

# Critical Criminology as a Guardian of Human Rights: An Action-Based Model

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**Abstract** Too often, human rights are treated as an unconditional good and thus beyond politics. Yet human rights have always existed within an identified political context. Today, this context is neoliberalism. However, while criminologists often allude to various shortcomings of international human rights and humanitarian law, little consideration has been given to the neoliberal undercurrents of contemporary human rights discourse and practice. This article argues that neoliberalism and the human rights movement exist in a symbiotic, co-constitutive relationship. Against the neoliberal hold on human rights, the article points to an alternative political foundation, Action-Based Human Rights. The action-based model aims to be a platform for resistance and to root human rights in action and opportunities for agency and self-representation. The article suggests a preliminary path to how criminologists can begin to advance this alternative.

## Introduction

Human rights have been the dominant discourse in the fields of international ethics and law for the past few decades. Today, human rights are widely considered the moral foundation of world affairs (Douzinas 2003: 161), and they hold near-hegemonic status as a moral discourse of individual human dignity (De Sousa 2015), embraced even by those of a conservative political bent (Perugini and Gordon 2015: 53). Within the field of criminology, prominent voices have applauded the emergence of human rights violations as a matter of criminological interest (Savelsberg 2010: 1).<sup>1</sup> Indeed, most criminologists who study state crimes have adopted international human rights and humanitarian law as their standard

<sup>1</sup> Cohen has noted that during the 1980s he gradually moved “from ‘doing’ criminology to ‘doing’ human rights” (1993: 97). See also Garland’s remark that “an engagement with human rights is essential for twenty first century criminology that aspires to depth and relevance” (Murphy and Whitty 2013 [abstract]).

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(Rothe 2009: 6; Murphy and Whitty 2013: 568; Lynch et al. 2016: 9). As such, they have answered, at least to some extent, the call of Schwendinger and Schwendinger to base the definition of crime on human rights (1970).

Human rights are often treated as an unconditional good, and thus as beyond politics. Yet contrary to this conception, human rights have always been defined within an identified political context, and as such reflect a given power structure. Indeed, the connection between human rights and politics dates back to the original conception of the Rights of Man, which were “anchored [to] the political flowering of capitalism and the self-understanding of bourgeois society and its individualism” (Harvey 2009: 12). Today, human rights discourse and practice are rooted in a neoliberal political context, and the dominant understanding, as this article will show, is that human rights serve the neoliberal order.

Given the growing commitment of criminology to human rights, the first and more modest objective of this article is to familiarize the criminology community with the body of work that links human rights and neoliberalism. This corpus of work has been produced largely outside the field of criminology, and more specifically has been ignored both by scholarship about state crimes and by the progressive criminological discourse about the definition of crime. To this end, the article reviews the literature on the juxtaposition of neoliberalism and human rights discourse and practice. In particular, it follows the debate generated in the wake of Moyn’s book *The Last Utopia* (2010) and especially Susan Marks’s critical reading of that work. Marks (2011a) concurs with Moyn’s revisionist history of human rights, which both see as coalescing into a dominant international movement relatively recently, in the 1970s. Yet she goes further, pointing to its shared history with the consolidation of neoliberalism into a hegemonic social regime, which took place at the same historical moment.

The second and more ambitious objective of this article is to call for an alternative conceptualization of human rights. This alternative builds on republican political thought to root human rights in action and opportunities for agency and self-representation. Further, the article asks how criminology can begin to integrate and support this alternative conceptualization. More precisely, the article seeks to reflect on the role of critical criminology in identifying abuses of human rights in a way that expresses the claims of those who struggle to make their voices heard, but who are not represented within the dominant tradition of international human rights and humanitarian law. In a sense, by proposing this alternative I aim to complement existing work on resistance within criminology.<sup>2</sup>

To clarify my meaning, the understanding that human rights are intimately connected to politics should not lead us to seek an alternative, “pure” human rights that is disconnected from politics—something that is inherently impossible. Likewise, the fact that human rights are necessarily tied to a political context should not make us abandon them. Rather, our challenge is to offer an alternative to the neoliberal hold on human rights, and to anchor them in a different emancipatory political foundation. More precisely, our task is to break away from viewing human rights through a neoliberal filter, which focuses on individual rights and their protection by bureaucratic institutions while failing to challenge the deep latent destructive effects of neoliberalization. Against the neoliberal hold on human rights, this article advocates for an alternative political foundation: *Action-Based Human Rights*. The ambition of action-based human rights is to offer a political horizon that supports forms of collective political action based on the active participation of those seeking

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<sup>2</sup> For a review of these studies, see Ross (2015a: 495).

redress or refuge. Moreover, it aims to expand human rights struggles by seeking more than short-term relief for the victims of human rights violations, and by paving the way for them to play a greater role, via political participation, in shaping their future.

In light of this alternative conceptualization of human rights, this article seeks to rethink the relationship and commitment of criminology to human rights. That is, how can critical criminology support and advance the action-based human rights model? How can we change the narrow neoliberal yardstick by which we identify human rights violations and the types of practices it shapes? As I will argue, the alternative action-based model forces us to approach human rights in a new way, one informed by the real-life struggles of those who seek social justice. In particular, it aims to extend the scope of state crimes by adopting a bottom-up model that can guide criminologists in configuring their subject matter and in conceptualizing types of harm.

The article proceeds as follows. It begins with a brief review of the literature on state crimes and the role of human rights as a standard for crime. It proceeds to an overview of neoliberalism and its co-existence with progressive social movements. This is followed by a discussion of the co-constitutive relationship between neoliberalism and human rights, which I argue has helped both to obtain their dominant status. In the last part of the article I outline my alternative political context, the action-based model. The article concludes with a suggested path by which criminologists can begin to advance this alternative.

## State Crimes and International Human Rights and Humanitarian Law

State crimes and crimes of the powerful have been objects of criminological inquiry since the late 1980s. Yet to date this field of study—whose subject matter includes, potentially, the worst atrocities known to mankind—remains on the periphery of mainstream criminology, which focuses more on “conventional” offenses committed by and inflicted on individuals, mainly at the street level. Generally speaking, research into state crime has documented and explained injuries that are a result of state actions, focusing mostly on case studies (Ross 2017: 29) and the etiological factors that explain such occurrences (see, for example, Kramer and Michalowski 1990; Barak 1990; Tunnell 1993; Kauzlarich 1995; Kauzlarich et al. 1998; Ross 1995, 2000a, b, 2002, 2012, 2015b; Friedrichs 1996, 1998; Kauzlarich and Kramer 1998; Green and Ward 2004; Kauzlarich et al. 2003; Kauzlarich and Friedrichs 2003; Rothe and Friedrichs 2006, 2015; Rothe and Mullins 2011; Rothe and Kauzlarich 2014,<sup>3</sup> 2016<sup>4</sup>).

The first task that students of state crime had to complete was to define their subject. This meant, essentially, extending the definition of crime beyond its traditional meaning of actions that transgress the legal framework of the state. At the heart of this endeavor lay an ambition both to broaden our understanding of crime to include forms of social harm that states’ criminal codes do not address, and, simultaneously, to incorporate the perspective of the victim. In practice, this meant establishing a new framework able to incorporate harmful activities by the state (or by powerful agents within the state), whether because the state violates its own rules, or because the acts it commits are not addressed by the laws in the books (Rothe and Friedrichs 2006: 150; Barak 1991: x).

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<sup>3</sup> The book focuses of victims and victimology of state crime.

<sup>4</sup> The book provides a comprehensive review of state crime literature and in addition addresses the connection between neoliberalism and state crimes: 3–17; 65–74.

The quest for a definition of state crimes has yielded various standards. One of these definitional standards is *social harm* (see, for example, Kramer 1985; Michalowski 1985; Kramer and Michalowski 1990; Hil and Robertson 2003; Angew 2011; Greenfield and Paoli 2013; Presser 2013).<sup>5</sup> As a basis for classification, social harm embraces a universal humanistic perspective, one that takes into account the viewpoint of victims and allows addressing injurious actions regardless of whether or not they are specified in a state's criminal code. Yet this definition failed to overcome the challenge of anchoring the standard of crime in some normative foundation. In a sense, in adopting the standard of social harm as a definition of state crime, researchers merely kicked the proverbial can down the proverbial road. Now, they had to determine who would have the right to decide what constitutes social harm, and on what basis.

In this respect, adopting international human rights and humanitarian law provides a solution to the normative challenge. International human rights and humanitarian law serve as an established, externally defined standard, which indeed has been embraced by most students of state crime (Kauzlarich et al. 1998: 51<sup>6</sup>; Rothe and Friedrichs 2006: 156; Rothe 2009; Savelsberg 2010; Rothe and Mullins 2011: 29–30).<sup>7</sup> Accordingly, state crime is defined as any act carried out by an agent or organization acting for or on behalf of the state and violating the law of the state or international law. A more recent definition holds that state crimes are “behaviours committed by and against states and their organizational entities that harm states or their entities and/or impact the rights of citizens of states as recognized by the United Nations Declaration of Human Rights” (Lynch et al. 2016: 9; 144).

Yet despite their great appeal as a well-established standard, many students of state crimes have pointed to various shortcomings of international human rights and humanitarian law, particularly their limited jurisdictional scope, lack of punitive power, and overall ineffectiveness (see, inter alia, Quinney 1979; Chambliss and Zatz 1993; Mullins et al. 2004; Bassiouni 2011<sup>8</sup>). Under their current dominant structure, international law and its tribunals operate on a top-down model, which represents the interests of strong players, most notably strong states. As a result, many victims of state crimes find themselves excluded from these forms of redress (Rothe and Kauzlarich 2014: 239). Indeed, international law regards each country as sovereign. Historically, the basic principles of international law were based on consent and mutual agreements between nation states, and international law relies on domestic-national legal systems to control, indict, and adjudicate themselves (Mullins et al. 2004: 287). This structure gives states the power to deflect, ignore, defuse, and control information.<sup>9</sup> As such, it allows and even motivates states to bypass justice and punishment.

<sup>5</sup> Some scholars have proposed a new field of study dedicated to social harm, *zemiology*, derived from the Greek word *zemia* (harm or damage).

<sup>6</sup> Kauzlarich et al. suggest that international law should serve as the epistemological framework for the study of state crimes (1998: 51).

<sup>7</sup> For a good review of human rights in criminology, see Murphy and Whitty (2013).

<sup>8</sup> As Bassiouni writes, international human rights law and humanitarian law, in their current form, are incomplete, meaning that they do not guarantee all necessary protections for human rights (2011: 1).

<sup>9</sup> Public apathy also plays a role in this process. See Cohen (1993, 2001).

## Neoliberalism: A Very Short Overview

Neoliberalism is not a unified doctrine (Davies 2014: 3). Rather, it is an umbrella concept delineating a form of social regime that took root in the West beginning in the 1970s, and that has since spread to other countries around the world. The concept relates to the most significant structural transformation since the Industrial Revolution, what William Davies felicitously calls “the pursuit of the disenchantment of politics by economics” (ibid: 4). Neoliberalism is often defined by market supremacy—a rule by market logic that governs increasingly greater spheres of life (Konczal 2017). The advent of neoliberalism entailed deep modifications in the dynamics between capital, the state, and labor, giving preference to new modes of political regulation (often and mistakenly titled deregulation), deeper divisions of labor, geographical mobility, and cultural flexibility. This social regime is characterized by a diminished belief in the collective good and its replacement by a process of cultural, economic, and political privatization, where the state relinquishes many previously held social responsibilities.

The dominance of neoliberalism is reflected in the epistemological and ontological conditions by which contemporary social institutions and movements operate, including the human rights movement. The success of neoliberalism was based on its ability to present its logic, market supremacy, as inevitable, and thereby to give new meaning to the way we understand social responsibility and social pathologies. That is, the distinctive neoliberal belief that all conduct is economic conduct (Brown 2015: 10), and that any enterprise should be judged in terms of its profitability (ibid: 28), means that even policies such as public reinvestment in education, or strong bank regulation, could coexist with the economization of political life. For this reason, NGOs, nonprofits, schools, neighborhood organizations, and even social movements (including those for human rights) that understand themselves as opposing neoliberal economic policies may nonetheless be organized by a neoliberal rationality (ibid: 201–202). This seeming contradiction is enabled by a form of *progressive neoliberalism* (Fraser 2017), a combination of an expropriative, plutocratic economic program with a liberal-meritocratic politics of recognition. The logic of progressive neoliberalism generates an alliance between a strong anti-distributive mode of neoliberalism (in terms of resource distribution) and liberal currents of social movements (e.g., struggles against racism, or for multiculturalism, environmentalism, or LGBTQ rights) (ibid). In this respect, for example, Nancy Fraser argues that the neoliberal social regime was able to absorb the second wave of the feminist struggle and to recruit women’s efforts to break the glass ceiling in order to deepen capital accumulation (2009; Rothe and Collins 2017: 612). In a recent article, Rothe and Collins (2017) argued that in our era of the hyper-neoliberal capitalistic state, forms of resistance (antifascism demonstrations, the Black Lives Matter protests, women’s marches, pro-immigration protests such as the Day Without Immigrants, etc.) are consumed by the commodification of resistance and thus do not challenge the status quo. At the end of the day, they argue, they only serve to perpetuate the system (ibid).

One of the constitutive elements of the neoliberal order is that this social regime puts the individual, seen as either a consumer or an entrepreneur, at the forefront. Individual freedom matters more than the common good. Conceptually this paradigm is based on liberal thought, which at its core is founded on the ideology of possessive individual autonomy (De Sousa 2015: xiv). In this respect, Boaventura De Sousa Santos, following Ernst Bloch, reminds us that the superiority of the concept of law and rights is tightly connected to bourgeois individualism and, as such, to capitalism (ibid: 1–2). The centrality of individual

freedom and personal liberty has intensified under neoliberalism. At the same time, individualization also means individual responsibility (Harvey 2007: 93; Wacquant 2008: 9). In general, neoliberal society gives preference to individual or “biographical” solutions to social problems, such as self-reliance and self-improvement, instead of collective-good solutions. Hester Eisenstein, in this respect, joins Fraser in arguing that global elites have used feminist ideas to seduce women into rendering up their labor power by, in particular, emphasizing personal achievement and gain (2010). Boltanski and Chiapello (2005), similarly, argue that the neoliberal workplace responded to the personal alienation built into the old industrial mode of production by introducing workplace formulations that support individual creativity while maintaining a structural foundation of inequality and exploitation.

Neoliberal modes of governance also transform the democratic promise of shared rule into the promise of enterprise and portfolio management. In practice, this means that in place of citizens actively sharing and contesting power, the neoliberal order emphasizes, at best, consensus achieved through stakeholder consultation, focus groups, best practices, and teamwork (Brown 2015: 207–208). Put simply, neoliberalism, in this sense, can be depicted as an assault on human agency in the realm of political action.

With respect to social pathologies, neoliberalism, as rule by market logic, has shaped a way of understanding and dealing with social phenomena that puts a premium on superficial manifestations while ignoring deep structural pathologies. Bauman (2005) and, in different capacities, others such as Jameson (1991),<sup>10</sup> have used the concept of the “aesthetic turn” to conceptualize this development. The concept of the “aesthetic turn” represents a deep transition in the way social problems and political actions are understood, whereby the neoliberal regime engages with the aesthetic aspects of social phenomena, rather than their root causes (Mehezay 2018). It should be noted that the analytical use of aesthetics by Bauman and other scholars is not confined to the nature of art, beauty, taste, etc., but relates to packed configurations of meanings that exist even within a political context (ibid: 2). The term is conceptually similar to Fraser’s (1995) *affirmation strategies*, by which she means actions that offer only superficial solutions to social problems while failing to disrupt the conditions which give rise to them. That is, according to Fraser, neoliberalism focuses attention on superficial aspects of social life, leading to policies that affirm, rather than challenging, social conditions. Progressive neoliberalism (Fraser 2017) is the exemplar of such a social regime, in which struggles for recognition centered around the manifest symptoms of social pathologies are the only available strategies for social remedy. In this way, forms of resistance only affirm the status quo. This dynamic, I argue, has had a dominating effect in shaping the role of human rights organizations and has shaped policy toward human rights victims since the 1970s.

## The Co-constitution of Neoliberalism and Human Rights

Human rights today enjoy enormous esteem, particularly in the West. This, of course, was not always so, and their current standing does not reflect their contested past. It was only from the 1970s that human rights began to win their public endorsement and eventually became dominant. At the same historical moment, in the 1970s, neoliberalism made its appearance and began to develop into a hegemonic social regime. I argue here that this

<sup>10</sup> Jameson, in his analysis of the cultural logic of late capitalism (what he sees as the essence of postmodernism), asserts that this era is ruled by the superficial, the image and the symptom (1991: 9).

correlation is not mere coincidence. Rather, human rights emerged under the umbrella of progressive neoliberalism. Even more, the two exist within a co-constitutive dynamic, a type of symbiotic relationship in which each contributes to the successful continuation of the other.

There are three main approaches to the relationship between human rights and neoliberalism.<sup>11</sup> The first is that human rights and neoliberalism are two different paradigms and that human rights can still be a platform for resistance against neoliberalism. The second is that human rights are neither neoliberal nor anti-neoliberal, but a powerless companion to neoliberalism. The third is that human rights discourse and practice have been used as a tool to advance the establishment and dominance of neoliberalism. The co-constitutive argument stems from the latter, but takes it one step further. It maintains not only that human rights have been used to support the neoliberal regime, but that the opposite is also true: namely, that working under the neoliberal agenda has helped the human rights movement to win esteem. In this respect, Zachary (2017) argues that the co-constitution between human rights and neoliberalism is based on shared accounts of subjectivity: radical utilitarianism and the independence of the governed (Zachary 2017: 168). Put simply, he attributes their mutual relationship to a shared embrace of human development, in the sense of investment in training, skills, and education (building on human capital theory) (ibid: 165).<sup>12</sup> This means that the logic of rights goes hand in hand with the development approach (ibid: 175), while development in turn is framed as a human right (ibid: 178).

I share Zachary's belief that in certain contexts, neoliberal rationality and human rights consolidate in a way that benefits and strengthens both. In what comes next I will review their convergence and how each has helped the other solidify its status over the past few decades. In particular, I will highlight how human rights advocacy has not only failed to address the harm caused by the structural social ills and economic inequality that neoliberalism has produced, but, in some way, has contributed to the neoliberal project by curtaining and shifting our vision from these social ills. Having argued that, in the section that follows I will offer a way in which human rights could still be a platform for resistance to neoliberalism.

## The Structural Forces at Play

Rights are never isolated from a structure that supports them. In the United State, for example, in the decades following War World II, the *localization* of production, in which capital and labor shared much of the same physical space, led to a regime that provided social rights as a safety net against the harsh realities of markets. In return, this social regime demanded workers' cooperation as a reliable labor force. To be sure, this collective effort to address the root pathologies of capitalism and social inequality was limited and was not offered to everyone; for the most part, racial minorities did not enjoy the same protections and rights. All told, the structure of capital accumulation in this historical moment of "heavy capitalism" (Bauman 2000), in which factories, with their heavy machinery, were a feature of the developed world and production was localized, produced mutual dependency between social actors: labor, capital and the state. The state, in this context, functioned as

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<sup>11</sup> For a good review see Zachary (2017): 164.

<sup>12</sup> This argument builds on human capital theory.



a mediator between capital and labor. The state disciplined capital, and supported labor by granting social rights.

When crisis beset this mode of capital accumulation, this social compact collapsed. Structurally, this moment was marked by growing dominance of the financial sector and the information economy. Through new technologies, new financial products were developed for “making capital out of capital”. One of the defining features of this shift in terms of industrial production revolved around what Saskia (2006), Giddens (1990) and others have called *deterritorialization*, or globalization. Deterritorialization meant that capital no longer shared much of the same physical (and therefore political) space with labor, and thus capital did not need, as before, to make concessions to labor. The result was a disjuncture between social processes and social agents which had previously been entwined, combined with a weakening of the state’s ability to discipline capital. As capital became more dominant and the previously held social compact disintegrated, the state withdrew from its social responsibilities.

Moyn, in his acclaimed book *The Last Utopia: Human Rights in History* (2010), offers a revisionist history of human rights, in which he argues that human rights have, in fact, a very short history. It was Moyn who put forth the idea that the human rights movement emerged only in the 1970s, seemingly from nowhere (2010: 3). It was only at that historical moment that social movements first adopted human rights as a slogan and organizing principle (ibid: 121). This assessment is shared by Charles Beitz, who argues that the idea of human dignity was absent from the way human rights were understood even after World War II (2013: 268; 270).

In dating the birth of modern human rights to the 1970s, Moyn places the origins of the contemporary human rights movement at the very moment of the rise and establishment of neoliberalism. Thus, the point of departure for human rights is the moment in which even strong capitalist states dramatically abandoned their commitment to collectively combat social pathologies. Moreover, human rights struggles start from a condition of deterritorialization. It is almost a given that any sovereign power which could respond to harsh realities would be geographically and politically detached from those who need support.

In addition, the deterritorialization that has broken down the social compact in strong and wealthy states, most notably in the United States, has resulted in a shift from localized social rights, as collective-good solutions, to individual “biographical” solutions, often in the form of self-reliance and self-improvement. More important, in the context of this article, is that part of the effect of deterritorialization has been a diversion from social rights, addressing root causes of social pathology, to embracing universal human rights discourse as a form of social remedy. This transition is the foundational background to the co-constitution between neoliberalism and human rights. All told, these structural forces shape the way human rights struggles currently operate and how they are ideologically understood.

## Shared Ideological Foundations

Moyn, in his book, did not initially make the connection between human rights and neoliberalism, yet he acknowledged the link later, in response to his critics (Moyn 2014).<sup>13</sup> As he wrote: “The human rights revolution and the victory of market fundamentalism have been simultaneous” (ibid: 147). He even points out that as “globalizing neoliberalism and

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<sup>13</sup> For a good review see Alston (2013).



international human rights emerged at the same moment and developed in parallel, there are undoubtedly connections to be found” (ibid: 149). He then quotes Ernst-Ulrich Petersmann, who argues that there is little daylight between economic liberalization and the promotion of international human rights (ibid: 148). While he remains somewhat skeptical about the existence of a deep connection between the two, he admits that neoliberalism and human rights share key ideological building blocks and, most notably, a common institutional foe, developmentalist statism. All in all, he maintains that the shared parallels are worthy of further examination (ibid: 156–157).

The first key ideological building block shared between human rights and neoliberalism is the non-political creed that informs both. For neoliberalism, as noted above, this non-political creed stems from a firm belief in market supremacy and, to quote Davies again, the disenchantment of politics by economics. For human rights, it is based on the notion that human existence is an unconditional good; that is, human rights have their own internal validity and are not based on any external authority. The second shared ideological foundation is individualism and individual responsibility. The neoliberal subject is the individual consumer or the individual entrepreneur. At the same time, today, at the level of discourse and public sentiment, the task of international law is to protect individual human rights (Moyn 2010: 176). The International Criminal Court’s prosecutorial branch, for example, focuses on individual criminal actors (see, for example, also Mullins et al. 2004: 300; Molina 1995). That is, the International Criminal Court targets individuals alleged to bear responsibility for state crimes, as opposed to considering the liability and accountability of state organizations or institutions.

Ignoring the structural forces described above and their shared ideological foundations, one could argue that the corresponding emergence of neoliberalism and human rights presents a paradox: the very moment of the consolidation of human rights was also a time of a major decline in social and economic rights. Indeed, as the record thus far indicates, the establishment of human rights as a hegemonic movement has provided little, if any, protection against the social outcomes of capitalism in late modernity.<sup>14</sup> Human rights have proved rather indifferent to the rising social pathologies of neoliberalism, most notably inequality, lack of opportunities, and social exclusion.

But it is precisely the two movements’ shared ideological foundations, and, more so, the impact of neoliberal epistemological dominance, that explain this seemingly paradox. This dichotomy makes sense if we look at the epistemological meaning of liberty and freedom that informs the discourse of human rights. David Harvey titled the first chapter of his book *A Brief History of Neoliberalism* (2007) “Freedom’s Just Another Word,” pointing out that this word has a specific, and for him, rather hollow meaning. As he argues, the proponents of neoliberalism promoted their system as the protector of freedom and liberty, and, moreover, as paving a path towards the culmination of human culture, particularly as opposed to totalitarianism. But the neoliberal version of freedom is very narrow, limited to individual personal freedom. More importantly, freedom in the neoliberal view is subordinated to market logic, in that freedom is held to be best protected in a system that strongly preserves private property rights, a free market and free trade—a world in which private enterprise can flourish. At heart, as Harvey sees it, the repressive aspect of this conception of freedom and liberty stems from the fact that they apply first and foremost to

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<sup>14</sup> I use the term “late modernity” because it is a well-known idiom, particularly in the field of criminology (Garland 2001). Bauman originally spoke of “postmodernity” (Bauman 1987) and of “fluid modernity” (Bauman 2000: 23), which ultimately became “liquid modernity” (ibid.).

the economic sphere. Indeed, as Polanyi (1944) realized early on, this version of liberty is, at its core, freedom of enterprise and private ownership; all other rights and liberties are conditioned by these principles. Thus, other civil liberties such as freedom of conscience, freedom of speech, movement, association, etc., are valid only as long as they do not contradict, impinge on or interfere with the freedom to accumulate capital, the freedom to keep technological inventions from being used for public benefit, and even to the extent of the freedom to exploit others (Harvey 2007: 36–37; Polanyi 1944: 256–258). Fundamentally, protecting the integrity of the financial system is prioritized over the well-being of the local population (Harvey 2007: 71). Putting it a different way, freedom became “a matter of consumption, choice and expression: an individual good rather than a social and political practice” (Brown 1995: 13).

Nonetheless, the neoliberal regime managed to install itself as the guardian of freedom. This status allowed neoliberal regimes to say one thing and do another; to use the discourse of rights while being oppressive. For example, Wendy Brown describes how, in the 1980s, the administration of Ronald Reagan in the US used the language of freedom to justify the right to work while destroying unions (1995: 13).<sup>15</sup> And, as will be discussed, in keeping with the construct of market supremacy, under the globalized human rights movement, the “right to develop”—supporting free trade and private investment (Klein 2007; Kennedy 2004: 149)—takes precedence.

### Mutually Reinforcing Paradigms

As described above, critical voices argue that neoliberalism and human rights share more than a timeline and even more than key ideological fundamentals—that they are mutually reinforcing paradigms. This means that, on the one hand, the existence of the human rights movement has helped to divert attention from and to legitimize the consolidation of neoliberalism and, on the other hand, operating under a neoliberal epistemological and ontological context has shaped the human rights movement’s modes of action and enabled its successful establishment.

In this respect, Susan Marks applies a different analytical toolkit to examine the development of the human rights movement. She juxtaposes Moyn’s book and argument with Naomi Klein’s book *The Shock Doctrine* (2007), and argues that the successful establishment of neoliberalism was due in part to the emergence of the human rights movement, with its non-political creed (2011a: 9). And holding to its non-political creed was essential for the success of the human rights movement. However, this meant that the human rights movement committed itself to a mode of operation that is restricted to affirmation strategies (Fraser 1995)—policies that address the aesthetic aspects of social phenomena, and that ultimately affirm, rather than challenge, social conditions.

Like Moyn, the author and social activist Naomi Klein sees the emergence of the human rights movement as dating back only to the 1970s (Marks 2011b: 57; Klein 2007: 118–128). Yet, for Klein, unlike Moyn, the history of human rights cannot be told in isolation from developments in the history of capitalism (Marks 2011a: 9). According to Klein, the grassroots human rights movement, as a new activist model, began with the effort to stop torture and disappearances in Chile and Argentina during the 1970s (Marks 2011b: 57). Yet while this work was wholly vital, it stopped there, and shied away from addressing

<sup>15</sup> Ronald Reagan v. Professional Air Traffic Controllers Organization (Patco).

the injurious outcomes of neoliberal reconstruction, which was also a signature policy of these dictatorships (Marks 2011a: 9).

Klein documents the evolution of this pact of neutrality with neoliberalism through the history of Amnesty International. Amnesty International, the beacon of the global human rights movement, which won the Nobel Peace Prize in 1977 for its work, demonstrates, for her, how the human rights movement joined hands with neoliberalism.<sup>16</sup> Amnesty International's 1976 report on Argentina illustrates the evolution of the human rights movement as politically neutral in the face of neoliberal reconstruction. Klein appraises the significance of the report in uncovering the extent of systematic torture and disappearances under that brutal dictatorship. Like many others, she is of the opinion that the organization was instrumental in helping to curb state terror (Klein 2007: 118; Marks, 2011b: 59). But for Klein this is only half the story. The organization did not review or comment on the radical neoliberal restructuring of Argentina that was forcefully executed by the junta, and which, at times, even rationalized the terror. The junta government claimed, in this respect, that the "dirty war" was necessary to restore order and protect the well-being of the state against left-wing guerrillas (Klein 2007: 118; Marks, 2011b: 58). Thus, while the report references a long list of decrees that violated civil liberties, it does not address additional key social and economic rights violations by the regime that harmed so many. For instance, the junta government radically enforced wage reductions through price increases, abruptly cut social protection and redistributive schemes, and deepened poverty overall, all for the sake of promoting capital accumulation by a small elite (Marks 2011b: 58). In this, Klein argues, the human rights movement helped the consolidation of the neoliberal regime.<sup>17</sup> All in all, Amnesty International until recently focused exclusively on civil and political as opposed to economic rights, and operated harmoniously within the neoliberal order (Harvey 2009: 55). Hence, as Klein writes, "human rights emerged as a set of 'blindness' that narrow our field of vision and prevent us from seeing (and hence from challenging) the wider scene" (Klein 2007: 118; Marks 2011b: 59). The "human," with reference to the legal subject in human rights discourse, is thus stripped from her/his socio-political context, from time and place. Thus, the joining of hands with neoliberalism directs our gaze toward manifest and brutal forms of abuse while deflecting our vision from the deep and no less ruthless social reconstruction that goes virtually untouched.

In illuminating the connection between neoliberalism and the human rights movement, Klein demonstrates the co-constitution of the two. For her, it is not only that the operations of human rights activists stopped short of confronting the adverse effects of neoliberalism, but that this deep social-economic reconstruction created the conditions that allowed and even rationalized the gruesome oppression and terror that were reported by human rights organizations (Marks 2011a: 9). And vice versa, its decision to overlook the injurious outcomes of the neoliberal project allowed the new international movement to gain prestige and eventually establish its dominance as an international movement. The human rights movement, in other words, enjoyed credibility and won esteem because it remained strictly neutral, impartial and non-political (Marks 2011b: 57). Harvey argues, in this respect, that a "connection [was] forged between neoliberalization and the appeal to universals, ethical

<sup>16</sup> Moyn takes this position too in his later article "Torture and Taboo: On Elaine Scarry" (2013). Moreover, Amnesty International was unwilling to adopt Nelson Mandela as a political prisoner because he refused to renounce the use of violence (Perugini and Gordon 2015: 3).

<sup>17</sup> The junta's regime, Klein reminds us, and not just in Argentina, was supported by leading Chicago School economists (Klein 2007: 118; Marks 2011b: 58).

principles, and human rights” (2009: 55). In practice this means that the activists kept their distance from political engagement; international human rights work, by and large, was limited to documenting violations, but did not address the bigger picture, namely the reasons and the social context in which those violations occurred (Marks 2011b: 57).

As part of progressive neoliberalism, this mode of operation informs most human rights organizations today. Human rights organizations, NGOs, and GROs (grassroots organizations) have traditionally adopted the universalistic rhetoric of human dignity and focused their operations on accountability via documenting, monitoring and gathering information about abuses. In general, the inclination is to let the facts speak for themselves while maintaining political neutrality. This mode of operation is generally used in campaigns against torture, and for ecological and environmental rights (Harvey 2009: 55). The human rights movement has established itself as an advocate and defender of the right to difference. In this way it plays a central role in the liberal-meritocratic political struggle for recognition (Fraser 2017). It is forceful in advancing the rights of, say, women and indigenous people, and promoting identity politics in general, but has been much less effective or even supportive of struggles for political-economic equality (Harvey 2009: 55).

Overall, operating within a neoliberal context has given human rights its prestigious standing as the highest moral code, but this status is contingent on its disengagement with politics; namely, for human rights organizations to maintain their status, they must remain nonpartisan, and their mandate stems from their universality. They are expected not to take sides (Perugini and Gordon 2015: 53) and to limit their operations to documenting harmful violations, with a focus on transparency and accountability. Thus, the co-constitutive relationship between neoliberalism and human rights empowers both.

## **Alternative Political Context: Action-Based Human Rights and Criminology**

In light of the analysis above, in this section I point to an alternative political context in which human rights not only break from the embrace of neoliberalism, but could be a platform for resistance. The action-based model frees itself from the pretense, supported by neoliberal ideology, that human rights are beyond politics. Moreover, the action-based model identifies human rights struggles in a way that is fundamentally different from the current dominant tradition, where those engaging in human rights struggles are treated passively as victims of violations, and where the mode of engagement is primarily through international law and the interests of strong players, most notably states. The proposed model aims to divert human rights from the legal realm to the political sphere. It is based on the understanding that human rights struggles cannot be reduced to either the realm of the judicial system, or to ethics. Further, the action-based model emphasizes the socio-political conditions in which human rights struggles take place, and seeks to induce opportunities for empowerment and self-representation by those who struggle for freedom and wellbeing. As such, to borrow from the Schwendinger and Schwendinger (1970: 142–143), this model is a point of departure which I hope will be useful for those interested in exploring new approaches to the current challenges for human rights struggles.

The action-based model draws on republican political thought, as well as new directions in citizenship studies, in order to address the conceptual and practical challenges to human rights that have accompanied the neoliberal embrace, particularly its divestment away from the political sphere. The objective of this alternative model is to articulate a new political

foundation for human rights, one rooted in action and agency. As noted, under the current conceptualization of human rights, those who seek protection and change are passive; others speak on their behalf and act to win limited objectives that do not address the root of the matter.<sup>18</sup> That is, human rights organizations and the international human rights and humanitarian legal apparatus operate as top-down bureaucratic institutions with an emphasis on individual accountability. They represent those who suffer harm and choose the course of action to be followed, focusing on first aid for survival and individual responsibility while leaving the conditions that gave rise to the harm in place.

Neoliberalism, for the reasons described above, can offer no solution to the intrinsic structural challenge in which all rights, human rights included of course, are only valid within a political context; that is, the condition whereby rights are only conferred as part of a social contract (Mann 2016: 126). Regardless of their normative standing, rights remain privileges granted by and grounded in an external sovereign authority.<sup>19</sup> This means that without a political foundation, rights have no practical meaning. The same is true for international law, which is based on agreements between nation-states,<sup>20</sup> rather than being subordinate to supranational law (Moyn 2010: 116–117).

Indeed, in many respects the rights of man derive their meaning from citizenship. Such a state-based foundation infringes on the ability to secure human rights regardless of one's identity and, particularly, one's socio-political affiliation. Essentially, it means that individuals who are stateless, who lack meaningful citizenship, have no viable organ by which to secure their rights. The only way they can obtain their rights is by either establishing a new social contract or joining an existing one (Mann 2016: 60). Yet too often these options are unavailable. Put simply, if rights are not rooted in a national framework they are not granted anywhere (Arendt 2017: 406). Those who exist outside the state or some construal obligation are *rightless* (Mann 2016: 71–72; Rancière 2004). Moreover, often the condition of those outside a social contract is made worse by their being ignored—"Not that they are oppressed, but that nobody wants to oppress them" (Arendt 2017: 293; quoted by Rancière 2004: 299). In this respect, they suffer from a *sovereignty gap* (Shenhav 2006: 214), a condition in which the positive aspect of life management is denied by their sovereign, or no sovereign exists.<sup>21</sup> Of course, rights are not allocated equally among citizens, whether within a given state or between states; depending on the political project and social conditions, some citizens enjoy more rights than others. Thus, a lack of protecting sovereignty affects not only non-citizens (migrants and refugees), but others, second-class citizens who suffer from a "citizenship gap"—discrimination on the basis of race, ethnicity, class, etc.

These conditions of rightlessness and the sovereignty gap are the core challenges of human rights. The action-based model seeks to rejuvenate the role of human rights seekers by reinstating them as modern political subjects—that is, active agents who can participate in the political process and thereby shape their lives. Anything short of this offers only temporary remedies to the problem, not a solution.

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<sup>18</sup> See also Rancière (2004: 297–298).

<sup>19</sup> In fact, defining human rights as an unconditional good is something of a tautology: the reason they are valid and just is that they are valid and just (De Sousa 2015).

<sup>20</sup> Of course the balance of power in the world has had great impact on the establishment and framing of international law.

<sup>21</sup> "Sovereignty is, at the same time, the authority to decide at any given moment what is the governing law" (Ophir 2003: 360).

Devising a program that empowers those whose human rights have been violated, and that addresses the structural pathologies which created their condition, is indeed a most challenging task, one that will require a collective effort and, ideally, strong international forces. As I suggest, the first step should be to break free of the neoliberal embrace of human rights, and to re-politicize human rights in a paradigm that supports political action. The basic premise of this paradigm is simple: namely, that the fundamental precondition for human rights is a struggle for human rights (Mann 2016: 58–59; Rancière 2004: 302). That is to say, human rights are the result of political action by those who seek them. Moreover, against the current confinement of human rights practice largely to documenting manifest brutal violations of human rights, the new paradigm must include a struggle to change the socio-political context that generates these violations to begin with. Further, this is a struggle that must be led by those who seek justice and change.

In general, the action-based model for human rights aims to offer an alternative to the contemporary rights discourse. My argument here goes back to Marx's critique on the Jewish Question, in which he argues that the rights of man are an obstacle to human emancipation, not a solution. Thus, any attempt to rethink social justice must break away from the rights-based model that is rooted in the legal sphere and protected by bureaucratic institutions. It must speak to the prevailing tendency to treat political matters as legal questions, which is, of course, a form of a political action in itself. That is, on questions of human rights, the neoliberal mind turns to law rather than to politics (Kennedy 2004: 19). But when we relate to human rights as a thing within the legal sphere, we simply ignore the root problem. As David Kennedy tells us, we move from rights to remedies and then to basic "needs"; but remedies and basic needs represent the symptoms rather than the actual illness (2004: 24). Most crucially, in the legalization of human rights, we lose other valuable emancipatory strategies (Kennedy 2004: 9), ones rooted in political action and agency. Such modes of actions require a structure that can support and enable agency, with an emphasis on collective action.

What does this mean precisely? First and foremost, supporting agency means turning away from the passive role currently played by those who struggle for human rights. As we know, too often, human rights organizations speak for those who cannot speak. Yet in doing so, they unintentionally contribute to their silence and passivity. Those who struggle for human rights must represent themselves and not be represented by others; justice must be demanded and fought for by those who seek it (Kennedy 2004: 350). Moreover, we should demand more from human rights. Mere survival cannot be the final goal (Mann 2016: 78). Our challenge is to allow those who struggle for human rights to set their own goals, and to facilitate the conditions that will enable them to achieve them.

In fact, this understanding is not new. It dates back to the political philosophy of Aristotle, who argued that maintaining a good and virtuous government does not depend solely on the possibility of checking the ruler (where the human rights movement aims to be today), but on the ability of the ruled to partake in ruling (1962: 1–2). As Arendt wrote: "Liberties in the sense of civil rights are the results of liberation, but they are by no means the actual content of freedom, whose essence is admission to the public realm and participation in public affairs" (2017: 6). There is no freedom without participation in shaping one's future. Elements of Michel Foucault's thought also complement this call for active participation by those who seek to free themselves. Foucault calls for replacing the liberal transcendental ethics of the rights of man with an ethos of active resistance as a direct route to transformation. For Foucault, resistance should not be understood as negation, but as a creative process: "To create and recreate, to transform the situation, to participate actively in the process, that is to resist" (Lazzarato 2006: 17).



Against the neoliberal order that diverts the struggle for human rights away from the political sphere and denies those who struggle their role as political subjects, the action-based model aims to democratize the operation of human rights. Indeed, neoliberalism, with its general hostility toward politics, can be seen as an affront to the project of democracy, an effort to eliminate the very idea of the demos and to replace it with governance and new management (Brown 2015: 201; 207). Against this, we must enlist anew a democratic creed, and the aspiration that people regulate their common life through ruling themselves together (Brown 2015: 202). The fact that with human rights struggles we often find ourselves in non-national terrain should not discourage us. In this respect Jacques Rancière reminds us that democracy is always an eruption of “the part that has no part” (2010: 19). It refers to the “uncounted,” who in a democracy receive a voice and partake in the political process.

To this effect, a new direction in citizenship studies aims to push our understanding of citizenship and democratic participation beyond the formal, institutional, legal realm (Kaplan and Levi 2017: 3; Cushion 2009: 140–141; Isin and Turner 2007). The main idea advanced by scholars at the forefront of this field is to move from a passive “rights-given” to an active “rights-claiming” as the defining feature of citizenship (Isin and Nielsen 2008). This is particularly relevant for non-citizens and, as such, for human rights seekers, who can act as political subjects by “doing citizenship” as opposed of being granted formal rights (ibid; Kaplan and Levi 2017: 3). Working towards a similar goal, new directions in political sociology address the question of how human rights can work as a social movement. They aim to analyze forms of political activism and options for a regenerative politics of representation that seeks social justice (Estévez 2011: 1143).

In sum, at the heart of the action-based model for human rights is a call for collective action and participation. It is based on the understanding that the essence of human rights derives from the act of claiming them. It thus aims to democratize the struggle and disconnect it from the neoliberal embrace, which in itself produces structural harm while diverting and limiting political action. The challenge is how to support this active struggle for human rights, and more broadly, how lift the question of citizenship outside the question of rights. Finally, for scholars of criminology, the question is how we can contribute to this new direction.

## How Can Criminologists Begin to Advance the Action-Based Model for Human Rights?

Although most research on state crime has focused on description, some studies, in response to the shortcomings of international law, have turned their attention to state crime controls (see, for example, Kauzlarich and Kramer 1998; Ross 1995, 2000a, b, 2017<sup>22</sup>; Ross and Rothe 2008; Sparrow 2008; Rothe and Mullins 2011), public criminology (Kramer 2009), and resistance (Friedrichs 2009),<sup>23</sup> including *newsmaking criminology*—a form of public criminology coupled with *resistance in “real time,”*<sup>24</sup> in which criminologists use the mass media to affect public attitudes about crime and justice (Barak 1988: 566; 2007: 191–192). Friedrichs, commenting on the body of work on resistance, argued

<sup>22</sup> Ross offers a heuristic model for controlling crimes of the powerful and not just state crimes.

<sup>23</sup> For a list of studies, see Friedrichs (2009: 8). For a good review see Rothe (2009–2010).

<sup>24</sup> I thank the anonymous reviewer for this observation.



that studies of resistance do not pay sufficient attention to the role of social movements (2009: 20). In embracing the role of social movements in human rights struggles, and in calling for their radical break from progressive neoliberalism, the action-based model aims to complement these studies.

Following the tradition of organic public sociology set forth by Burawoy (2005a, b) and Barak's newsmaking criminology, this is a call for action. It is a call for criminologists not only to voice their knowledge, analysis and opinions as "public intellectuals," but also to "take sides" in the Howard Becker tradition (Barak 2007: 193). As Barak argues, newsmaking criminology "asks criminologists to eschew notions of alleged value neutrality and 'objectivity'" (ibid). In this way, criminologists politicize their mode of action and break from any neoliberal non-political creed as part of a greater effort to anchor human rights in an alternative political foundation. And, in the tradition of organic public sociologists, criminologists can strike up a dialogic relationship with this silenced public "in which the agenda of each is brought to the table, in which each adjusts to the other" (Burawoy 2005a: 9). In doing so, criminologists work in close connection with those who struggle for human rights, hearing their voices, and then harnessing their own professional and symbolic capital—i.e., their professional and academic platforms—to give context to their hardships and aspirations, help articulate their demands, and together devise forms of actions and solutions.

Prominent voices within the field of state crimes in criminology warn us against expecting criminology to do too much. They argue against pursuing radical egalitarian policies and considering power structures as "crimes." As they assert, "such general sociopolitical questions underpin all critical social science, but we must be clear that criminology is an inappropriate vehicle for addressing them politically" (Green and Ward 2000: 110–101). Their concern is understandable; demanding too much runs the risk of shattering the disciplinary framework of criminology. But, I argue, we in fact have no choice. Maintaining our adherence to the top-down model of international law and human rights struggles under progressive neoliberalism in general means to remain reactive and, overall, ineffective in addressing gross violations of human rights.

Our mission, as a starting point, is to reaffirm a new understanding of what constitutes crime. In this respect, the action-based model aims to take up the Schwendingers' call to treat human rights as historically determined rather than based on criteria embodied by the law (1970: 137). Accordingly, the action-based model argues that rather than being committed to the top-down approach of international law in codifying norms, criminologists should be open to a bottom-up model in which those in the field inform our efforts to define and identify crime. As the Schwendingers argue, "To defend human rights, criminologists must be able to sufficiently identify the violations of these rights—by whom and against whom; how and why" (1970: 145–146)—and more so, to ground this defence in what is most important: the actual conditions from which people suffer (148–149). As such, this re-articulation should be based on field work aimed at informing our understanding of real-life struggles of all sorts, including crimes of omission,<sup>25</sup> as Barak defined them (1991), as violations that stem from a sovereignty gap. By being attentive to what is happening on the ground, we can allow those who struggle for freedom and justice to define what constitutes harm. For example, legal scholars Mann (2016) call on the International Criminal Court to shift its focus from "spectacular" violence to a less visible category of "banal" or

<sup>25</sup> I.e., actions that restrict access to social benefits: food, shelter, health, education, etc.

“normalized” violence in the everyday life of asylum seekers, which is an inevitable by-product of global social and economic structures. Their call is based directly on the voices of asylum seekers in Greece, detained time and again for open-ended periods in facilities whose conditions pose serious threats to physical and mental health (ibid: 6–7). Yet instead of addressing the life-threatening conditions in which asylum seekers are forced to live, the International Criminal Court singles out a limited number of “bad apples” while ignoring the underlying socio-economic injustices that stem from structural human rights violations.

For criminologists, the action-based human rights model is, first, a movement to politicize the definition of crime. For human rights to work as a standard—that is, as a framework that informs our understanding of types and conditions of social harm committed by power—we must be attuned to actual, existing forms of resistance by those who strive to break out of their dire conditions. It is the task of criminologists to help shine a light on their struggles and aspirations.

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