists responding to the *Hardwick* decision, it is the state sanctioned conception of rights-bearing subjectivity that not only excludes HIV positive women but, to borrow Lisa Bower's (1994) formulation, helps to "create the rhetorical conditions for [women] to resist this representation of their identity and to turn to alternative forms of social activism" (1016).

In making rights claims on behalf of HIV positive women, opponents not only help to reconstitute their identity and provide them with the space for political action, but implicitly argue for their right to create new relationships. They thus engage in the kind of relational rights politics Foucault suggests. Although opponents use the language of privacy rights as a way to keep the state out of the doctor-patient relationship, they also challenge and reimagine the nature of that relationship. As opponents suggest, the doctor-patient relationship must be respected not as it is, for that would most likely perpetuate the coercive and punitive treatment of women, but rather as it can and should be. Whether it is in a handbook directed at women or medical professionals, in a newsletter addressed to HIV positive women, or in a press release detailing the opposition to mandatory HIV testing, opponents depict women, indeed encourage women, to take charge of the doctor-patient relationship, to see themselves as worthy of attention, care, and information, to become educated and to educate the doctors in turn, if need be.

In all these instances, rights language is a fundamentally contested and contingent language that enables certain kinds of political change while foreclosing others. Rights discourse, as McClure (1992, 1995) and Foucault (1982, 1984) suggest, can be a language through which to contest cultural codes, norms, and state recognized conceptions of the

rights-bearing subjectivity. In analyzing mandatory testing debates through the lens of a political reading of rights, then, we see that opponents of mandatory HIV testing are, at times, able to hold off the implementation of a regulatory state health policy, but perhaps more importantly, they are able to bring about changes in the daily practices and behaviors of individuals. Through rights language, and the categories of identity contested therein, opponents of mandatory testing have been able to bring about changes in research agendas, the Centers for Disease Control's definition of AIDS, public opinion, clinical practices, and the day-to-day treatment of HIV positive women. They may not have been able to prevent the implementation of mandatory newborn testing in New York State and may have contributed to the perpetuation of a constraining ideology of motherhood. But these political outcomes by no means tell the whole story of the political potential of rights in the context of HIV testing debates.

Conclusion

The paradoxical nature of these outcomes may, of course, be unsettling and frustrating. To the lawyers at the HIV Law Project in New York and the plaintiffs in the case against the state, it may not be reassuring that their loss in the state realm may have been accompanied by greater public acceptance of HIV positive women. Similar frustrations are evident in feminists' continued attempts to articulate a jurisprudence or a conception of rights-bearing subject that can guarantee particular political outcomes. Anxious and frustrated by their inability to bring about desired political outcomes, feminists seek to articulate a conception of identity that will be irrefutable and irresistible, that will give the state no choice but to recognize it.

But if the lessons of Arendt and Mill are to be heeded, giving in to this anxiety comes at a high price. For Mill, discomfort with the contingency of identity and political outcomes led him to make claims for a space of absolute non-interference for some, something he knew was impossible, while simultaneously urging state interventions in

the lives of others. He rejects all that he recognizes about socially constituted characters, partial perspectives, and the value of engaging in political struggle and debate with others as he searches for a clear determination of the proper role of the state and the boundaries of individual freedom. Perhaps even more clear is Arendt's warning. In giving in to our desire for certainty in political outcomes and at the level of identity, we actually risk giving up political power. In searching for a form a language of politics that will generate particular political outcomes, we actually undermine the possibility of those outcomes. In expecting rights claims to function like self-evident truth claims, we forget that rights are meaningful only in the context of political communities and through engagement and contestation. Believing in the irresistibility of rights claims, or searching for the formulation of that irrefutable claim leads, she suggests, to political apathy, disappointment, and ultimately a lack of rights. What both scholars suggest, Arendt explicitly and Mill implicitly, is that we recognize and embrace the partiality and contingency of rights claims; that we acknowledge and embrace the fact that rights claims are a part of ongoing struggles over identities, attitudes, relationships, and, of course, laws.⁴⁰

What, then, are the implications of a political reading of rights for feminist politics? As I have suggested throughout this project, feminism's engagement with rights language has a more complex and contingent history than rights critics acknowledge. Feminist politics of rights has long been about much more than simply trying to keep the state and society out of the lives of citizens. It has often entailed reliance on multiple conceptions of the rights-bearing subject and resulted in paradoxical political outcomes. It has often been the case that rights language has had a power well beyond the realm of the state as well as it has been used to challenge culturally accepted identity categories, social norms and attitudes. What a political reading of rights points to, then, is less a new

⁴⁰ This is, of course, the lesson I pull out of Foucault as well.

way of doing politics and much more a new attitude toward the kind of politics we are already doing. Certainly, a political reading of rights encourages oppositional political movements to consider the use of rights language in non-state locations and as a way to challenge and reconceive identity and relationships. However, the importance of this lens of analysis lies in what it teaches us about our expectations of and our relationship to rights.

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Curriculum Vita

Karen Zivi

- 1991 University of Virginia (1987-1991), Political and Social Thought, B.A.
- 1997 Rutgers University (1992-2001), Political Science, M.A.
- 2001 Rutgers University (1992-2001), Political Science, Ph.D.
- 1992 Marion Johnson Fellow (1992-1994), Department of Political Science, Rutgers University.
- 1995 Teaching Assistant, Department of Political Science, Rutgers University.
- 1996 Teaching Assistant, English Department, Rutgers University.
- 1998 Dissertation Fellow, Social Science Research Council.
- 1999 Dissertation Fellow, Department of Political Science, Rutgers University.
- 2000 Lecturer, Social Studies Program, Harvard University.
- 1997 "Examining Pedagogy in the Service-Learning Classroom: Reflections on Integrating Service into the Curriculum," Experiencing Citizenship: Concepts and Models for Service Learning in Political Science, William Hudson and Richard Battistoni, eds., Washington DC: American Association of Higher Education.
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