

**Citizenship as  
Method:  
A post-foundational  
approach to the  
problem of  
rightlessness**

**Peter Rees**

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I, Peter Rees, hereby declare that this thesis and the work presented in it is entirely my own. Where I have consulted the work of others, this is always clearly stated.

Signature:

Date:

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# Abstract

This thesis addresses the aporetic relationship between universal rights and citizenship by proposing a new framework for analysis: citizenship as method. The problem is that, despite being *universal*, rights are only granted to those belonging to *particular* political communities (citizenship), meaning that in a contemporary context many irregular migrants with an insecure legal and political status experience forms of *rightlessness*.

Citizenship as method addresses rightlessness by rethinking citizenship. It navigates between two poles: accounts of citizenship that are over-determined by its legal and institutional form and contemporary critical citizenship studies which fail to explain how radical practices of citizenship encounter and transform institutions. Citizenship as method is a deconstructive approach to citizenship that utilises contemporary post-foundational political theory to rethink the relationship between citizenship and universal rights in non-oppositional terms. Because citizenship makes rights possible and these same rights call it into question then: a) there can be no rigid opposition between universal rights and citizenship; b) citizenship is structured by a constitutive aporia; c) this aporia can be mobilised by a political practice of rights-claiming through which citizenship is displaced according to its own logic. Drawing upon a range of illustrative examples of struggles over citizenship by irregular migrants, I develop an ethico-political approach to rights-claiming. I then analyse how practices of rights-claiming by irregular migrants function in relation to modern citizenship's two primary institutional features: law and democracy.

Citizenship as method is a conceptual framework for analysing the constitution, contestation and re-articulation of citizenship in ways that meaningfully attenuate the problem of rightlessness. This study provides a dynamic, post-foundational, theorisation of citizenship and a set of resources for negotiating it: a new rights-claiming analytic and a novel and integrated account of the sites of transformational citizenship which can be deployed in new contexts for further analysis.

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# Introduction

Shamima Begum, one of the so-called Isis Brides, is sat with a reporter from ITV News in a refugee camp in Northern Syria. While holding her newborn baby, she reads aloud from a letter sent to her parents by the United Kingdom Home Office. She learns that she has been deprived of her British citizenship by the then Home Secretary, Sajid Javid. Not long after, it is reported that her three week old son, Jarrah, has died (Chulov and Parveen 2019). In the wake of Jarrah's death, Sajid Javid comes under intense criticism for making Shamima Begum stateless. The Shadow Home Secretary, Diane Abbott, wrote that '[i]t is against international law to make someone stateless, and now an innocent child has died as a result of a British woman being stripped of her citizenship' (quoted in Quinn 2019). The revocation of Begum's citizenship would certainly appear to be an indefensible act of arbitrary power but it also brings into view so many of the paradoxes associated with citizenship, particularly in its relationship to universal rights. Without her citizenship and situated in a camp on the border between two nations, Begum is without the rights that are meant to be a feature of 'the inherent dignity' of all humans, irrespective of distinctions such as 'race', 'gender' and 'religion' (UN General Assembly 1948). However, the plight of Shamima Begum and her baby son reveals something more: citizenship, as a 'rationality of government', inflicts extraordinary violence by 'promoting the rule of territorial states over populations, thereby dividing humanity' (Hindess 2004: 309). At one level, citizenship immobilises the world's poorest populations, most notably in the Global South. The philosopher of ethics Joseph Carens observes that '[c]itizenship in Western liberal democracies is the modern equivalent of feudal privilege - an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely' (1987: 251-52). At the same time, when large groups of people are forced to move, citizenship, as a system for the management of the global population, results in masses being collected in camps. As it currently stands, there are an estimated 68.5 million people displaced worldwide, with 25.4 million refugees (UNHCR). Citizenship is the political problem that this thesis addresses.

The paradox of citizenship is that, despite the violence it often inflicts, so many people still struggle for it: Shamima Begum's family fought for her citizenship status by challenging the United Kingdom's Secretary of State in court (Johnson 2019) and tens of thousands of migrants die every year making journeys across land and sea in the hope of a better life in a new political community. Running throughout this thesis is a tension between two indissociable stories of citizenship: on the one hand citizenship is a governmental technology that inflicts great violence and cements global inequality (Hindess 2000; 2004); on the other hand, citizenship is the possibility of a life of rights and dignity. This paradox is captured best in Hannah Arendt's famous expression of 'the right to have rights' (Arendt 1951). Central to Arendt's formulation was a critique of the 'perplexities of rights' (1951: 369) that at once claimed to be 'universal' and 'inalienable' yet referred to 'an "abstract" human being who seemed to exist nowhere' (Ibid: 370). The problem with rights is that, despite their purported claims to universality, their realisation is dependent upon membership within particular legal and political communities, which tends to mean citizenship. The consequence of the attachment of rights to citizenship is that statelessness is tantamount to rightlessness. The dangers of which are very real and have led to some of the worst atrocities in history, such as the Holocaust, and the continued exploitation of many irregular migrants today.

To make matters worse, not only are rights not inalienable but, in the case of the French Revolution, which gave birth to the modern nation-state, the 'whole question of human rights[...] was quickly and inextricably blended with the question of national emancipation' (Ibid: 370). The Declaration of the Rights of Man was perverted by the nation to found and legitimate the French State's sovereignty and its absolute right to jurisdiction over its contents and borders. For Arendt there is only one true universal right and that is 'the right to have rights' (Ibid: 376), which means the right to belong to some form of organised (legal and political) humanity. Yet this right sets up a seemingly insurmountable contradiction between its claim to universality and its necessary reliance on particular forms of politics. This aporetic relation marks the social, political and theoretical point of intervention of this thesis, which examines the relationship between rights and citizenship through the conditions of rightlessness experienced by many contemporary irregular

migrants. Irregular migration is the prism through which this project will be focussed, as it represents the limit situation at which the many violent paradoxes of modernity are made visible and real conditions of rightlessness are experienced in day-to-day life. For this reason, Arendt observes that the migrant is not just of interest empirically – exemplifying the dangers of statelessness – the migrant is also an ‘emblematic philosophical figure’ (Arendt quoted in Krause 2008: 44). Practices of rights-claiming by irregular migrants challenge and even break down common sense conceptions of citizen/non-citizen.

### **A Crisis of Citizenship?**

The political question of migration and along with it the problem of rightlessness has become increasingly prominent in a contemporary context. This project responds to two opposing forces at play in the present moment, which are only likely to worsen in the future, and point towards a *crisis of citizenship*.

In the first case there is the problem of the displacement of people on a large scale. According to a report sponsored by the United Nations High Commissioner for Refugees (UNHCR 2016), the so-called refugee crisis saw over 4.9 million refugees displaced from Syria to neighbouring counties in 2016 alone (Ibid). In 2015 there was a record 1.3 million migrants from a range of different countries who applied for asylum in the 28 member states of the European Union (Clayton and Hereward 2015). Another example being the Rohingya crisis, where as of March 2019, over 909,000 stateless Rohingya refugees were displaced, mostly into congested camps (OHCA 2019). Taking a longer-term view, the scale of the problem only gets worse. A report by the Asian Development Bank found that over one billion people could be displaced by climate change by the end of the century (Alcoseba Fernandez 2017). Going even further, a report released by Cornell University found that climate change could result in up to two billion people – a fifth of the world’s population at that time – becoming climate refugees (Geisler and Currens 2017). While predictions vary, it is clear that the mass displacement of people is only likely to get dramatically worse.

As global migratory pressures increase, many liberal democracies are experiencing a retrenchment of nationalist politics. While anti-immigrant

sentiment is nothing new, the end of the Cold War has seen the rise of migration as a security concern; a process which has accelerated further in the wake the September 11<sup>th</sup> terrorist attacks (Bigo 2002; Huysmans 2000). The result being the development of a sophisticated border regime and citizenship being articulated in increasingly exclusionary terms (Squire 2009). Right-wing populist politicians have latched onto fears about migration and turned them into a formula for electoral success. The examples are too numerous to list but one only need look at the Brexit vote in the United Kingdom led by Nigel Farage and (at the time) UKIP, the election of Donald Trump as President of the United States and the rise of nationalist politicians, such as Marine Le Pen in France, Matteo Salvini in Italy and Viktor Orbán in Hungary. In each case, their popularity has come on the back of nationalist and anti-immigrant platforms. Latching onto this new *zeitgeist*, in 2016 the ex-British Prime Minister, Theresa May, gave her now infamous 'citizens of nowhere' speech. She said

Now don't get me wrong. We applaud success. We want people to get on. But we also value something else: the spirit of citizenship.

That spirit that means you respect the bonds and obligations that make our society work. That means a commitment to the men and women who live around you, who work for you, who buy the goods and services you sell.

That spirit that means recognising the social contract that says you train up local young people before you take on cheap labour from overseas. That spirit that means you do as others do, and pay your fair share of tax.

But today, too many people in positions of power behave as though they have more in common with international elites than with the people down the road, the people they employ, the people they pass in the street.

But if you believe you're a citizen of the world, you're a citizen of nowhere. You don't understand what the very word 'citizenship' means. (2016)

Theresa May's speech brings to the fore all of the ambivalences of citizenship. In a sense, May is not wrong. Arendt herself rejected both the possibility and desirability of global citizenship (Arendt 1970). However, Arendt would also reject May's conflation of the ethical with the political, where she says that you look after your own before 'you take on cheap labour from overseas'. At a time when levels of migration are at an unprecedented high and only likely to rise further along with the sea levels, May's nationalist interpretation of the meaning and 'spirit' of citizenship is at once typical of the present political moment and troubling for the way in which its rights and obligations end at the border. It is precisely the dangers of these two opposing forces: mass displacement, on the one hand, and reinvigorated nationalisms, on the other, that point towards a *crisis of citizenship* as the horizon against which the necessity of this research takes place.

### **Irregular Migration and the Experience of Rightlessness**

The paradoxes of the modern nation-state system are intensifying, as borders harden and migration increases. The result being that a growing numbers of irregular migrants find themselves caught in liminal positions of real or 'virtual' statelessness (De Genova 2010) and, thus, rightless. The rightlessness irregular migrants experience can take many different forms. For some it makes their journeys across borders extremely dangerous. Forced to cross to Europe by sea in the hands of illegal traffickers, over 5,000 refugees died in the Mediterranean in 2016 alone (UNHCR). Of those who make it successfully, organisations such as Amnesty International (2016) report that women and children are particularly susceptible to violence and sexual exploitation. When the unofficial migrant camp in Calais named the Jungle was forcefully evicted by the French authorities, the Refugee Youth Service reported that almost a third of the children they had been monitoring had gone missing (quoted in Harris 2016). Finally, migrants who are settled in their 'host' countries but have an irregular status often experience forms of rightlessness that leave them particularly vulnerable to exploitation in the labour market. Nicholas de

Genova reports on the rise of the 'deportation regime' that has the effect of producing a refined legal vulnerability, fuelling the 'demand for undocumented migrants as a highly exploitable workforce - and thus ensures their enthusiastic importation and subordinate incorporation' (2010: 38-9). Researchers in the field of critical migration studies, such as Bridget Anderson (2013; 2000) and Monika Krause (2008), amongst others, have documented how the experience of illegality and deportability results in the concrete exploitation of cheap migrant labour in building and cleaning sectors, amongst others, precisely because it prevents them from accessing their rights.

A large part of the problem is discursive. There is a tendency to believe that the justification for border controls is predicated on pragmatic material factors, particularly around questions of overpopulation and resource scarcity. There is a parallel here with the 1930s because, as Arendt observed, the refugee crisis at the time 'had next to nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization' (1951: 373). The same is true of today. Taking the United Kingdom as an example, the effects of migration are complex and vary depending on a number of factors. However, there is a broad consensus that there are limited economic downsides to migration at current levels and that over the long to medium term EU migration is a net benefit to the economy (see Dustmann and Frattini 2014; Ruhs and Vargas-Silva 2019).

While there are some fears that low-cost migrant labour undercuts its domestic counterpart, the effect tends to be limited to low skilled sectors.<sup>1</sup> Furthermore, as De Genova's (2010) research finds, somewhat paradoxically it is the existence of a growing border regime that creates the conditions that makes migrant labour so exploitable, by rendering their legal and political standing so insecure.<sup>2</sup> This leads theorists, such as Sandro Mezzadra and Brett Neilson, to rethink the place and role of borders: they claim that borders do not function as physical barriers at the edge of a given territory that stop the flow of people but are in place to manage migration in a way that produces

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<sup>1</sup> A report on the effects of EEA migration by the United Kingdom government found that while there were some sectoral effects, on the whole migration improved employment conditions ('Migration Advisory Committee' 2018).

<sup>2</sup> An interesting point is that migrant-led political action undertaken primarily in the gig economy has had an inflationary effect on wages, pushing them up for themselves and domestic workers in this sector.

exploitable subjects. Mezzadra and Neilson are interested 'how borders regulate and structure the relations between capital, labor, law, subjects, and political power' (2013: 8) as a function of the expansion of global capitalism. Consequently, the popular desire for the strengthening of borders, as a result of the deflationary pressure that migration may have on wages, paradoxically only operates to increase the exploitation of migrant labour and further drive down wages.

What does this reveal? Setting aside the very legitimate ethical arguments made in favour of migrants' rights, fears over migration are not grounded in an economic reality predicated on the scarcity of resources but are primarily the result of a *political* discourse and functions of power within a global capitalist system. As such, the crisis of citizenship requires political solutions, not just in the form of new models of citizenship but also counter-hegemonic rights-claiming strategies that contest entrenched forms of power and start to reorient contemporary discourses on citizenship and migration. One of the central tasks of this thesis is to contribute to the growing literature that challenges the contemporary discourse on migration and to start to unpick the hard borders that separate out common sense conceptions of citizens and migrants.

### **Overcoming the Right to Have Rights?**

From the moment Arendt's analysis of the 'perplexities of rights' was first published there have been attempts to politically and/or theoretically overcome, or at the very least mitigate, the paradoxical relationship between universal rights and citizenship. Optimistic champions of human rights point to the 1948 Universal Declaration of Human Rights (UDHR) as marking a fundamental shift in the relationship between rights and the nation-state. Whereas in the 1789 Declaration of the Rights of Man and the Citizen there is an intrinsic link between rights and the nation-state/citizenship, for Samuel Moyn the UDHR is 'a central event in human rights history' due to the 'recasting of rights as entitlements that might contradict the sovereign nation-state from above and outside rather than serve as its foundation' (Moyn 2012: 13). One consequence of the growing human rights regime is the development of new 'postnational' theories of citizenship. These thinkers argue that the expansion of universal rights and a growing cosmopolitan institutional

framework has transformed the very nature of citizenship (Jacobson 1996; Joppke 1998; Soysal 1994). From this point of view, entitlements to rights are no longer predicated on national origin but on a more universal concept of 'personhood'. More attention will be paid to postnational citizenship in chapter one; however, for now it is sufficient to observe that it fails to overcome many of the aporias and political problems of the right to have rights. Arising out of a misguided focus on the privileged position of the 'guest worker', I demonstrate how postnational theorists fail to spot the ways that many irregular migrants still experience conditions of rightlessness as disposable and deportable subjects (De Genova 2010). What postnational theorists fail to understand is that the aporias of rights are intrinsic to the very concept of rights itself and cannot simply be overcome by expanding the basis of citizenship indefinitely.

This thesis deals with two alternate approaches, both of which recognise that the paradoxes of rights are internal to their very structure and not resolvable. Instead, they attempt to theorise more fluid models and practices of citizenship through which political communities are transformed. Seyla Benhabib proposes a model of 'democratic iterations' (Benhabib 2004; 2006; 2011). Whereas Engin Isin (see various in Isin and Nielsen 2008) and Anne McNevin (2011) amongst others develop a concept of 'acts of citizenship'. Both approaches are problematic but for opposing reasons.

Benhabib's concept of democratic iterations is concerned with how human rights - in the form of cosmopolitan norms - are utilised, contested and interact with legal and political institutions in processes of democratic iterations. Predicated on a performative dimension of citizenship, she believes that the identity of the subject of rights (the citizen) is rearticulated in democratic process, where '[w]e, the people who agree to bind ourselves by these laws, are also defining ourselves as a "we" in the very act of self-legislation' (Benhabib 2006: 33). However, as will be discussed in detail in chapter two, her excessive legalism negates the transformational potential of her own theory. In this view, citizenship operates first and foremost as a legal status and rigidly frames the spaces in which politics take place.

An alternate position can be found in the work of theorists of acts of citizenship. For them, of whom Engin Isin is the primary exponent, acts of citizenship refer to an alternate way of researching and understanding

citizenship. What is important about this approach to citizenship is that it is not determined in advance by a legal status. Rather, it shifts the object of analysis to investigate political actors who may not be citizens from the point of view of the law but enact themselves as citizens in order to claim the rights that they do not have. From this perspective, 'what is important about citizenship is not only that it is a legal status but that it involves practices' (2008: 2). Such 'practices' are not just prior to citizenship as status but the condition of its possibility. The problem is that theorists of acts of citizenship are unable to account for how the act experiences, interacts with and transforms citizenship as a legal and institutional category. The aim of this thesis is to chart a course that navigates between Benhabib's more liberal approach that views citizenship primarily as a legal status and contemporary literature on 'acts of citizenship' that seeks to broaden the field by foregrounding citizenship as an extra-legal and transformative political practice. This is the research gap this study fills.

## **Summary of Argument**

At this point it might be useful to outline the main argument this thesis makes and identify its contribution to the field. My study starts from the premise that in order to address the problem of rightlessness it is necessary to rethink citizenship. I do this by developing a new conceptual approach: citizenship as method. A key point of differentiation between citizenship as method and other theoretical approaches to rights and citizenship is a methodological focus on irregular migration and rightlessness.<sup>3</sup> Rightlessness is not just the material problem that this thesis addresses but also functions as a critical and analytic tool to be used to interrogate the limits of citizenship and rights.

Citizenship as method is a deconstructive framework for analysing the constitution, contestation and re-articulation of citizenship. My approach is deconstructive in the sense that it investigates the constitutive aporias of citizenship and rights, not as irresolvable contradictions, but key points of political and theoretical intervention. However, while I am indebted to

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<sup>3</sup> In *Contesting Citizenship* (McNevin 2011), Anne McNevin develops the acts of citizenship literature and also focuses her analysis through the figure of the irregular migrant. However, she does not deploy rightlessness as an analytic framework, which is one point of divergence between our approaches.

deconstruction, citizenship as method extends beyond poststructuralism to make use of contemporary post-foundational political theory; most notably when it comes to providing a theoretical account of the articulation of the social (Laclau and Mouffe 2001) and rethinking the relationship between ethics and politics (Fagan 2013). I will address what I mean by post-foundational theory in detail in chapter two. For now I understand post-foundationalism to share with poststructuralism a critique of all forms of metaphysical essentialism but to go beyond the domain of language to investigate all figures of foundation (see Marchart 2007). Adopting a deconstructive approach that utilises post-foundational theory, I develop a series of 'infrastructures' (Gasché 1986) through which to account for and rethink the aporias of citizenship and rights in non-oppositional terms. This thesis explores the hypothesis that because citizenship makes rights possible and that these same rights call it into question then: a) there can be no rigid opposition between universal rights and citizenship; b) citizenship is structured by a constitutive aporia; c) this aporia can be mobilised through political practices of rights-claiming through which citizenship is displaced according to its own logic. The figure of the rights-claiming irregular migrant is the locus around which I investigate this hypothesis.

Through a critique of essentialism and the putting into question of all forms of foundation, a post-foundational theoretical framework allows me to reconcile the gap in the literature identified previously: the overdetermination of citizenship in its institutional form (democratic iterations) and the inability to account for their effects and transformation (acts of citizenship). While I navigate between these two positions, my own approach owes a greater methodological debt to acts of citizenship. By highlighting how 'those engaged in the constitution of citizenship are not always citizens in the conventional sense' (Isin 2017: 501) theorists of acts of citizenship have revitalised the field. In so doing, they have provided a new entry point into the study of citizenship that breaks with traditional hegemonic narratives. Despite this, the tendency to exclude citizenship as a legal and institutional formation and focus solely on the category of 'acts' limits the radical and explanatory potential of the approach.

Utilising a series of illustrative examples of struggles over citizenship by irregular migrants, citizenship as method maintains the same analytic

entry point but *broadens* and *deepens* the field of study: by 'broaden' I mean to go beyond the singularity of the act as the object of analysis and investigate the social and political conditions and political processes that make counter-hegemonic politics effective; 'deepening' refers to the need to investigate the state as well as civil society as a site of radical citizenship. The task of this thesis is to investigate how irregular migrants engage in practices of rights-claiming that operate within and beyond the confines of the state to enact transformational forms of citizenship. To do this I:

- i) Define the nature of the problem: first in terms of rightlessness; and second in regard to the limitations in contemporary theories of citizenship;
- ii) Reformulate the right to have rights in non-oppositional terms by utilising post-foundational theories of ethics and politics to develop a political practice of rights-claiming;
- iii) Analyse how rights-claiming functions in relation to the two primary institutional features of contemporary citizenship: law and democracy.

These three areas are the analytic foci out of which I develop an account of citizenship as method, which is my main contribution to the field of citizenship studies.

Citizenship as method does not provide a normative blueprint for citizenship, nor a definitive methodology for theorising or practicing citizenship. Rather, it is a new framework for analysing the constitution and contestation of citizenship in ways that meaningfully attenuate the problem of rightlessness. Utilising post-foundational theory, citizenship as method provides a theorisation of the foundations of citizenship that is built upon the constitutive aporia of the right to have rights. It does so without an appeal to any absolute ground because rights signify both the necessity and impossibility of citizenship. What follows on from this move is the possibility of a political practice of rights-claiming that, at one and the same time, demands forms of order and continuity as well as dynamism and change. To achieve this, citizenship as method contributes a set of resources for the (deconstructive) negotiation of citizenship, both in terms of a new rights-

claiming analytic and an integrated account of the sites of transformational citizenship that take place across civil society and the state. To summarise, citizenship as method is primarily about politics: about the way in which citizenship is instituted through political acts that result in hegemonic forms and understandings of citizenship but also the diversity of citizenship practices - often by non-citizens - that call citizenship into question and rearticulate its meaning.

### **Illustrative Cases**

The conceptual ideas explored in this thesis are discussed in relation to a series of illustrative cases. There is a debt here to the acts of citizenship literature. While in this thesis I suggest the need to go beyond the act, as an approach it still contains important methodological insights that I intend to maintain. As Rutvica Andrijasevic observes, a vital strength of acts of citizenship is that it introduces 'a different entry point for analysis that approaches citizenship starting precisely from mobilisations of marginal groups rather than from an institutional or representational angle' (2015: 49). In this sense, there is a crucial link between methodology and epistemology. As feminist activists and scholars, such as Donna Haraway (1988) observe, knowledge is always 'situated' and knowledge production is not a neutral process but dependent upon one's socio-political location. By offering a different 'entry point' into the study of citizenship that eschews formal narratives of citizenship in legal terms, acts decentres the traditional (hegemonic) narratives of citizenship. So, while this thesis shifts the object of analysis beyond the act as it is understood by theorists such as Isin, it maintains the same entry point: the political struggles of oppressed and marginalised groups, specifically irregular migrants. Citizenship as method, contra acts, investigates institutional forms of citizenship but it does so from the bottom up in order to provide an understanding of citizenship that is less distorted by hegemonic narratives. In this way, this thesis extends the conceptual framework for analysing citizenship.

The question is, how to reconcile the aims of this thesis with the demands of a different entry point into the study of citizenship. Here I want to briefly justify my use of examples. Because my doctoral project is a work of political theory concerned with developing a new analytic framework, one

that has a certain degree of generalisability, a sociological method or in depth singular ethnographic account would be unsuitable. Running in parallel to the theoretical arguments, this thesis utilises multiple illustrative examples that move from one intensive moment to another with no formal teleology. They are set apart from the main body of the text and appear in a different font so that they may be read separately and could even be supplemented or replaced with other similar examples.<sup>4</sup> There are two primary reasons for this approach. First, it enables me to resist a totalising logic, I articulate an understanding of citizenship in its diversity that is in keeping with the critique of essentialism inherent to a post-foundational approach. Second, while citizenship as method is not a universal framework, the aim is to draw some generalisable (though iterable) conclusions about citizenship that might be applicable across in a number of different contexts. Utilising a series of illustrative examples makes it possible to remain sensitive to a variety of marginalised social positions while continuing to interrogate citizenship more generally. However, future research might well use the analytic framework of citizenship as method to interrogate particular cases in more detail.

## Terms and Scope

Up to this point in the project I have deployed the term *irregular migrant* as though it is relatively unproblematic to do so; however, this is far from the truth. Consequently, my aim here is to justify the terminology used and why I have settled on the term *irregular migrant*.<sup>5</sup> An obvious alternative would be *illegal migrant*, yet such a label is undesirable for a number of reasons. Most importantly, it is problematic because it feeds into a discourse of illegalisation that portrays the very lives and being of certain people as criminal. In addition to this discursive issue, the term *illegal migrant* does not capture the necessary range of precarity associated with irregular migration. Many migrants who experience themselves as deportable may have some legal standing within a particular political community. For example, the worker whose legal status is dependent upon their employment might not be able to challenge exploitation

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<sup>4</sup> The approach outlined here is indebted to Jon Beasley-Murray's justification of his approach in his book *Posthegemony* (2010). Similarly to this project he has intensive illustrative examples that are articulated separately but run in parallel to his theoretical approach.

<sup>5</sup> The terminological discussion here is indebted too but not identical with McNevin's own consideration of terms (2011: 18-21).

by their employer due to their precarious legal standing. Another possibility is the label *undocumented migrant*, which does not suffer from the same pejorative discursive limitations as the previous term. It has been popularised through the activism of the French *Sans-papiers*, who are the subject of the discussion in chapter four. However, once again it fails to capture the multiplicity of statuses and differing experiences of vulnerability required throughout this project. An alternative would be the term *nonstatus migrant*. This term is used extensively in the literature, particularly in a Canadian context (e.g. Nyers 2008). This term is more suitable in the sense that it captures a broader array of migrants who lack full immigration status. It also successfully conveys a relationship to the state and vulnerability to state power. However, as with the two previous terms, it fails to express all the nuances of irregular migration as many do have some form of status, it is just precarious. Furthermore, as Anne McNevin observes, 'it implies an evacuation of any kind of status, which seems to work against the recovery of status among irregular migrants that is the concern of the progressive movements from which the term emerged' (2011: 19)

Finally, then, this leads to the term *irregular migrant*. Although it is imperfect, I suggest that it is the most appropriate. The term is problematic as it expresses 'the spectre of abnormality attached to not being "regular"' (Ibid: 20). In so doing it reproduces a set of complex relationships and hierarchies, all of which are attached to the authority of the state and its ability to approve the flow of people across its borders. However, it has the advantage of remaining open to the broad array of statuses of migrants that might experience themselves as disposable and deportable subjects (De Genova 2010) within a system of differential inclusion.<sup>6</sup> Furthermore, while on the one hand it might be problematic to reproduce hierarchies of belonging within the sovereign triad of people / state / territory, on the other hand the contemporary condition of rightlessness only arises out of this complex of power relations

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<sup>6</sup> Differential inclusion is an important concept deployed by Mezzadra and Neilson in their book *Border as Method* (2013). It draws attention to the fact that borders no longer operate according to a simple inside/outside binary. Differential inclusions problematises unitary conceptions of migration and helps to illuminate how different categories of migrants under different circumstances have access to a varying array of rights. For example, EU citizens, foreign students and Commonwealth citizens all experience international borders differently, with each holding different rights in their host countries.

and the border technologies through which it is reproduced. As McNevin observes, 'the integral relation between territory and irregular migration makes the study of the latter especially apt for coming to terms with contemporary transformations that place the relationship between citizenship and territory in question' (Ibid: 21). It is for these reasons that I will deploy the term *irregular migrant* throughout this project, in light of its inadequacy and with the expectation that migrants and migrant activists will use different labels to express their identities and subject positions.

A central proposition of this thesis is the claim that irregular migration, particularly political practices of contestation by irregular migrants, shape the meaning of citizenship. As a result, there is a methodological focus on political actors who are transnationally mobile. The advantage of a focus on the irregular migrant is that it does not approach transnational mobility from the perspective of the more privileged 'cosmopolitan' subject (see Amit 2015). However, it does mean that there is a limitation, whereby this thesis is not able to fully account for the experiences of those, particularly in the Global South, for whom the idea of crossing international borders is not possible. As Pheng Cheah correctly observes, it is both ethically and epistemically problematic to 'leave... out the subaltern subjects in decolonized space who have no access to globality and who view coerced migration as a plus' (1997: 172). My research is informed by, predominantly post-colonial, literature that emphasises the historical and ongoing relationship between colonialism and a Euroamerican public sphere (for example El-Tayeb 2008). Nevertheless, the privileging of mobile subjects might miss the different ways that citizenship is shaped, both in the global south and north, by immobile actors. As a result, I would foresee this as an area of potential research in the future.

The omission above leads to two further qualifications regarding the scope of the current project. The relationship between citizenship and migration is not composed of unitary blocks organised along an inside/outside dichotomy but is cut across and fragmented by other categories, most notably race and gender.

While migration and citizenship are often approached from the perspective of mobility, scholars have noticed that there is a notable silence when it comes to race (Anderson 2013; Lentin 2014). Citizenship and migration are both racialised categories meaning that the boundaries of

belonging are also highly racialised\_ ( Anderson, 2013; Back, Sinha, & Bryan, 2012; Bhabra, 2016). As Teresa Hayter observes, '[i]mmigration controls have their origins in racism, and they legitimate and breed racism' (2000: xxvi). Not only are citizenship and migration racialised categories, they are also highly gendered. Different and highly unequal social, political and economic relations shape women's migratory experiences and result in highly differentiated outcomes in relation to men. (see various in Tastsoglou and Dobrowolsky 2006). Saskia Sassen refers to a particular process that she labels the 'feminization of survival' (2003: 506). Due in part to their heavy debt burdens, shrinking economies in the global south limit the opportunities for male employment, which has meant the task of survival has fallen on the shoulders of women. There is an ever-expanding global proletariat consisting of migrant women from the global south, who are often employed in low wage and precarious work in the world's global cities, ranging from blue collar work to work in the sex trade (Sassen 2000; 2003). Due to their often weaker economic and political standing in host polities, women also tend to have inferior claims to citizenship (Tastsoglou and Dobrowolsky 2006: 18).

Migration and citizenship are not simply differentiated along the lines of race and gender; instead, as the circuits of survival suggest, there are also, important gendered and racialized 'tie-ins' (Sassen 2000: 519). Global inequalities predicated upon colonial histories and forms of neo-colonialism (e.g. Structural Adjustment Policies by the IMF and World Bank) drive migration in a highly differentiated manner. These inequalities are not just the result of different migratory pressures but are also exacerbated and entrenched by citizenship as a normative category. In her book *Against Citizenship* Amy Brandzel argues that 'citizenship is not only the central structure for reifying the norms of whiteness, heterosexuality, consumerism, and settler colonialism[...] but that these norms are brutally enforced against nonnormative bodies' (Brandzel 2016: 8). While this thesis stops short of Brandzel's claim that 'there is nothing redeemable about citizenship' (Ibid: 5), these are important warnings against the often harmful, multiple and contradictory ways that migration and citizenship intersect with race and gender. While this study operates in awareness of these problematic hierarchies and takes methodological steps to avoid their reproduction, thematic and spatial limitations mean that it is impossible to address them in

full. As such, this is an invitation to further scrutiny from other critical scholars, activists and those invested in rethinking and transforming citizenship.

## **Outline of Chapters**

This thesis is divided into three main sections. The first section comprises of chapters one and two and defines the nature of the problem the thesis addresses: first in material and political terms in chapter one and then by identifying the research gap in chapter two. Chapter three bridges between the first part of the thesis and the rest by setting out the theoretical and methodological framework this thesis deploys. Section two consists of two chapters that are conceptual pairs: the aim is to rethink the right to have rights by developing an account of the political practice of rights-claiming. Section three also comprises a conceptual pair of chapters that investigate citizenship's two primary institutional features: law and democracy. The thesis concludes by drawing everything together to outline the theory and practice of citizenship as method.

*Chapter one* establishes the nature of the problem that this thesis addresses in material and theoretical terms. Starting with an outline of the logic that underpins Arendt's formulation of the right to have rights, the aim is to assess its contemporary relevance. Arguing that, despite the proliferation of a global human rights regime, the aporias of rights remain relevant, I propose to shift from a concern with statelessness to rightlessness. While not formally stateless, irregular migrants with an insecure legal and political status often experience forms of rightlessness. Consequently, rightlessness is the concrete problem this thesis addresses and the irregular migrant is the locus around which the analysis is organised. Rightlessness also has a methodological function in this study, operating as a key critical concept through which to interrogate the aporetic limits of citizenship and rights.

*Chapter two* starts from the material problems identified in chapter one and investigates three different attempts to address them: No Borders activists and scholars, Seyla Benhabib's concept of democratic iterations and theories of acts of citizenship. Despite sharing a similar analysis of the problems borders represent, I find that the No Borders project fails to offer viable solutions because it does not fully apprehend the nature of power and the

function of the constitutive outside in shaping the political. Seyla Benhabib's model of democratic iterations offers a more sophisticated conceptual solution to the right to have rights. On the one hand its dynamic and performative understanding of citizenship is attractive, but ultimately its political potential is negated by an overdetermining legal framework. Theorists of Acts of citizenship offer an alternate approach, viewing citizenship as an activity that is prior to and transformative of citizenship as a legal status. However, this approach is problematic because it has little or no account of how the act engages with and transforms citizenship as a legal and institutional category. It is precisely this gap that my doctoral project addresses: the need to develop a dynamic concept of citizenship that can account for its institutional form without being over-determined by an excessive legalism.

*Chapter three* is a bridging chapter that responds to the failures of the literature addressed in the previous chapter by proposing citizenship as method as a new conceptual approach. The first part of the chapter engages with the acts of citizenship literature to highlight some of the shortcomings with the approach, suggesting the need to 'eventalise' (Foucault 1991) the act. Section two eventalises Rosa Parks' famous act of defiance and draws a set of historical lessons that can inform the migrant rights movement. The final section delineates the central tents of citizenship as method, as a deconstructive negotiation of citizenship. This is the framework that will be deployed and further developed across the remainder of this thesis.

*Chapter four* is the first of a conceptual pair of chapters that turn to an analysis of rights. The aim of the chapter is to rethink how we understand the right to have rights. The first step is to reframe the right to have rights in terms of the relationship between ethics and politics. Madeleine Fagan's post-foundational account of the ethico-political furnishes this project with a conceptual framework for reworking the right to have rights in non-oppositional terms. There are two steps in this process. The first is to recognise that this is not a purely theoretical endeavour, which I do by proposing an account of rights-claiming as an ethico-political practice. I substantiate this using the example of the Calais Hunger Strikers, who were a group of refugees in the now-demolished Calais Jungle migrant camp. The second step turns our attention towards citizenship. If ethics and politics are not in opposition but

mutual conditions of possibility, then it is a case of investigating how existing orders are displaced through the claims they make possible.

*Chapter five* builds on the theoretical foundations developed in the previous chapter to sketch an account of the political practice of rights-claiming. I do this through an engagement with the emerging literature on rights-claiming as a performative practice. Karen Zivi's recent work provides this project with a framework for approaching rights-claiming as the substantive practice of citizenship. However, her work does not go far enough in thinking through how rights-claiming contests and might re-articulate citizenship. To do this, I utilise Ben Golder's heterodox reading of Foucault's politics of rights, which distinguishes between rights-claiming as 'tactics' and 'strategy'. This analytic distinction is crucial to an understanding of citizenship as method and I demonstrate how it works through a re-reading of the famous case of the French *Sans-papiers* migrant movement.

*Chapter six* is the second set of chapters that function as a conceptual pair, where I put the apparatus of citizenship as method to work to investigate citizenship's two primary institutional features: law and democracy. This chapter puts the rights-claiming framework developed across the previous two chapters to work to analyse citizenship in its legal form. The first section of that chapter uses Alan Hunt's understanding of law as a 'constitutive mode of regulation' to investigate how law works to secure hegemonic relations. The second section utilises Jacques Derrida's understanding of law and democracy to investigate how rights-claiming can shape the meaning of law from within the legal system. The final section moves beyond the formal confines of law to investigate law's 'jurisgenerative' (Cover 1982) potential. Utilising the example of civil disobedience by the French farmer Cedric Herrou who was criminalised for offering hospitality to refugees, I argue that because the constitutive aporia between law and justice can be mobilised to found new rights-claims that are not formally recognised in statute. The radical potential of this move resides in the fact that the law both secures hegemonic relations but is also responsive to changes in political contexts.

*Chapter seven* turns its attention to the other key institutional feature of citizenship: democracy. The chapter is structured through a critical engagement with the radical democratic tradition and, in particular, the populist turn. I suggest there is a need to rethink the subject of radical

democracy by first highlighting how structural limitations of electoral democracies tend to discriminate against migrants and then showing how this is often reproduced in populist articulations of 'the people'. In response, I propose the irregular migrant as the subject of radical democracy. Utilising the framework of citizenship as method, I proffer an alternate account of radical democratic activity, oriented around practices of rights-claiming by irregular migrants. Through the example of the migrant-led youth group Let Us Learn, who campaigned for educational rights, I demonstrate how the tension between democracy and citizenship can be utilised as a motor for the transformation of the political.

*Chapter eight* pulls the different pieces of the puzzle back together to reflect on what this research has uncovered and its central contributions to the field. I frame my approach, citizenship as method, in contrast to some of the limitations inherent to the acts of citizenship literature, particularly in relation to its dependence upon a performative framework. In so doing, I draw out the central propositions of citizenship as method, as a deconstructive negotiation of citizenship. In particular, I focus on how citizenship as method broadens and deepens the field of critical citizenship studies. Using the example of human rights violations along the Southern border of the United States and the different rights-based responses, the chapter finishes with a brief discussion of how citizenship as method might help to navigate contemporary politics in the here and now, while also remaining open to a more radical future.

# 1. Abstract Nakedness: On the borders of rights

Louis Henkin claims that we are living in 'the age of rights' (1996). Yet, despite his optimism, around the globe many irregular migrants continue to experience conditions of rightlessness in their everyday lives. The paradox of universal human rights is that they count for very little unless there is a particular political community to act as their guardian and enforcer. In *The Origins of Totalitarianism*, Hannah Arendt lamented what she called the 'abstract nakedness' (1951: 380) of being nothing but human through her analysis of the condition of statelessness. For Arendt, the only truly universal right is 'the right to have rights'. Taking the aporia(s) of the right to have rights as its starting point, the task of this chapter is to define the theoretical and political terrain upon which this thesis will intervene. In Arendt's formulation, the two forms of right - the universal and the particular - open up a seemingly irresolvable conflict between universal human rights and citizenship. For rights to move beyond mere abstraction and gain meaningful content, they are dependent upon citizenship to be realised; however, due to their context transcending nature, 'the rights of man must also be extended beyond citizenship' (Derrida and Roudinesco 2004: 94). It is precisely this contradiction that makes statelessness so dangerous: when the individual is expelled or excluded from citizenship, they are thrown back onto 'the abstract nakedness of being nothing but human' (Arendt 1958: 380). Stripped of all the social and political attributes that constitute our personhood, the stateless person's universal rights become essentially void: to be *stateless* is also to be *rightless*.

Despite the strength of Arendt's criticism of rights, there are reasons to believe that the global political context has changed. Arendt finished writing *The Origins of Totalitarianism* at the end of the 1940s and it was first published in 1951. Whereas, starting in 1948 with the Universal Declaration of Human Rights, a defining feature of the post-War era is the rise of the human rights regime: a set of norms, rules and institutions that govern the international human rights system (Moyn 2012; Nickel 2002). The task of the current chapter

is to assess the contemporary relevance of the right to have rights, in order to define the material and conceptual problem that this thesis addresses. Central to this task is Arendt's account of personhood. I will outline what this means in detail in the next section of the chapter but for now the important point is that the loss of one's personhood, which corresponds with the loss of one's place in an organised political system, leads to rightlessness. Utilising Arendt's concept of personhood, I argue that the aporias of the right to have rights remains a real political problem but that it is necessary to shift from a concern with statelessness to a broader understanding of rightlessness, in order to better understand the experiences of many irregular migrants. While not formally stateless, the insecure legal and political standing of a large number of irregular migrants means they often live their lives in murky liminal zones between legality and illegality. This legal insecurity means that irregular migrants are often unable to access the rights that should be theirs according to the many declarations, charters and treaties on human rights (Anderson, 2013; De Genova, 2010; McNevin, 2011; Sigona, 2016; Squire, 2016).

A focus on rightlessness is not meant to eclipse a concern with statelessness altogether: it is both an urgent political problem – one example being India recently making 1.9 million people stateless (Regan 2019) - and a vibrant area of research (see Sigona, 2016). Rather, my intention in this chapter is to take Arendt's analysis of the 'the perplexities of rights' further, to investigate how it manifests itself in a contemporary social and political context through the lived-experiences of irregular migrants. In so doing, I develop an account of rightlessness that will be crucial to this thesis for several reasons. Rightlessness is a *concrete* problem that poses *conceptual* difficulties. It is a concrete problem for the many irregular migrants who live precariously in the interstices of the nation-state system. Conceptually speaking, rightlessness is a problem because it cannot be squared off, by either human rights norms or forms of postnational citizenship. It refers to an irresolvable tension between the universality of human rights and their dependence upon citizenship to gain concrete form – this is the *aporia of rights*. Finally, deployed as an analytic category, rightlessness serves an important function that differentiates my approach in this study from other theorists working in the field of citizenship studies. Rightlessness is a framework through which to explore the limits of citizenship and rights as they are experienced by irregular

migrants and a criterion through which to evaluate the effects of political transformation.

The current chapter formulates this position in three stages. The first unpacks the logic that underpins Arendt's critique of rights, paying particular attention to her conception of personhood. The second stage engages in an institutional investigation into the human rights regime and theories of postnational citizenship in order to evaluate claims that personhood has been decoupled from the nation-state (Soysal 1994). The third and final step turns to an analysis of the struggles of irregular migrants in a contemporary political context, which contradicts the claim that personhood has been universalised. Linking together the securitisation and illegalisation of migration with a growing border regime, I argue that despite a growing human rights regime, the aporia of rights remain a serious political problem. I finish with a definition of rightlessness as the central problem this thesis addresses.

## **1.1 The Right to Have Rights or Abstract Nakedness**

In the immediate aftermath of the Second World War, two parallel and opposite events were taking place: global leaders were preparing what would become the 1948 Universal Declaration of Human Rights; simultaneously, Hannah Arendt was writing one of the most devastating critiques of the concept of universal rights to date. While one declared that '[a]ll human beings are born free and equal in dignity and rights' (UN General Assembly 1948), the other lamented the fact that, stripped of the privileges of citizenship, the individual to whom inalienable rights are supposedly attached becomes near-impossible to recognise as a 'person'.<sup>7</sup> Through an analysis of statelessness, Arendt shows that, for the refugee, 'the abstract nakedness of being nothing but human was their greatest danger' (1951: 380). In what follows, I outline Arendt's critique of rights in order to draw out the logic

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<sup>7</sup> In this context 'person' has a very specific meaning for Arendt. Personhood refers to a specific phenomenological understanding of what it means to be recognised as a bearer of rights through legal and political belonging within organised humanity. This point will be elaborated more fully later in the chapter.

underpinning the distinction between being merely 'human' and her conception of 'personhood', which is crucial to our understanding of rightlessness.

## **Rights and Revolutions**

Arendt's critique of the 'perplexities of rights' was borne out of the contradictions of modernity that became apparent in a particular historical context: the Enlightenment. In his book *The Last Utopia: Human Rights in History* (2010), the historian and legal scholar Samuel Moyn writes an anti-essentialist history of the concept of human rights. For Moyn, the Enlightenment is a key juncture in the development of universal (human) rights. The French revolutionary *Declaration of the Rights of Man and of the Citizen* (1789) arose in the context of Enlightenment universalism and the revolutionary era and, as Moyn observes, 'clearly does bear some affinity to contemporary forms of cosmopolitanism' (2010: 20). Yet, there are also key conceptual differences. The clue comes in the name, where the declaration referred to the rights of both 'man' (universal) and 'the citizen' (particular). Despite their supposed universality, there was no question that the *Rights of Man* could only be achieved through the construction of spaces of citizenship, where they could be implemented and enforced. In this respect, '[t]he "rights of man" implied a whole people incorporating itself in a state' (Moyn: 26) and it is the elision of 'people' and 'state' that Arendt objected to so vehemently. The reasons why become clear through her critique of rights and identification of the dangers of statelessness.

The strength of Arendt's critical analysis is that it is rooted in a concrete problem. She addresses the perplexities of rights, as Ayten Gündođdu observes in 'political and historical terms' rather than through 'an abstract, formalistic statement demonstrating the logical impossibility of human rights' (2015: 4). For Arendt, the conjunction of enlightenment universalism with the revolutionary era is essential, because as traditional forms of authority collapsed, the *Declaration* meant that 'Man, and not God's command or the customs of history, should be the source of Law' (1951: 369). However, the concept of universal man as the bearer of rights is immediately equivocated within the declaration: if rights are *universal* then they are the rights of all, irrespective of political membership; however, if they are the rights of citizens,

then they are the rights of members of particular political communities. The result being that 'stateless people were as convinced as the minorities that loss of national rights was identical with loss of human rights' (Ibid: 371). From the beginning rights were inextricably bound to membership within juridico-political communities: citizenship.

In contrast to how they are understood today, at the time of the Enlightenment human rights 'were deeply bound up with the construction, through revolution if necessary, of state and nation' (Moyn, 2010: 20). For Arendt, the French Revolution marked the birth of the nation-state and set into motion what she saw as the primary contradiction of modernity: the 'secret conflict between state and nation' (Arendt, 1951: 297). The state, in its different forms (republican/constitutional monarchy etc...), was first and foremost a legal institution whose function was to protect and extend rights to all of those who reside within its borders, irrespective of nationality. Yet Arendt saw that as traditional forms of authority dissolved, the principle of 'common origin' (nationality) became the glue that held the political community together. The result being the contradictory association of nation and state, where 'the state was partly transformed from an instrument of the law into an instrument of the nation (Ibid: 296), only recognising other nationals as the subject of rights within its jurisdiction.

The French Revolution elided the Rights of Man with the demand for national sovereignty, setting up the conflict between nation and state. Arendt describes the problem very clearly:

The same essential rights were at once claimed as the inalienable heritage of all human beings and as the specific heritage of specific nations, the same nation was at once declared to be subject to laws, which supposedly would flow from the Rights of Man, and sovereign, that is, bound by no universal law and acknowledging nothing superior to itself. The practical outcome of this contradiction was that from then on human rights were protected and enforced only as national rights and that the very institution of a state, whose supreme task was to protect and guarantee man his rights as man, as citizen and as national, lost its legal, rational appearance (Ibid: 297).

On the one hand, the identification of the rights of man with the citizen already represents a formal contradiction between the universal and the particular. Yet, for Arendt the problematic linking of nation and state runs deeper and is inherently racialised. Because the traditional markers of sovereignty disappeared along with the monarchy, the notion of kinship 'signifies the emergence of the nation as the primordial community of citizens' (Isin 2012: 456). In the process, as the state is conjoined with the nation there is an identification of the citizen with the national and thus the rights of man come to refer to the rights of nationals only (Arendt, 1951: 210).

The result is that the racialised logic that underpins totalitarianism was not an exception but a principle inherent to the internal contradictions of the nation-state. Hitler took this to its radical conclusion with his claim that 'right is what is good for the German People' (Arendt 1951: 254). The paradox of rights is not just that in their universal sense they are overly abstract but, through the perversion of the state by the nation, they found the laws of the sovereign whose right it is to exclude. So, in the case of the Jews in Germany, the dangers of statelessness manifested itself when the 'Nazis started their extermination of Jews by first depriving them of all legal status' (Ibid: 375). It was at this historical juncture that:

[w]e became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation (Ibid: 376).

Critically, the loss of a polity, for Arendt, coincided not just with the loss of all rights but in the loss of one's place in the common world and 'with expulsion from humanity altogether' (Ibid: 377). Arendt explicitly links rightlessness, as the corollary of statelessness, with the more ambiguous claim that it represents the 'expulsion from humanity'. By utilising Arendt's concept of 'personhood', the next section unpacks the logic of this claim and its implications for understanding rightlessness.

## Personhood: Who is the human in human rights?

Throughout *The Origins of Totalitarianism* Arendt goes to great lengths to demonstrate the links between statelessness and the condition of rightlessness. However, what she means by this is not straightforward because, as Gündogdu observes, the loss of citizenship does not just refer to the violation of one's rights but is 'a condition that can render void even the rights one formally has' (Arendt, 1951: 254). This is because the loss of citizenship also entails the loss of one's personhood. What this means is not immediately apparent but it is a crucial dimension of rightlessness. Seeing as rightlessness is the primary problem that this thesis addresses, it needs to be addressed in detail. For Arendt, the loss of personhood results in rightlessness. The question is, what does personhood mean? It has three deeply interrelated dimensions that are *legal*, *political* and *phenomenological*. I explore each in turn now before returning to explain how the loss of citizenship might entail the loss of even the rights we formally have.<sup>8</sup>

The first and in many ways most important dimension of personhood is its legal form. In Arendt's account of the right to have rights discussed above, this means to live within 'some kind of organized community'. Here Arendt is closest to conventional understandings of citizenship, viewed as a legal status within a territorially bounded nation-state. Legal personhood is of paramount importance because it produces a form of equality - where all are equal before the law - that protects the individual against arbitrary violence. The problem for the stateless person is that they live 'outside the jurisdiction of... laws without being protected by any other' (Ibid: 363).<sup>9</sup> Consequently, the stateless are potentially subject to arbitrary violence from both individuals and the state. The example that Arendt gives once again is the state violence carried out against the Jewish population in Nazi Germany. So, for the stateless, it 'is not that they are not equal before the law, but that no law exists

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<sup>8</sup> The outline of Arendt's account of personhood given here is fairly schematic. For a fuller discussion of personhood and its central place in Arendt's writings on statelessness and rightlessness see chapter five in Ayten Gündogdu book *Rightlessness in an Age of Rights* (2015).

<sup>9</sup> Arendt makes this point through a distinction between the stateless person and the criminal, where the criminal may break the law but is still protected against arbitrary violence from it and has recourse to many of the channels for justice (see Arendt, 1961: 375-363).

for them; not that they are oppressed but that nobody wants even to oppress them' (Ibid: 375).<sup>10</sup>

The importance of legal personhood leads directly onto its political dimension, which means to live in 'a framework where one is judged by one's actions and opinions'. As Gündoğdu notes, '[l]egal recognition of personhood is not merely a juridical issue but also[...] a political one that is directly linked to the question of whose action and speech are taken into account in a given community' (2015: 104). The loss of legal personhood does not just deprive the stateless of protection from arbitrary violence but from a place within the common world of organised humanity, where they 'are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion' (Arendt 1951: 376). The political importance of personhood is linked to Arendt's very specific understanding of politics discussed above. Because equality is not an innate essence given at birth, but produced through the human artifice, then it is political. However, in its political sense personhood does not just represent equality before the law but refers to the creation of a political community of equals. Rights are possible precisely 'because man can act in and change and build a common world, together with his equals and only with his equals' (Ibid: 382).<sup>11</sup>

The legal and political dimensions culminate in Arendt's phenomenological understanding of personhood. Personhood, in its phenomenological sense, refers to 'an artificial convention that institutes relationships among different individuals' (Gündoğdu 2015: 105) and through which one finds a place in the world. A phenomenological approach to personhood breaks with the metaphysical assumptions that underpin traditional understandings of rights, so we can see that:

'[t]he paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general-without a profession, without a citizenship,

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<sup>10</sup> In *Who is the Subject of the Rights of Man* (2004) Rancière challenges this assertion that the stateless are absolutely outside the law, making it clear that in the case of Nazi Germany there were laws specifically in place to oppress the Jewish population. This point will be made in relation to the contemporary experiences of migration shortly to show that migrants are not outside the law but exist in a 'zone of indistinction' in relation to law.

<sup>11</sup> In her later work *The Human Condition* (1963), Arendt argues for a conception of freedom and politics centred on the human capacity for action as a world building capacity.

without an opinion, without a deed by which to identify and specify himself-and different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance' (Arendt, 1951: 3830).

So, for Arendt, personhood is a phenomenological category that means to be embedded within a common human framework of reciprocal relations, which is the condition of the possibility of rights.

It is now possible to explain why the loss of citizenship, which is co-extensive with her phenomenological account of personhood, leads to the fundamental condition of rightlessness. Arendt's problem with formal human rights documents is that they fail to appreciate the fact that rights are not an ontological given but political achievements: : '[w]e are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights' (1951: 382). So while the stateless might formally have certain rights, such as the right to life, they live in a condition of fundamental rightlessness because these rights are dependent on the goodwill of others. On the other hand, the loss of certain rights does not necessarily imply rightlessness. Gündoğdu points out that '[c]itizens can be deprived of certain rights, including the right to life (e.g., soldiers during a war), but they are not rightless as long as they have legal and political standing' (Gündoğdu 2015: 94). So the 'human' might formally have some rights but without 'personhood', legal and political standing in a polity, they are still fundamentally rightless. Because the stateless are deprived 'of a place in the world which makes opinions significant and actions effective' (Ibid: 296) they exist in a condition of rightlessness. Personhood is the condition of rights. While Arendt was concerned with statelessness, in the final section of this chapter I use her account of personhood to demonstrate how irregular migrants, who are not formally stateless, experience forms of rightlessness due to their insecure legal and political standing. First, I address the changing global political context, where the growth of a global human rights regime leads some theorists (Jacobson 1996; Soysal 1994) to claim that personhood has been extended beyond the borders of the nation-state.

## 1.2 Personhood Beyond Borders

Context matters. Published in 1951, *The Origins of Totalitarianism* exposes the paradoxical and dangerous relationship between human rights and citizenship in the modern era of nation-states; however, the global political context is now very different. The historical epoch since the end of World War II has seen the rise of a global human rights regime. There have been numerous declarations, treaties and supranational institutional developments designed to limit the dangers of statelessness and extend legal personhood beyond the borders of the nation-state. Responding to changes in the international political context, theorists of postnational citizenship argue that the rapidly evolving global situation has changed the shape of citizenship, resulting in the development of new 'postnational' models of belonging (Jacobson 1996; Soysal 1994). They claim the new global context has eased, or even erased, the dangers of statelessness by extending personhood beyond the nation-state. The aim of the current section is to outline the logic that underpins this argument before critically evaluating it in the final section of the chapter. To do this, I engage in an institutional and sociological analysis of developments in the global human rights regime and its effects on citizenship.

### The Global Human Rights regime

In many ways the 1948 UDHR is *the* central event in the history of human rights. It represents a major conceptual change with the 1789 *Declaration of Rights of Man and of the Citizen* because it breaks 'the umbilical connection between rights and citizenship' (2010: 38). While the foundation of the 18<sup>th</sup> century *Rights of Man* might lie in a universal conception of mankind, it was taken for granted that these rights were dependent on citizenship and, thus, the nation-state. The UDHR represents a radical departure from this understanding due to the 'recasting of rights as entitlements that might contradict the sovereign nation-state from above and outside rather than serve as its foundation' (Ibid: 13). By equating rights with citizenship, the *Rights of Man* re-enforced the sovereignty of nation-states. In contrast, the UDHR posited the human as sole source of rights, generating new claims that often

come into conflict with the sovereignty of nation-states. Yet, despite the conceptual shift in the human rights framework that the UDHR brought about, in an essay published in 1949 Arendt was critical of what she called its 'lack of reality' (Arendt 1949). Arendt's criticism was less about the conceptual innovation inherent in the UDHR and the content of the rights it espoused and aimed more towards the lack of mechanisms to enforce them above and beyond the nation-state. Yet, coming out in 1951, *The Origins of Totalitarianism* was written at the point when the human rights framework was still in its embryonic form, so does it still 'lack reality'?

The post-war era has been defined by a series of transformations that might reasonably be seen to have attenuated some of Arendt's concerns. Since its inception in 1945, a cornerstone of the United Nations has been its promotion of universal human rights. Out of this has grown the contemporary human rights regime, consisting of an array of new institutions, treaties and mechanisms. In the sphere of international politics, the function of global governance regimes is 'to facilitate the making of specific cooperative agreements among governments' (Keohane 2005: 62). Regimes cohere around particular issue areas by defining 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge' (Ibid: 57). While the UDHR does not constitute a human rights regime alone, out of it has grown a series of treaties, covenants and enforcement mechanisms that have given it more 'reality', to borrow Arendt's phrase. Broadly speaking, these have proceeded in three phases. The first of these is in the period after the UDHR, with the key moment being the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While the UDHR was the basis for the two covenants, they have now become the central pillars of the human rights regime because they contain much stronger promotional and investigatory powers. However, with the exception of the European Court of Human Rights, supranational enforcement mechanisms remain weak (Gündoğdu 2015; Nickel 2002).

The second phase in the development of a human rights regime took place in the 1970s and grows out of the problems of enforcement. This period saw the growth of what Keck and Sikkink labelled 'transnational advocacy networks' (Keck and Sikkink 2014: 89). While the UDHR might be the central

conceptual event in the development of human rights, Moyn suggests that it was during this period that human rights became an international force – with 1977 being the breakthrough year (2010: 118).<sup>12</sup> What defines this period is the growing trend for non-governmental organisations (NGOs) to occupy a prominent place in the human rights regime. NGOs such as Amnesty International, worked across civil society to create a series of formal and informal mechanisms. Central to the new approach were forms of information exchange. Through the creation of networks, ‘non-traditional inter-national actors to mobilize information strategically to help create new issues and categories, and to persuade, pressurize, and gain leverage over much more powerful organizations and governments’ (Keck and Sikkink 2014: 89). While these enforcement mechanisms were mostly informal, they were able to exert a considerable degree of leverage over governments due to the fact that many made human rights a cornerstone of their international image.<sup>13</sup> Advocacy networks provided a political framework that addresses weaknesses in institutional enforcement mechanisms.

Finally, the end of the Cold War marked a further phase in the evolution of a global human rights regime. Since the 1990s there has been a massive acceleration in the institutionalisation of human rights and the widespread acceptance of their normative force. One example is the growing norm for humanitarian intervention, culminating in the 2005 Responsibility to Protect that was adopted by all the member states of the United Nations.<sup>14</sup> Theorists such as Seyla Benhabib argue that the rise of the global human rights regime has transformed international politics. There has been a shift away from a Westphalian model of sovereignty, where ‘states are free and equal; they enjoy ultimate authority over all objects and subjects within a circumscribed territory’ (Benhabib 2006: 23), towards a model of liberal international sovereignty, in which the ‘formal equality of states is increasingly dependent upon their subscribing to common values and

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<sup>12</sup> This is a point that I will return to in chapter four, through a discussion of the political practice of rights-claiming.

<sup>13</sup> For example, in *Activist Beyond Borders* (1998) Keck and Sikkink use the example of Mexico to highlight the efficacy of TANs.

<sup>14</sup> The Kosovo and Iraq wars are two prime examples of military intervention predicated on (often dubious) humanitarian grounds. This is a point I will return to in the discussion on human rights in chapter three.

principles, such as the observance of human rights, the rule of law, and respect for democratic self-determination' (Ibid: 23-24). In this way, the human rights regime has, supposedly at least, broken the necessary connection between rights and citizenship.

The most obvious way that Arendt's critique of rights has been addressed is through a series of measures designed specifically to address the dangers of statelessness. In the first case, Article 14 of the UDHR sets down the right of all people to seek asylum in other countries. This is a right that is reinforced by the 1951 Convention Relating to the Status of Refugees and, in particular, Article 33 that enshrines the principle of *non-refoulement*, prohibiting states from returning refugees to home countries where their lives and freedom may be under threat. The 1951 Refugee Convention has been ratified by 145 states (UNHCR), thus achieving meaningful legal status across most of the globe. The new human rights regime also addresses another of Arendt's primary concerns: the way that the 'Nazis started their extermination of Jews by first depriving them of all legal status'. Article 15 of the UDHR attempts to address this issue by laying down a right to nationality and forbidding its arbitrary deprivation. Finally, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) explicitly addresses Arendt's concerns regarding the loss of legal personhood. It addresses this dimension of statelessness by declaring that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. While this is not an exhaustive list of human rights norms and mechanisms aimed explicitly at combatting statelessness, each of the articles and conventions relates to key issue areas highlighted by Arendt in *The Origins of Totalitarianism*. By highlighting specific norms and mechanisms concerning statelessness, alongside general developments in the construction of a human rights regime, the aim has been to demonstrate the many ways in which the human rights that Arendt said lacked 'reality' have achieved a degree of permanence in the international sphere. The question is, have these developments decoupled personhood from citizenship? Theorists of postnational citizenship have attempted to answer this question.

## Postnational Citizenship

The concept of postnational citizenship has been proposed in response to the structural changes in the global political system. Scholars argue that the human rights regime has resulted in significant changes in the relationship between citizenship and rights, extending the all-important notion of personhood beyond the borders of the nation-state (Jacobson 1996; Soysal 1994). In the wake of the Cold War, postnational citizenship has gained a great deal of traction: the European Union is often cited as the most advanced example of a postnational political system, while Canadian Prime Minister Justin Trudeau went as far as to declare Canada as the world's first postnational state (Lawson 2015). Despite Trudeau's claim, postnational citizenship does not refer to a particular mode of political belonging, nor a legal status but is an analytic concept, designed to document structural changes in the relationship between rights and identities. Postnational citizenship is not a normative proposal and must be differentiated from cosmopolitan approaches to citizenship (Archibugi and Held 1995; Held 2013). In what follows I explain postnational theorists' claim that personhood has been universalised through an engagement with the work of Yasemin Soysal, as one of its earliest and foremost proponents.

In *Limits of citizenship: Migrants and postnational membership in Europe* (1994), Yasemin Soysal takes as her starting point the disparity in the structure of citizenship that results in a 'dialectic of rights and identities': 'claims to rights, become universalized and abstract, [but] identity is still conceived of as particular and bounded by national, ethnic, regional, or other characteristics' (Ibid: 7). Picking up on this tension, alongside the many advancements in the human rights regime outlined above, Soysal claims that contemporary social and political theory tends to fail to take into account global transformations. In so doing, political theory 'privileges the nationally bounded model of citizenship and bypasses the reconfiguration of contemporary membership' (1994: 6). Soysal identifies two interrelated developments that are key to understanding the rearticulation of citizenship: the *first* is the global transformation (globalisation) of the state-system, where there is 'an increasing interdependence and connectedness, intensified world-level interaction and organizing... which altogether confound and complicate nation-state sovereignty and jurisdiction' (Ibid: 145). The *second* is the growing

discourse of international rights and norms that 'are formalized and legitimated by a multitude of international codes and laws' (Ibid: 145). Soysal investigates these tensions through the analytical figure of the migrant as 'guest worker', claiming her 'analysis reveals that the scope and inventory of noncitizens' rights do not differ significantly from those of citizens. Further, she claims that the rights of noncitizens are increasingly standardized across host polities' (Ibid: 119-120). When citizenship rights are broken down into categories of political, civil and social rights - as T. H. Marshall does in *Citizenship and Social Class* (1950) - then the lines between citizen and noncitizen become ever more blurred. In a contemporary context, it is no longer a simple task to differentiate permanent noncitizen residents of Western nation-states in terms of the rights and privileges they hold[...] particularly with regard to civil and social rights (Soysal 1994: 130).

Soysal's analysis of guest workers considers each form of rights identified by Marshall in turn. She discovers that access to *social* rights, such as education, health and welfare benefits, are primarily dependent on physical presence than formal citizenship. In the countries she analysed, *civil* rights for all tend to be enshrined in constitutional documents. Finally, it is *political* rights that are restricted to noncitizens, where rights to political participation tend to remain indirect (Soysal 1994: 123-29). The incorporation of the guestworker into membership rights leads Soysal to conclude that:

[n]ot only does the array of rights improve over time, but also the categories of populations that they cover expand. Even illegal workers are granted the right to appeal deportation, [and] to be treated humanely (Ibid: 131).<sup>15</sup>

Further, many of the countries analysed offer pathways to full citizenship status over time and often regularise the status of illegal aliens. The combined trends demonstrate, in Soysal's view, that rights that were once firmly restricted to citizens are now extended to foreign nationals on the basis of

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<sup>15</sup> A further finding is the reversal of Marshall's sequential model of the evolution of access to citizenship rights, where he claims they start with civil rights, move to political rights and finally result in social rights. In contrast, the nation-states Soysal has studied demonstrate that 'economic and social rights were the first ones to be fully granted to migrant workers in European host countries. Political rights became part of the agenda much later' (Ibid: 130).

physical location. The result is the decreasing importance of formal citizenship and the transformation of the concept of citizenship itself.

To recall Arendt's analysis, to be stateless is to be rightless because it entailed the loss of one's personhood. In this respect, postnational citizenship, according to Soysal at least, seems to have resolved the problem: 'In the postnational model, personhood replaces nationhood; and universal human rights replace national rights' (Soysal 1994: 142). The post-war transition from rights that have historically been granted only to nationals to their universalisation and extension to non-nationals has also transformed citizenship. Citizenship has shifted from a particularistic model of national belonging to a universalistic one predicated on the principles of equal personhood. Fundamentally, Soysal finds that '[r]ights that used to belong solely to nationals are now extended to foreign populations, thereby undermining the very basis of national citizenship, resulting in a new form of 'postnational citizenship' (Ibid: 136). This structural transformation in the form of political membership addresses the loss of personhood that statelessness entails because, in the new global context individual rights based on national origin are codified into schemes that emphasise a universal conception of personhood. It would appear that the aporias of rights are, if not yet fully, well on their way to being resolved.

So is that the end of the story? I suggest not. Despite a growing human rights regime and a series of measures aimed at combatting statelessness, the problem has by no means gone away altogether. In the first case, whilst it is difficult to put an official number on it, a 2017 UNHCR report claims that there are an estimated 10 million stateless people in the world today (UNHCR 2017). What complicates the picture further is that many theorists now also distinguish between primary and secondary sources of statelessness (Blitz 2006; Manly 2007; 2012; Sigona 2016).<sup>16</sup> Furthermore, although the right to seek asylum is almost universally guaranteed in law, claiming asylum has become increasingly difficult. A report by Migreurop (2014) noted how the European Union's border agency Frontex pursued strategies that were in danger of violating Article 33 of the Geneva Convention relating to the Status

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<sup>16</sup> Primary refers to direct discrimination and the denial of citizenship; secondary is about forms of national policies that arbitrarily discriminate against minorities (UN Human Rights Council 2009).

of Refugees (Frontexit 2018). Across the Global North there have been a series of measures designed to restrict and deter flows of asylum seekers, while at the same time the criteria for recognising asylum claims has become much tighter (Boswell 2003; Squire 2009). Finally, James Nickel undertakes a forensic investigation into the developments in the human rights system to assess whether or not it can rightly lay claim to being a global governance regime. While noting the many developments in the post-war era, he ultimately finds that 'the international human rights system falls short of being a global governance regime' (Nickel 2002: 371). Although the reasons vary depending on the institution, Nickel's main critique is that the human rights system still lacks enforcement power.<sup>17</sup> What each of these issues demonstrate is that the so-called human rights regime has not achieved the levels of reality needed to be considered truly universal. My contention is that the 'perplexities of rights' that Arendt uncovers reveal a deeper problem that postnational theorists fail to see. In the final section I substantiate this hypothesis through an investigation into the struggles of irregular migrants in a contemporary context.

### **1.3 Migration: At the limits of the nation-state system**

Theorists of postnational citizenship situate their analysis within a changing global context, marked by the transition from 'Westphalian' to 'liberal international' forms of sovereignty. Within this framework, they argue that the nature of political belonging has changed, where the limits of personhood no longer coincide with the borders of nation-states. However, despite the rise of the human rights system, Soysal still recognises that discrimination against migrants persists and may be perpetuated due to various social, political and economic factors. Crucially, for Soysal the continued violation of migrants' rights does not represent a theoretical problem but merely signifies an 'implementation deficit', where there is a 'discrepancy between formal rights

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<sup>17</sup> Other areas of criticism are that it is not truly autonomous, such as with the UN Security Council; or that it is not truly global, in relation the EU's human rights system (Nickel, 2002).

and their praxis' (1994: 134). Contra Soysal, I argue that the forms of rightlessness experienced by irregular migrants are not exceptions to the norm but reflect a more fundamental aporia inherent to the relationship between citizenship and rights in the contemporary nation-state system. In the final section of this chapter, I demonstrate how the contemporary problem of rightlessness occurs at the nexus of two interrelated processes: the *securitisation* and *illegalisation* of migration. Combined with new technologies of border surveillance and control (Bigo 2002), I view irregular migration as a limit concept, caught in the interstices of 'the system of rights, where the rule of law flows into its opposite: the state of exception and the ever-present danger of violence' (Benhabib 2004: 163). In so doing, I outline an understanding of rightlessness as the material and conceptual problem this thesis addresses and an analytic category through which to interrogate the limits of citizenship and rights.

### **Contemporary Migration: Securitisation, and illegalisation**

In recent decades the regulation of migration has emerged as an important and highly controversial area of concern, not just to governments and policy-makers but also activists and NGOs. This is due to factors, such as the geopolitical dislocation associated with the end of the Cold War, processes of economic globalisation and the post-9/11 security environment. (Squire and Huysman 2009). Migratory flows 'escalated in the aftermath of the Cold War, when border controls in former Eastern Bloc states were relaxed and Europe, in particular, confronted the potential for mass movements of people from those states into Europe' (McNevin 2014: 297). Beyond the European context, Saskia Sassen also attributes increased levels of migration, particularly from the Global South to the Global North, to global governance failures that have led to new 'counter-geographies of survival' (Sassen 2014: 83). Failures of developmental programmes have resulted in heavy debt burdens and high levels of unemployment across many countries in the Global South. The result of 'the growing immiseration of governments and economies in the Global South launches a new phase of global migration and people trafficking, strategies which function both as survival mechanisms and profit-making activities' (Ibid: 85). While the post-Cold War context has seen the liberalisation of some borders, most notably within the EU, many others have

become increasingly militarised. One only has to observe heightened policing of the US-Mexico border, the deaths along the external frontier of the EU or the deployment of the Royal Australian Air Force and use of off-shore detention in Australia to observe this phenomenon. As global flows of people increase, migration has been 'securitised' and 'illegalised' (Squire and Huysman 2009; Bigo 2002), resulting in increasingly violent practices of bordering and new forms of rightlessness.

Migration has been *securitised*. By securitisation I mean the discursive construction of irregular migration as an existential threat to sovereign nation-states (Bigo 2002; Buzan et al. 1998; Huysmans 2000; Squire and Huysman 2009). What is meant by the securitisation of migration and how it functions is contested and it is beyond the scope of this project to enter into the debate here. Broadly speaking they are split between the Copenhagen School, which foregrounds a linguistic and speech act theory of securitisation and the Paris School that is concerned with securitisation as institutionalised 'techniques of government' (Bigo 2002). I follow the work of Vicki Squire by understanding the securitisation of migration from a discursive perspective: 'a discursive analysis conceives both [The Copenhagen and Paris schools] as central to the workings of exclusionary politics. Indeed, linguistic (narrative) and non-linguistic (technical) processes of securitisation are both approached here as discursive practices that coalesce around a deterrent rationality and a logic of selective opposition' (Squire 2009: 39).<sup>18</sup> For Squire, the migrant is discursively constituted as a security concern through both the speech acts of political elites and the technocratic regulatory practices of security professionals, such as border agents, private companies and government agencies. The result being a particularly 'exclusionary reconstruction of a nationalistic conception of belonging' (Ibid: 14). Theorists, such as Squire and McNevin, highlight the 'appalling consequences of securitization' (McNevin 2014: 298) for the lives of irregular migrants, many of whom have died or suffered great hardship travelling across land and sea.<sup>19</sup>

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<sup>18</sup> For an overview of the differences between the Copenhagen and Paris Schools of securitisation, see chapter two in Squire's *The Exclusionary Politics of Asylum* (2009).

<sup>19</sup> McNevin also observes that the consequences of the securitisation of migration have had appalling consequences for attempts to regulate migration. She highlights how they accentuate 'pull factors' by creating a demand for migrants as precarious, thus exploitable, workers. This is a point I shall return too shortly.

Arising out of the restrictive security environment is a second process: the *illegalisation* of irregular migrants. The process of illegalisation is tied to the rise of irregular migration as a security issue. On the one hand it refers to the laws that increasingly criminalise irregular migrants. Yet it also signifies a broader discursive dimension of illegalisation that concerns the ways in which discourses on migration, particularly around security, construct the idea of the migrant as a criminal threat (Squire 2009). The intertwining of securitisation and illegalisation is a trend occurring across contemporary liberal democracies, one example being the recent 'Hostile Environment for Migrants' laws and policies in the United Kingdom. I will return to a discussion of the Hostile Environment in chapter six but for now it can be understood as 'a sprawling web of immigration controls embedded in the heart of our [the UK's] public services and communities' (Liberty 2019: 8). Through processes of securitisation and illegalisation, the Hostile Environment constructs a discursive context whereby citizenship is articulated in particularly exclusionary terms, in response to the territorial dislocation brought about by increases in migration (Squire 2009: 29).

### **Rightlessness and the Border Regime**

The interconnected processes of securitisation and illegalisation define the social, political and discursive contexts in which irregular migrants live their lives. Arising out of these contexts are new technologies and tactics of border surveillance and enforcement. Chief amongst these are the increased use of detention and deportation as symbolic tactics to produce the effect of sovereign power (Gündoğdu 2015: 109). The consequence of which has been to render the personhood of many irregular migrants increasingly precarious.

In *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, Nicholas De Genova charts the rise of the 'deportation regime' that has 'emerged as a definite and increasingly pervasive convention of routine statecraft' (2010: 34). De Genova utilises Giorgio Agamben's writing on sovereignty, bare life and the state of exception in *Homo Sacer* to make his argument. For Agamben, sovereignty is defined by and through its exceptionality: it is a form of differential inclusion that makes the juridical order possible and defines the nature of state power. The sovereign exception is a '*zone of indistinction between nature and right* [emphasis original]'

(Agamben, 1998: 21), which manifests itself in the form of the 'ban' - an expulsion from the juridical order. Agamben claims that, '[h]e who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable' (Ibid: 28). The banned subject is a limit figure, held in an undecidable zone between inside and outside. In a contemporary context De Genova locates the irregular migrant, as a deportable subject in this undecidable zone. It is here that the parallels with Arendt's work arise, because where 'refugees may be... an icon of statelessness and therefore also bare life, then deportability perfectly and precisely marks the zone of indistinction between a condition that is (virtually) stateless and one that is positively saturated with the state' (2010: 46). Irregular migrant's insecure legal and political standing within a contemporary context, where migration has been securitised and illegalised, undermines their personhood, preventing them from accessing the rights that legal personhood affords citizens.

The concrete effects of irregular migrants' legal vulnerability results in conditions of *virtual* statelessness and, thus, rightless. Researchers in critical migration, such as Bridget Anderson (2013) and Monika Krause (2008) point out that, due to the experience of deportability, 'it is not uncommon in the British building trade and among cleaning brigades to take on irregular workers for a month and then fire them without pay'. As deportable subjects, irregular migrant workers are often unable to contest these abuses through fear of being exposed as undocumented, or losing their employment, upon which their legal status is predicated. The social and political effects of a securitised environment for migrants, accompanied by new forms of border control and surveillance, undermine irregular migrants' personhood, resulting in new forms of rightlessness. Furthermore, it is not just catastrophic for the migrants themselves but it is also counterproductive in the desire to control migration. As many theorists have shown (Anderson 2013; De Genova 2007; McNevin 2014) the insecurity that irregular migrants find themselves in also creates 'demand-side pressures', or 'pull factors', that draw irregular

migrants to destination states (McNevin 2014: 298) as a highly exploitable form of labour.<sup>20</sup>

Soysal claims that, due to the growing human rights regime, personhood has been universalised. The struggles of contemporary irregular migrants tell a different story: the forms of rightlessness experienced by irregular migrants due to their insecure legal and political standing cannot be reduced to an ‘implementation deficit’, as Soysal suggests. The plight of contemporary migrants signifies the enduring relevance of Arendt’s critique; as Gündogdu observes, their predicament ‘should not be treated as an unfortunate exception but instead as a *symptom* manifesting the perplexities of the Rights of Man [emphasis original]’ (2015: 11-12). The rightlessness experienced by so many migrants illuminates a legal vulnerability that is internal to the logic of the international system itself. It is precisely this problem that this thesis addresses. Before finishing, I briefly define how I understand this problem, its differences and similarities to Arendt’s work and how it will be utilised across the remainder of the thesis.

### **From Statelessness to Rightlessness**

The primary focus of this chapter has been to develop an account of rightlessness. In order to do this, I have utilised Arendt’s concept of personhood to analyse the contemporary political context and assess the claim that the human rights regime has resolved the aporias of the right to have rights. On the one hand, the securitisation and illegalisation of migration clearly problematises the claims of postnational theorists that personhood now extends beyond the borders of the nation-state. The use of border controls by states places limits on universal conceptions of personhood, situating irregular migrants in murky zones of illegality, where they are unable to access the rights they formally have. On the other hand, nor can the experiences of rightlessness by irregular migrants be entirely reduced to an

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<sup>20</sup> In drawing attention to the manner in which border controls might counterintuitively increase pull factors related to irregular migration, I want to make it clear what I mean in relation to two key points. Firstly, I am not contributing to a narrative that sees migration as having a deflationary effect on domestic wages. All the evidence demonstrates that this is not the case (Dustmann and Frattini 2014). Secondly, nor am I attempting to contribute to attempts to ‘manage migration’ flows more effectively. As Vicki Squire makes clear (2009), such attempts are generally counterproductive but also necessarily involve massive amounts of violence.

Arendtian framework, where the tragedy for the stateless person is that no law exists for them. De Genova's analysis of the growing deportation regime clearly demonstrates that the deportable subject is not outside of law but resides in a 'zone of indistinction', on the threshold between the fullness of the citizen and the absence of the absolute other – it is in this liminal zone that the experience of rightlessness occurs. Consequently, using Arendt's understanding of personhood to analyse the experiences of irregular migrants, what becomes clear is the need to move from an understanding of *statelessness* to a broader conception of *rightlessness*.

The rightlessness experienced by irregular migrants is the problem that this thesis addresses. As discussed at the beginning of the chapter, rightlessness is a concrete problem that poses conceptual difficulties. It is a problem in material terms because it endangers the lives of migrants who cross borders and leaves them open to exploitation in host countries. From a conceptual standpoint, the impossible aporias of the right to have rights remain as pertinent today as they were when Arendt first formulated them. Universal rights remain dependent upon citizenship to be realised. Rightlessness both exposes limitations of citizenship and yet can only be resolved by citizenship. When Soysal says that the exploitation of migrants is due to an 'implementation deficit', her argument implies that it would be possible one day to close the gap between the universality of rights and the particularity of the contexts in which they are realised. In contrast, what my analysis of irregular migration reveals is an irresolvable disjuncture between the ethical category of universal rights and the political contexts in which they can be put into effect. This is an aporia that cannot be erased; yet nor does it have to be configured in the terms in which it is currently inscribed. It is to the consideration of this question that chapters four and five turn. Finally, as an analytic category, rightlessness has a methodological function in this thesis. It is a way of holding focus on the limits of citizenship and a framework through which to evaluate the efficacy of political practices that aim at transforming citizenship. In the following chapter, I deploy the concept of rightlessness as a tool to evaluate the different theoretical approaches to rights and citizenship that I survey. To sum up, the importance of rightlessness to this project is threefold: first, it identifies the empirical problem around which this project is organised; second, it is an intellectual problem to be grasped; third, it is an

analytic tool, through which the limits of citizenship and human rights come into view.

## Conclusion

In the current chapter I defined the problem addressed in this thesis by developing a conceptual account of rightlessness. Specifically, I investigated the logic that underpins Hannah Arendt's formulation of the right to have rights in order to assess its relevance in a contemporary social and political context. Arendt's critique of universal rights and the contemporary nation-state system highlighted the dangers of statelessness *qua* rightlessness that the loss of citizenship entailed. For Arendt, the stateless are not rightless because they no longer have legal status within a polity but because the loss of citizenship entails the loss of their personhood. Within the Arendtian formulation, personhood does not mean to be human, but refers to our place, both legally and politically, within a common human framework. In Arendt's thought, rightlessness refers to the loss of personhood.

Across the chapter, I then sought to situate Arendt's understandings of statelessness, rightlessness and personhood within a contemporary context to assess their continued relevance. In so doing, I surveyed the post-World War Two human rights regime. Theorists of postnational citizenship argue that the transition from rights that have historically been granted only to nationals to their universalisation and extension to non-nationals reflects a deeper renegotiation in the meaning of citizenship. According to Soysal, '[i]n the postnational model, universal personhood replaces nationhood; and universal human rights replace national rights' (1994: 142). In principle, then, developments in human rights and the concomitant transformation in the basis of citizenship should overcome the problems of statelessness because now 'the individual transcends the citizen' and '[t]his is the most elemental way that the postnational model differs from the national model' (Ibid: 142). However, citing the contemporary struggles of many irregular migrants, I have argued that Arendt's account of the relationship between rightlessness and the loss of personhood retains its contemporary relevance. In a post-Cold War context, rightlessness has emerged as a primary political problem due to

the dual processes of the securitisation and illegalisation of migration (Squire and Huysman 2009). These processes have resulted in new border regimes (Mezzadra and Neilson 2013), where the increased use of detention and deportation as symbolic tactics of sovereign power have undermined the personhood of many irregular migrants, resulting in new forms of rightlessness (De Genova 2010; Gündogdu 2015). From this perspective, rightlessness - albeit in a modified form - retains its contemporary relevance as a critical tool for understanding the legal and political precarity of various categories of migrants. Finally, because rightlessness arises out of an encounter with citizenship, we need to talk about how we encounter citizenship. It is to the consideration of this question that the next chapter turns.

## 2: Citizenship: Solution or problem?

Rightlessness reveals citizenship to be both a solution and a problem. For so many irregular migrants, the experience of rightlessness arises out of an encounter with citizenship, as the state-sanctioned mode of political belonging. That could be the irregular migrant living in and working in their host nation without a secure status; or it could be those, such as Shamima Begum, collected in camps around the world, unable to move because they lack the correct citizenship status. Then there are those who are immobilised by citizenship, particularly in the Global South, who find their life chances overwhelmingly determined by the citizenship status they just happened to be born into (Carens 1987). Yet, as we saw in the previous chapter, citizenship is also necessary: despite the rise of a global human rights regime, it remains essential for (universal) rights to be realised. This is the aporia of the right to have rights. The question this provokes is how to theorise citizenship in a way that can mitigate the problem of rightlessness?

In this chapter, I conduct a survey of different attempts to address the aporias of rights by reconceptualising citizenship. The aim is to situate my own research in relation to contemporary dialogues on citizenship, before outlining the basic framework of a post-foundational approach. The research gap that this thesis addresses arises in response to three different approaches: one rejects citizenship altogether; another grapples with citizenship in its legal form; and the third emphasises its radical and extra-legal dimension. The first of these approaches refers to No Borders activists and theorists (Anderson, Sharma, and Wright 2009; Hayter 2000), who argue that citizenship is fundamentally unjust and should be superseded. Although No Borders theorists engage in some very strong analysis and pose valid criticisms of citizenship, I suggest that they lack a fully developed account of the relationship between politics and power (Squire 2009). The second approach to citizenship is provided by Seyla Benhabib and refers to her concept of democratic iterations (Benhabib 2004; 2006). She proposes a dynamic account of citizenship in its legal and institutional form. Finally, I evaluate recent innovations in the field of critical citizenship studies and, in particular,

theories of acts of citizenship (Isin 2012a; Isin and Nielsen 2008; McNevin 2006), that foreground radical and contestatory practices of citizenship. Overall, I argue that contemporary literature tends to theorise citizenship in a manner that is overdetermined by law on the one hand or fails to grapple with citizenship in its legal and institutional dimensions on the other. The final section of the chapter sets out the conceptual apparatus required to address this research gap.

## **2.1 No Borders, No Problem?**

This section of the chapter is evaluative and sets out to assess the ongoing validity of citizenship. In the political imagination, citizenship is viewed as a universally applicable mode of political belonging and is associated with wholesome ideas of civilisation and progress. Yet the case of Shamima Begum reveals that '[c]itizenship operates[...] as a divisive practice, separating the citizens of a state not only from the citizens of all other states but also from the non-citizen residents who occupy a lesser status within the state itself' (Hindess 2004: 309). In this section, I ask the question: if citizenship is so problematic, then should a political project committed to migrant rights and global justice not reject it altogether? Advocates of the No Borders movement certainly think so (Anderson, Sharma, and Wright 2009; Hayter 2000). Work by No Borders activists and scholars represents a good place to start in the process of critically evaluating citizenship. I argue that while its approach contains a series of strong criticisms of the limits of citizenship, the project is ultimately untenable because it lacks a sufficient understanding of the political dimension of citizenship and its relationship to power. In response to these failures, I turn to James Tully's recent work on citizenship (Tully 2014). Tully distinguishes between 'modern' citizenship, as a state-sanctioned mode of political belonging, and 'diverse' citizenship, as a counter-hegemonic political practice, in order to think through a concept of citizenship that is not overdetermined by the state. I adopt this distinction as a useful heuristic device through which to frame and interrogate the different approaches to citizenship investigated in the rest of the chapter.

## No Borders

The No Borders movement offers one of the most radical critiques of citizenship. The movement gained traction in the mid-1990s, linking economic conditions to increasing border securitisation and the growing illegalisation of irregular migrants (Hayter 2000). However, despite its newfound resurgence, challenges to the unjust nature of citizenship and contemporary borders are not new. Over thirty years ago Joseph Carens' article 'Aliens and Citizens: The Case for Open Borders' (1987) made a compelling argument against immigration controls. In subsequent years, the argument has only been strengthened. Today, while it might still be seen as radical, '[a]rguments for open borders are among the strongest in political philosophy and applied ethics' (Sager Forthcoming: 1). Despite the strength of the philosophical arguments, open borders remain a distant prospect.<sup>21</sup> This is because the issues around citizenship, rights and migration are not just questions of ethics but also politics. As such, any solution is necessarily political because politics is not just a question of logic but of negotiating a terrain of contested and competing demands.

In their joint chapter "*We are All Foreigners*": *No Borders as a practical political project* (2012) Bridget Anderson, Nandita Sharma and Cynthia Wright attempt to outline one such political solution. Their criticisms of citizenship and borders are rooted in a materialist perspective. They respond to the discrepancy between the free movement of capital but not people by arguing that the simultaneous process of 'granting more freedom to capital and less to migrants is far from a contradiction but rather a crucial underpinning of global capitalism and the equally global system of nation-states' (Anderson and Sharma 2012: 73). In laying the groundwork for No Borders as a political project, Anderson et al. identify a similar set of problems to those discussed in the previous chapter: the securitisation and illegalisation of migration, combined with disciplinary border regimes, turns migrants into precarious subjects that are unable to claim their rights and entitlements. Within a global capitalist system, citizenship and borders work to produce a highly vulnerable

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<sup>21</sup> A no borders position can and should be differentiated from the argument for open borders. While the former might reject the legitimacy of the nation-state, the latter call for the abolition of immigration controls and promote free movement but may still accept the nation-state as a political unit (see R. Jones 2016).

and, thus, exploitable workforce. They argue that, 'migrants are not naturally vulnerable; rather the state is deeply implicated in constructing vulnerability through immigration controls and practices' (Ibid: 78). Consequently, the No Borders political project rejects both human rights and citizenship. Human rights are rejected because they inscribe the state as an appropriate protector for vulnerable migrants (Ibid: 79), whereas citizenship is rejected on the grounds that it is merely a function of sovereignty, as the 'mode of state-controlled belonging' (Ibid: 80). Citizenship not only fails to tackle the problem of exclusion; it also plays an essential role in the articulation of oppressive power relations.

In an earlier editorial published on the same theme, Anderson et al. highlight some of the practical limitations of 'citizenship-rights-based' frameworks (Anderson, Sharma, and Wright 2009: 9). They identify two primary problems with citizenship-rights-based' approaches that take citizenship as the ground for political mobilisations: first, these approaches are not ultimately prepared to fully challenge the right of states to control their borders and, thus, to exclude and deport; second, because there are strong tendencies towards judicial processes, they often function as a form of anti-politics, taking political organising and contestation out of the hands of ordinary people and those most affected (Ibid: 8). The No Borders political project functions quite differently. It attempts to move beyond abstract constructions of the universal rights-bearing human and universal personhood associated with de facto and de jure citizenship in order to re-think the links between space, labour and action, and create new forms of relating to one another (Anderson and Sharma 2012: 79-82). Working against restrictions on movement and the production of illegality, the No Borders movement challenges 'nation-states' sovereign right to control people's mobility [and] signals a new sort of liberatory project, one with new ideas of "society" and one aimed at creating new social actors not identified with nationalist projects' (Ibid: 74). A No Borders politics imagines a global struggle that corresponds to the nature of the problem it addresses, where human society under late-capitalism is organised at the global level.

The strength of the No Borders approach is its combination of clear analysis with a strong critique of the contemporary border regime. By adopting a materialist perspective, its proponents have a good understanding

of how migration functions within a contemporary capitalist system. Furthermore, their criticism that conventional rights-citizenship based approaches are problematic because they both fail to challenge borders and contain depoliticising tendencies. These are important concerns that must be addressed. However, I argue below that the No Borders movement contains a series of limitations at the levels of both theory and politics.

The first difficulty is that they conflate the contemporary border regime with the concept of citizenship in general. This is a historical counterfactual. Without doubt citizenship, as with all forms of political community, involves the drawing of boundaries. However, as many theorists have observed, (Sassen 2014; Squire 2009; McNevin 2011) the contemporary border regime is not an intrinsic feature of citizenship but a contingent ideological formation that is linked to the rise of the neoliberal political and economic settlement. A second problem, remaining at the theoretical level, is that the No Borders approach does not appreciate the role that the notion of the limit plays in the formation of political communities. Vicki Squire identifies this weakness very clearly when she says that: '[t]he problem with this [No Borders] is that it assumes that the "outside" is something that can eventually be incorporated within the territorial order, rather than a feature that plays a constitutive role in its very formation' (Squire 2009: 179). Politics is inherently conflictual and erasing borders does not automatically mean that there will not be new, maybe even worse, forms of exclusion.

Attendant to the theoretical difficulties above is a political problem: a No Borders approach fails to fully comprehend the nature of power in the formation of politics. Again Squire offers a strong rebuttal, observing that the No Borders movement assumes that 'the removal of state immigration controls will naturally iron out division and inequality and that the oppositional encounters occurring at the limits of political community will be transcended by removing borders' (Ibid: 180). The No Borders approach fails to acknowledge the constitutive role of power in shaping the social world (Laclau and Mouffe 2001). Ironically, considering their similar criticism of citizenship and rights based politics, a No Borders approach also has depoliticising tendencies because, irrespective of modern borders, political communities are necessarily a function of power. There is no blueprint for a utopian order; politics is an ongoing process of re-politicisation that calls into

question all sedimented forms. Finally, there remains a political difficulty because there appears to be no account of the political practices that might move towards a world where open borders are a global reality. By rejecting the language of rights, it remains unclear what political strategies the No Borders movement have at hand and how they might be deployed in the pursuit of their aims. In chapters four and five, I address this issue by proposing a political account of rights-claiming as the practice of radical citizenship. I argue that if we approach rights as a political practice rather than something we possess, then rights-based politics might call power into question instead of reinscribing it.

### **Two Modes of Citizenship**

The critical approach adopted by the No Borders movement, towards both contemporary border regimes and traditional citizenship-rights responses to migration, certainly raises some valid concerns. While taking some of these concerns onboard, I argue that their overly pessimistic view of citizenship arises out of the fact that they view it first and foremost as a legal status. Recent work in the field of critical citizenship studies not only foregrounds citizenship's political dimension but also its radical potential (Isin and Nielsen 2008; Isin 2012a; McNevin 2011). Citizenship is not merely a state-sanctioned form of legal membership but also a political practice of exercising, enacting and contesting new forms of rights and belonging. In *On Global Citizenship* (2014), James Tully attempts to theorise this gap between the traditional understanding of citizenship's relation to the state, and its more radical form as a political practice. He differentiates between citizenship in what he designates its 'modern' and 'diverse' modes. By drawing a distinction between citizenship's two modes, Tully's aim is to destabilise the hegemonic status of 'modern' citizenship through the presentation of its alternative form as a 'diverse' set of practices based around the freedom of participation. Tully's identification of two modes opens up alternate theoretical and methodological approaches to understanding the dominant paradigm of citizenship, as both a concept and object of analysis.

The first and most familiar variant is citizenship in its *modern* mode. In this modality, citizenship is viewed as a legal status, primarily in nation-states. National citizenship takes on a civil form, because it is bound by law. In its

global form, citizenship is cosmopolitan and has achieved a large degree of legitimacy under global laws and institutions (Ibid: 7-8). The birth of modern citizenship can be traced back to French and American revolutions of the 18th century and is primarily defined around two institutional features: 'the constitutional rule of law (nomos) and representative government (demos)' (Ibid: 11).<sup>22</sup> Predicated on the rights of man and institutionalised in the form of constitutional democracy, the modern variant of citizenship presented itself as a universal model that was exported globally through American and European hegemony. While the modern mode of citizenship is imagined to be predicated on ideas of universal rights, democracy and peace, the reality is somewhat different. Instead, it has been associated with 'imperialism, inequality, dependence and war. This tendency is intrinsic to the modern mode of citizenship as a whole (Ibid: 32).

The second form that citizenship takes, for Tully, is its *diverse* mode. In contrast to modern citizenship, in its diverse form citizenship does not refer to legal membership within a nation-state but to citizenship 'as a situated or "local" practice that takes countless forms in different locales. For this reason, it cannot be described in terms of universal institutions and historical processes, but as forms of grassroots democratic or civic activities' (Ibid: 8-9). For Tully, diverse citizenship is civic at a national level, as it is not circumscribed by law; in a global context he refers to it as 'glocal' (Ibid: 8).<sup>23</sup> Central to Tully's analysis of diverse citizenship is the fact it does not correspond to any single institutional framework, or universal language, around which it can cohere. In fact, whereas modern citizenship is hegemonic, diverse citizenship practices tend to be counter-hegemonic, calling into question established power structures through forms of 'acting otherwise' (Ibid: 38). Because they are not determined by law, citizens form relations based upon principles of mutual equality in which they are neither governing, nor governed, but exercise power together, as citizens. Tully claims that these

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<sup>22</sup> The birth of the modern mode of citizenship is the same historical moment in which Arendt observed that the perplexities of rights first came into being.

<sup>23</sup> 'Glocal', or 'glocalisation' refers to a process under globalisation where there is a co-present tendency towards processes of both particularisation and universalisation. In the sense that Tully is using it, it refers to the way in which diverse citizenship practices tend to be localised but also taking place in a globally conscious and interconnected framework. See Roland Robertson (2014) for more. In its "glocal" sense, citizenship is. A multi-layered practice that takes places at the local, national and global levels.

take two main forms: one engages with institutional politics more directly and is 'when citizens organize themselves in order to negotiate in or over a citizen/governance relationship' (Ibid: 62); the other is 'when citizens organize and run an entire activity on the basis of citizen partnership, not in relation to a government, but to citizenize the activity for its own sake (rather than submit to institutionalization or governance)' (Ibid: 62). Here one can think of direct and local forms of direct democratic organisation, such as village commons or urban communes or autonomous civic communities like Marinaleda in Andalucía, Spain (Hancox 2013). Although civic citizenship, as opposed to civil, is founded in action, not law and its institutions, it still takes place within legal frameworks but with an 'understanding of the rule of law as a network of relationships of negotiated practices. Law is a craft or practical art rather than a science' (Tully 2014: 56). The significance of Tully's distinction between modern and diverse forms of citizenship to my own project is threefold.

First, Tully's understanding of diverse citizenship opens up a dimension of citizenship that No Borders activists and theorists do not account for in their analysis. On this reading, citizenship is not just an oppressive form of political belonging but also a counterhegemonic practice through which injustice and exclusion can be challenged. Second, from an analytic perspective, Tully's approach functions as a heuristic device that frames the different theories of citizenship analysed in this chapter. The edges of each mode are necessarily blurry, but I take Seyla Benhabib's concept of 'democratic iterations', discussed in the following section, to be operating with an understanding of citizenship in its modern mode. In contrast, Engin Isin's theory of 'acts of citizenship, outlined in the subsequent section, tends towards an understanding of citizenship in its diverse form. Finally, Tully's identification of citizenship in its current hegemonic articulation (modern) and as a counterhegemonic practice (diverse) are crucial to the post-foundational account of citizenship that I develop in the next chapter and deploy throughout this project.

## 2.2 Democratic Iterations

Seyla Benhabib attempts to set out a dynamic theory of modern democratic citizenship. The right to have rights is the central problem around which Benhabib's work is focussed. While Benhabib accepts the Arendtian critique of universal rights and the international system, she is critical of Arendt for finding a 'political but not a conceptual solution' to the paradoxes of the right to have rights (Benhabib 2006: 59). Arendt proposes a *jus soli* as opposed to a *jus sanguinis* model of citizenship (Ibid: 60) but is ultimately unable to overcome the contemporary dominance of sovereign nation-states., She notes that, at present, there is no political community beyond the nation-state and that:

[n]ot only did loss of national rights in all instances entail the loss of human rights; the restoration of human rights, as the recent example of the State of Israel proves, has been achieved so far only through the restoration or the establishment of national rights (Arendt 1951: 380).

It is impossible to attenuate the aporias of rights altogether because 'a sphere that is above nations does not exist. Furthermore, this dilemma would by no means be eliminated by the establishment of a 'world government'' (Ibid: 379). To her credit, Benhabib does not try to erase the ethico-political aporias of the right to have rights. Instead, she proposes a conceptual solution in the form of 'democratic iterations'. Benhabib suggests that Arendt was unable to resolve the problem of rightlessness due to her anti-foundationalist approach. As a result, she utilises the theoretical framework of Habermasian discourse ethics, in order to defend a 'postmetaphysical justification of the [Kantian] principle of right' (Benhabib 2006: 131). This allows Benhabib to argue for a dynamic relationship between democracy and citizenship, where cosmopolitan norms are mobilised in particular contexts through democratically iterative processes that transform the contents of citizenship. I argue below that her use of the theoretical framework of discourse ethics and misappropriation of the Derridean concept of iterability negates the potential of her approach to ease

the aporias of the right to have rights. In so doing, it also problematises her understanding of rights, law and democracy.

### **Democratic Iterations**

For Benhabib, the problem with the right to have rights is one of a 'dialectic of rights and identities', where 'the individual who is the subject of rights is assumed to have some kind of fixed identity which precedes the entitlement to the rights in question (Ibid: 168). However, Benhabib also notes an often-overlooked dimension to this: 'namely that the exercise of rights themselves and the practice of political agency can change these identities' (Ibid: 168-169). From this observation she develops a conceptual solution to the aporias of the right to have rights in the form of democratic iterations. Democratic iterations are processes through which 'a democratic people, which considers itself bound by certain guiding norms and principles, engages in iterative acts by re-appropriating and reinterpreting these, thereby showing itself to be not only the subject but also the author of laws' (Ibid: 49).

Benhabib starts from the presupposition that 'we have entered a phase in the evolution of global civil society which is characterized by a transition from *international* to *cosmopolitan* norms of justice [emphasis original]' (Benhabib 2011: 134). However, she resists engaging in a subsumptive logic that negates the contradiction between the universal rights and citizenship.<sup>24</sup> Instead, universal cosmopolitan norms become embedded in particular political communities and, through processes of jurisgenerative democratic politics, transform the meaning of citizenship itself. In order to make this claim, however, she has to address what she sees as the weakness in Arendt: her anti-foundationalism. She does this by utilising the theoretical framework of discourse ethics to provide a 'postmetaphysical justification of the principle of right' (2006: 131).

Discourse ethics, as conceived by Jurgen Habermas, claims to 'go behind the structures of language and rationally reconstruct 'the universal validity basis of speech' (Habermas 1979: 5). Habermas contends that 'anyone

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<sup>24</sup> This is an important difference between Benhabib's approach and that of postnational theorists, discussed in the previous chapter. While Benhabib's analysis charts many of the same shifts in the global political system, she does not think that it means personhood universal or the paradoxes of rights can be overcome.

acting communicatively must, in performing any speech act, raise universal validity claims and suppose that they can be vindicated' (Ibid: 2). A contested norm can have its validity basis rationally reconstructed through discourse in an 'ideal speech situation', free from asymmetrical power relations. Any contested norms that have gone through this discursive process must, according to Habermas, 'be suitable for expression as 'universal laws' (Ibid: 63). Benhabib utilises this post-metaphysical universal framework to claim that contemporary rights are of the following sort: 'I can justify to you with good grounds that you and I should respect each other's reciprocal claims to act in certain ways and not to act in others, and to enjoy certain resources and services' (Benhabib 2006: 130). The result is that any norms, or normative institutions, that have been subject to discursive scrutiny can be considered universally valid.

Having articulated a foundation for cosmopolitan norms, Benhabib insists upon their 'jurisgenerative' capacity. Here she is working with a particular conception of law taken from the work of both Robert Cover (1982) and Frank Michelman (1988) that underscores law's capacity to create a normative universe of meaning which can often escape the 'provenance of formal law-making' (Cover 1982: 125).<sup>25</sup> Law is not abstracted from politics and society but both *constitutes* and is *constituted by* the social and political field. From this perspective, cosmopolitan norms represent generalised principles that require contextualisation within specific juridical political communities. There is a mediating interplay of the universal and the particular through which both gain their content. 'Just as without the actualization of human rights themselves, self-government cannot be meaningfully exercised, so too, without the right to self-government, human rights cannot be contextualized as justiciable entitlements' (Benhabib 2011: 128). Democratic iterations occur in the interplay of the universal and the particular, in jurisgenerative political processes through which the *demos* can reflexively alter its own meaning. An example Benhabib gives is the German district of Schleswig-Holstein that, after a decade of national debate, decided to allow non-citizen but long-term residents to vote in local elections (Benhabib 2004: 182-83).

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<sup>25</sup> Benhabib's understanding of jurisgenerativity is closer to that of Michelman (1988) than Cover (1983). This is a topic that I will return to in more detail in chapter five.

In developing her concept of democratic iterations, Benhabib re-appropriates the Derridean theory of iterability to claim that:

in the process of repeating a term or a concept, we never simply produce a replica of the original usage and its intended meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways (Ibid: 48).

The emphasis here is on democratic citizenship as a performative practice, where '[w]e, the people who agree to bind ourselves by these laws, are also defining ourselves as a 'we' in the very act of self-legislation' (Ibid: 33). The post-metaphysical reconstruction of human rights is combined with the Derridean understanding of iterability to show that cosmopolitan norms have a context-transcending appeal that becomes embedded in particular polities through processes of democratic decision making. In so doing, the democratic community acts performatively, in the name of the universal, to *reiterate* the identity of those who are due rights. Democratic iterations render the borders of the political community fluid and open new claims to citizenship, supposedly mitigating the dangers of statelessness.

### **Misappropriating Iterability**

Benhabib's theory of democratic iterations has some important strengths. In contrast to a No Borders approach, she recognises that the aporias of the right to have rights represent a real aporia problem that cannot be erased. Benhabib engages in a genuine attempt to analyse the processes through which citizenship, in its legal and institutional form, can be reformed. The concept of democratic iterations functions by correctly, in my view, insisting upon the performative nature of politics, where the 'notion of iteration provides Benhabib with a dynamic conception of democracy and citizenship' (Thomassen 2011: 129). Despite these strengths, the radical and emancipatory potential of her notion of democratic iterations is negated by the theoretical framework that she adopts. I argue that this is due to her misappropriation of the Derridean concept of 'iterability'. This misappropriation leads to a series

of theoretical and political problems in Benhabib's understanding of law, democracy and rights.

The main problem with Benhabib's concept of democratic iterations is her understanding of how iterability and, as such, performatives function. This is inherent in the fact that she sees no problem in adopting the concept of iterability, while still invoking the idea that laws and constitutional texts have an 'original meaning'. She recognises this appropriation runs counter to the Derridean understanding but claims that

even if the concept of 'original meaning' makes no sense when applied to language as such, it may not be so ill placed in conjunction with documents such as the law and institutional norms. Thus, every act of iteration might refer to an antecedent which is taken to be authoritative (2006: 179-180).

In making this theoretical move she attempts to utilise the concept of iterability in her own theory, while rejecting the poststructuralist understanding of performativity with which it is associated. Benhabib contends that the question of original meaning is only a problem on the terrain of language, not law or politics. However, on a number of different occasions Derrida refutes the idea that laws and institutions have an absolutely authoritative moment of original meaning. For him, there is a 'mystical' dimension to the foundation of all forms of authority (Derrida 2002). The absence of original meaning is not only a feature of language but of all figures of foundation. In order to convey this argument, I draw attention to how the logic of iterability challenges two key distinctions that are central to the constitution of meaning and identity, namely those between repetition and alteration, and between the constative and the performative (Thomassen, 2011).

In the case of repetition and alteration, as discussed above, iterability problematises a clear-cut distinction between the two. The point here is that any repetition is necessarily also an alteration because it takes place in a new context that affects its meaning. This also means that there can be no absolute moment of origin because every act must be repeatable, thus iterable, in order to be communicable. Taken to its logical conclusion, 'one can go further and

argue that the originality of the original is constituted retroactively through iterability when it is taken up by others and thereby resignified as the original' (Ibid: 130). Of course, Benhabib does not disagree; her point is simply that while this makes sense with language it does not when it comes to 'documents such as the law and institutional norms'. Yet, as Derrida's reading of a draft of *The Declaration of Independence* demonstrates, this is not the case. Iterability in all its forms is premised upon the impossibility of authoritative original meaning.

Reading *The Declaration of Independence* as the performative act that founded a new polity, Derrida highlights the impossibility of an absolutely authoritative moment of foundation. He is concerned with who signs the declaration and with what authority. This is a problem because the founding fathers sign in the name of 'we the people' but prior to the act of signing the 'people does not exist. They do not exist as an entity, it does not exist, before this declaration[...] The signature invents the signer' (Ibid: 10). This is what Derrida means by the 'mystical foundations of authority': it is the 'fabulous retroactivity' (Derrida 1986: 10), whereby the authority to found laws and institutions only ever arrives after the act of foundation has taken place. According to Judith Butler, this endows the performative with its political potential, because

the force and meaning of an utterance are not exclusively determined by prior contexts or "positions"; an utterance may gain its force precisely by virtue of the break with context that it performs. Such breaks with prior context or, indeed, with ordinary usage are crucial to the political operation of the performative (Butler 1997a: 145).

The logic of iterability furnishes poststructuralist theorists, such as Derrida and Butler, with two interrelated ideas: an understanding of meaning, identity and universality that is neither essential, nor fixed (Thomassen 2011) and an ontological explanation for change. Both of these are possible because the context within which the performative functions has no absolute moment of authority and so cannot constrain its meaning entirely. In rejecting these necessary components, Benhabib effectively wants to have her cake and eat

it: she wants to use the concept of iterability to provide a dynamic account of democratic citizenship whilst neutralising it of its more radical dimension. Benhabib cannot have it both ways and, in trying to do so, she negates the democratic potential of iterability. To be clear, this does not only make her concept of democratic iterations theoretically untenable, it also has important political ramifications.

The first problem with Benhabib's concept is that it is overdetermined by law. On one level, the strength of her concept is that she attempts to bring law back into the political field; however, in actual fact the opposite happens, where actually 'the law provides the framework within which the work of politics and culture go on' (Benhabib 2006: 60). Bonnie Honig correctly identifies the implicit legal chronology in Benhabib's work, where:

law is, first, prior to politics and capable therefore of providing a framework for it; then, second, law is corrupted by politics; and finally law is brought into the political arena in order to wrest from law... payment on its universal (context--transcendent, i.e., extrapolitical) promise (Honig 2011: 118-19).

So, while law is meant to be made subject to democratic processes of iteration, in truth its meaning is never fundamentally challenged. This is a direct result of the fact that Benhabib believes that in iterative processes documents such as laws and constitutions can and do have an 'authoritative original meaning'. From this perspective, change only ever occurs within a pre-existing and totalising frame, negating the radical potential of democratic iterations. The result is that there is no longer an open future, where new forms of rights, subjects and political belonging are possible. Instead, politics is necessarily reduced to contestations within a pre-existing frame: primarily, the nation-state.<sup>26</sup>

A second problem with Benhabib's approach is her conceptualisation of universal rights. By insisting on the transcendental status of the universal, there is a tendency to reinforce particularistic norms that have achieved universal status, inadvertently reasserting unequal power relations. This

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<sup>26</sup> This is a point I will return to in chapter six in a discussion on law.

problem becomes clear through a counter-reading of her example of the *l'affaire du foulard*.

*L'affaire du foulard* is a case that Benhabib refers to across several texts (2004; 2006; 2011) and has a central place in her account of democratic iterations. It refers to a long-term confrontation between the French state and Muslim women over their right to wear head scarves in school. It first started in 1989 when three girls were expelled from school. However, it rose to prominence in 1996 with the mass exclusion of twenty-three Muslim girls from their schools. The confrontation continued throughout the late 1990s and on into the early years of the twenty-first century (Benhabib 2006: 51-52).<sup>27</sup> Benhabib argues that *l'affaire du foulard* constitutes a democratically iterative process, through which Muslim women learnt to 'talk back to the state', asserting their rights within 'a framework created by the universalistic principles and intent of Europe's commitment to human rights on the one hand and the exigencies of democratic self-determination on the other' (Ibid: 198). The problem is that Benhabib essentialises identity: the women are defined as Islamic (particular) against a background of European universalism and the idealised content of democratic iterations operate within the framework of French republicanism and a European commitment to universal human rights.

In contrast, Gilles Kepel offers a reading that inverts and troubles Benhabib's designation of universality and particularity. Kepel notes that 'the UIOF [Union of Islamic Organizations of France] defends the right to wear the veil at school in public by recourse to universalist, not communalist, arguments' (Kepel 2004: 283). Here French secularism is subsequently viewed in its particularity, as oppressive Jacobinism imposed by the nation-state. By upholding the distinction between the universal and the particular Benhabib inadvertently hardens identities through a rigid binarism that reinforces modes of exclusion and forms of hegemonic power. The *l'affaire du foulard* does not demonstrate the universality of Europe's commitment to rights but the way in which they obscure positions of inequality. The possibility of a consensus is not a given and it is the French state's supposed universalism that causes the problem, concealing the particularity of French Jacobinism

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<sup>27</sup> For a fuller account of *l'affaire du foulard* see Benhabib (2006) or Kepel (2004).

behind the veil of a universal commitment to human rights and a secular public sphere. The result of Benhabib's insistence on a false universalism is a set of potentially discriminatory political policies. Instead, it makes more sense to see the actions of the Muslim women as the manifestation of the partiality of all conceptions of universalism and the contingency of any particular political project.

Seyla Benhabib deserves credit for developing a dynamic understanding of politics that refuses to reduce the ethico-political aporias of the right to have rights to a single solution. Furthermore, the rightlessness experienced by irregular migrants is a problem that arises out of an encounter with citizenship in its legal and institutional form. The strength of Benhabib's approach is that it represents a genuine attempt to theorise the political processes through which state-sanctioned citizenship can be transformed. In her concept of democratic iterations, she proposes a conceptual solution that might attenuate the dangerous contradictions of the right to have rights. Democratic iterations are performative political processes that 'break down the barriers between law and politics' (Honig 2011: 118) as cosmopolitan norms are operationalised in particular political communities to renegotiate the identity of its membership. However, resituating the concept of iterability within the framework of discourse ethics is problematic from the point of view of both law and rights. Her account of law is problematic as it defines the total frame from within which politics may go on. Benhabib's understanding of rights is equally troubling, as her supposed universalism conceals the way it could oppress minority voices and reinforces existing hegemonic political projects, as my counter reading of *l'affaire du foulard* shows. The result of these issues is a very thin conception of democracy. Benhabib conceives of a democratic politics bound so tightly by its own legal formalism that it suffocates any transformational potential and is predicated on a universalism that reproduces the logic and forms of domination that are a problem in the first place.

## **2.3 Acts of Citizenship**

The problem with Benhabib's attempt to provide a conceptual solution to the aporias of the right to have rights is that it results in a theory of citizenship overdetermined by its legal and institutional form. While there may be a necessary connection between universal rights and modern citizenship, the real history of citizenship is as much one of domination and violence. Unfortunately, in Benhabib's account there is a tendency to unwittingly reproduce this logic. In this section, I turn to recent developments in the reinvigorated field of critical citizenship studies that attempt to theorise citizenship in its 'diverse' form (Tully 2014). Theorists such as Engin Isin, Greg Nielsen and Peter Nyers, amongst others introduce the concept of 'acts of citizenship' as a new way of investigating citizenship (see Isin and Nielsen 2008). Starting from the primacy of the diverse mode of citizenship, they claim that:

what is important is not only that citizenship is a legal status but that it involves practices of making citizens - social, political, cultural and symbolic. Many scholars now differentiate formal citizenship from substantive citizenship and consider the latter to be the condition of possibility of the former (Isin 2008: 17) .

As its primary exponent, Isin elaborates a theory of acts of citizenship in the most detail. Addressing the aporetic relationship between rights and citizenship directly, Isin sees citizenship primarily as a form of political subjectivity and not simply a legal status, describing 'citizenship as the right to claim rights (2012a: 2). This means, as Arendt has already made clear, that before there are any rights there is the right to be political and this presupposes an understanding of political subjectivity because rights can only come into being as the result of political activity. Approaching citizenship from the perspective of acts means it is as much a methodological endeavour as it is theoretical; shifting the object of analysis to the study of citizenship as an activity through which rights-claiming subjects constitute themselves as *political* and enact their status as citizens. The potential to attenuate the contradictions of the right to have rights arises precisely because non-citizen actors carry out an impossible activism that has no prior authorisation in law. In delineating the framework of acts of citizenship, I first engage with Isin's

earlier genealogical work that disrupts the dominant narrative of modern citizenship and proposes a counter-understanding of citizenship as a site of exclusion and struggle over who is the subject of politics. Having outlined Isin's genealogical approach to citizenship as political subjectivity, I will reconstruct the theoretical framework of acts of citizenship in relation to theories of performativity. The final part will offer a series of criticisms.

### **Citizenship Beyond Status**

In *Being Political*, Isin's genealogical account of citizenship disrupts the universalising tendencies of modern citizenship. In the historical imagination citizenship is as much a metaphor for an idealised form of political belonging as it is a concept or status. The dominant narrative of citizenship charts a 'gradual and linear evolution from the ancient Greek polis towards an ever more inclusive basis for political practice' (McNevin 2006: 137). What is occluded in this story is the fact that citizenship and its practices always-already produce others who are both internally and externally excluded. Citizenship's universalising narrative tells a story that starts with 'Greek men[...] and extends over the centuries to include former slaves, the propertyless, the working classes, colonial subjects, women and indigenous populations' (Ibid: 137). Yet it is a story that is equally one of violence, where every shift in membership produces others, with new forms of exclusion. The real history of citizenship, according to Isin, is about struggles for inclusion by 'immanent others', such as slaves, women and migrants, who are, or have been, formally excluded yet citizenship privileges depend upon (Isin 2002: 137).<sup>28</sup> Citizenship inherently produces others and, as such, it has always been a site of contest and struggle.

It is out of this counter-narrative of citizenship that Isin's later theory of acts of citizenship starts to emerge. The first notable difference to how we understand citizenship in the current moment is that it does not necessarily refer to membership within a nation-state but 'rather a position of inclusion in any measure of political community and the necessary exclusion of others from that same unit' (Ibid: 137). Consequently, citizenship should be

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<sup>28</sup> Isin contrasts 'immanent others' to 'external others', who are 'those distant alien others whose incivility, backwardness and political immaturity marks, by contrast, the progress of citizenship's evolution' in the West (2002a: 137).

understood first and foremost as a form of (political) subjectivity and not a legal status. The second point is that because citizenship inherently produces others, then the history of citizenship is as much about struggles over who is the subject of rights as it is about belonging. For Isin, such struggles over who is the subject of politics have a specific form, taking place when non-citizens contest the terms of their exclusion by politicising their identity as potential citizens and, thus, the subject of rights. He refers to this as the process of 'becoming political' – those moments 'when the naturalness of the dominant virtues is called into question and their arbitrariness revealed[...] Throughout history these acts [have] redefined the ways of being political by developing[...] new practices that enabled them to constitute themselves as political agents under new terms' (Isin 2002: 275-76). What becomes apparent through Isin's genealogical reading is that not only is citizenship constituted through struggle but its meaning is often shaped by those who are not considered citizens in the traditional sense. Isin gives examples, such as slaves, women and immigrants (2002). These observations prompt Isin to develop a new approach to the study of citizenship that shifts the object of analysis to the *acts* that transform modes of 'being political'. Isin states that, 'if we approach citizenship as acts, we are interested in how those whose status is not citizenship may act as if they are and claim rights that they may not have' (Isin 2012b: 110-111). Turning to his book *Citizens Without Frontiers* and the essay *Theorizing Acts of Citizenship*, the aim is to outline the theory of acts of citizenship and its potential as an emancipatory mode of political action.

In *Citizens Without Frontiers* Isin outlines some of the different ways in which we may understand citizenship: as *status*, *habitus* and *acts*. *Status* is concerned with 'things such as rules, regulations and laws that govern who can and cannot be a citizen in a given state' (Ibid: 109). In contrast, *habitus* 'would be interested in how citizens and[...] non-citizens practice the rights that they do have' (Ibid: 110). Finally, we have the category of acts, which – in contrast to *habitus* – is about 'not only what people do but also how the things we do break away from norms, expectations, routines [and] rituals' (Ibid: 110). It is the category of acts that becomes the new analytic focus in the study of citizenship.

Acts of citizenship consist of five main components, the boundaries between which are not completely distinct.<sup>29</sup> First, acts are ways of ‘becoming political’, as described above. Citizenship is a form of political subjectivity and so acts of citizenship concern ‘how people constitute themselves as political subjects by the things they do (Isin 2012b: 110). Second, one of the core principles of acts of citizenship is that they ‘do not need to be founded in law or enacted in the name of law [emphasis original]’ (Isin 2008: 39). Acts of citizenship do not just exceed law, they may well be against it and even entail breaking it, through forms of civil disobedience. Third, acts of citizenship are inherently contestatory, in the sense that they are ‘collective or individual deeds that rupture social-historical patterns’ (Isin and Nielsen 2008), exemplified by migrants substantively performing a form of citizenship that is simultaneously a legal impossibility. Fourth, acts of citizenship are rights-claims that also enact new forms of rights. This is their creative dimension (White 2008), where in contesting established modes of being they also create new possibilities. Fifth and finally, acts of citizenship have the structure of ‘performance and event’ (Caraus 2018: 796). There is a crucial distinction to be made here between performativity, in general, and events: acts are not mere performances that routinely reproduce citizenship, rather they result in ‘events’ that ‘creatively transform its meanings and functions’ (Isin 2017: 501). Acts of citizenship can be summarised as follows: the political subject emerges out of the act of citizenship, as a rights claim; the act both articulates a wrong and, in the process, makes a demand for justice. In so doing, it institutes new forms of rights, justice and equality in the break it marks with any previous institution or convention (Isin 2012b: 127). To be clear, this schema is not exhaustive. Acts of citizenship are, by their very nature, creative and so necessarily exceed any such attempt to systematise them. What this list does do is to provide a minimal framework against which they can be assessed.

### **Acts, Events and Law**

Both Benhabib and Isin develop dynamic theories of citizenship by foregrounding its performative dimension. However, it is immediately

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<sup>29</sup> While these five components do identify the key parts of the concept of acts of citizenship, Isin & Neilsen never outline them in such a schematic fashion. I am indebted here to an article by Tamara Caraus (2018) for delineating the key components of acts of citizenship so clearly.

apparent that their understandings of performativity are radically different. As I argued in the previous section, in borrowing the concept of iterability, Benhabib puts limits on the potential of the act to effect radical change. She adopts an Austinian approach to the performative that is (over)determined by its context (Austin 1975); whereas Isin's understanding of the act is in keeping with Derrida and Butler's, viewing it as a 'breaking force' that has the potential to redefine its context. In Isin's view, to be an act of citizenship, the act must not be authorised by any prior context or institution but instead break from them, in the name of a wrong. Acts of citizenship are not overdetermined by formalistic accounts of law; in fact, a key condition of their possibility is that they have no legal foundation. In this regard, Isin offers a more radical theory of citizenship than Benhabib. In addition, acts of citizenship do not pertain to take place within a universalistic framework. Instead, they reveal the particularity of the citizenship regimes that they contest. Consequently, they do not have the same troubling tendency to reproduce the power relations and structures that were a problem in the first place. Despite these strengths, there are a number of difficulties with the concept of acts that diminish its emancipatory potential.

The first and potentially most serious problem is the relationship between acts of citizenship and law. If Benhabib's concept of democratic iterations was overdetermined by law, then Isin's account of acts of citizenship has the exact opposite problem: it is unclear how acts of citizenship interact with and might transform citizenship as a legal category. This ambiguity is identified by Nyers in the chapter 'No One is Illegal Between City and Nation'. Nyers observes a paradox: a principle of acts of citizenship is that they '*do not need to be founded in law or enacted in the name of law* [emphasis original]' (Isin 2008: 39); despite this, Nyers observes that in the case of No One is Illegal (NOII) they are calling for the regularisation of status and so 'the movement grounds its key demands within the law' (Nyers 2008: 179). This is where the concept of rightlessness developed in the previous chapter aids analysis. As I argued, the rightlessness experienced by contemporary irregular migrants arises out of a political context where migration has been securitised and *illegalised*. Consequently, if acts of citizenship are to realise their emancipatory promise and attenuate the contradictions of the right to have rights, then it must be possible to show how they transform citizenship as a legal category.

There is a second and related problem that points towards a broader issue with the acts of citizenship literature: they tend to fail on their own terms. What differentiates an 'act' from the 'performance' of citizenship, is that it results in an 'event'. I will return to what constitutes an event in more detail in the next chapter. For now Isin's own definition will suffice: 'events are action that become recognizable[...] only when the site, scale and duration of these actions produce a rupture in the given order' (2012: 131). While the many acts of citizenship that Isin and other theorists identify (see Isin, 2012; multiple in Isin & Neilsen 2008 McNevin 2011, Squire 2009) often break with the traditional scripts of citizenship, it is not clear that they actually result in the lasting and meaningful change associated with the category of the political 'event' (MacKenzie 2008). I argue that there is a failure in the acts of citizenship literature to coherently theorise how they operate as part of a broader form of counterhegemonic politics. This is a research gap that this project addresses. In so doing, I suggest that the concept of acts of citizenship needs to be situated within a deeper theorisation of law, in particular, and citizenship in its institutional form, more generally, if its emancipatory promise is to be realised.

A further problem is the tendency to reduce all forms of struggle and resistance to the concept of citizenship. This concern is voiced by theorists such as Amy Brandzel (2016), Anne McNevin (2011) and Paulina Tambakaki (2015), who object to the manner in which conceptualising rights-claiming in terms of acts of citizenship 'might inadvertently undermine struggles for another politics, by limiting these to struggles for and against citizenship' (Tambakaki 2015: 929). Not only might acts shut down the open futurity out of which new political formations arise but it also projects a false teleology onto the development of citizenship: as new rights become law, this transformation is redescribed retrospectively as a stage in the development of citizenship bolstering its hegemonic status (Tully 2014: 18-19). These are important concerns and in the final chapter of this thesis I return to them through an engagement with arguments McNevin makes in *Contesting Citizenship* (2011).

## 2.4 Theoretical Considerations: Post-foundational Theory

In this section I commence the discussion of the conceptual framework that I will use to address the gap in the literature identified in the current chapter. To recap, on the one hand democratic iterations are overdetermined by law and an institutional focus; whereas theorists of acts have little or no account of law and institutions. I utilise a post-foundational theoretical framework to address this omission. The strength of post-foundational theory is that it is able to account for institutional forms without being overdetermined by them. In this section I set out what I mean by post-foundational theory and also clarify my approach vis-à-vis deconstruction. In so doing, my aim is to outline some of the specific 'infrastructures' that help me work through the aporetic relationship between citizenship and rights. Here I am borrowing the term 'infrastructure' from Rodolphe Gasché (1986) who argues that there are 'formal rules' in deconstruction that attempt to organise and 'thus account for the differences, contradictions... [and] aporias' that produce discursive totalities.<sup>30</sup> These are the constitutive aporias within a structure that are crucial to how they function and, as such, cannot be resolved once and for all. The primary example, in this case, being the right to have rights. Let me explain how this works.

### Undecidability

There is no singular definition of post-foundational political theory but Oliver Marchart offers the most comprehensive guide (see Marchart, 2007). He defines it as 'a theoretical position which denies the existence of an ultimate foundation of the social without, and this makes it post- rather than anti-foundational, disputing the necessity of contingent groundings' (Marchart 2011: 131). Post-foundational political thought is a theoretical approach that

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<sup>30</sup> For a fuller discussion see chapters 8 and 9 in Gasché's book *The Tain of the Mirror* (1986). It should be noted that I am using the term 'infrastructure' very cautiously and as more of a heuristic framing device than a core concept. This is because such a systematising approach can lead to a very reductive reading of Derrida's work. For a critical reading of Gasché's systematising see Geoffrey Bennington's 'Deconstruction and the Philosophers (The Very Idea)' (1988).

involves a critique of essentialism and the metaphysical question of foundation. Although linked to poststructuralism, it is not reducible to it and resists some of the worst excesses that lead into forms of 'anti-foundationalism'. While concerned with revealing the absent foundations of social configurations, post-foundationalists do not assert that there is no ground at all but that there is an 'ontological weakening' (Ibid: 2) of ground through which we come to realise all attempts at foundation, while necessary, are always partial and incomplete. This is a Heideggerian form of reasoning because Heidegger theorises the 'ontological difference' between ontic beings and Being in its ontological sense, where ontology is 'explicitly devoted to the meaning of entities' (Heidegger 1926: 32). An ontological approach analyses entities in the world in order to address questions concerning the conditions of their existence. The ontological difference is mirrored in post-foundational political thought as the *political difference* between understandings of politics (ontic) and the political (ontological). This approach to the study of politics marks a split in the traditional concept:

where a new term (the political) had to be introduced in order to point at society's 'ontological' dimension, the dimension of the institution of society, while politics was kept as the term for the 'ontic' practices of conventional politics (the plural, particular and, eventually, unsuccessful attempts at grounding society) (Marchart 2007: 5).

A post-foundational ontology needs to be understood in its deconstructed sense, or what Derrida would refer to as a 'hauntology' (2006), where the ontological dimension indicates a radical instability in the structure of Being. As such, in post-foundational accounts of the political, 'contingency' becomes the key term whose function is to 'indicate precisely the necessary impossibility of a final ground' (Marchart 2007: 26) upon which society is founded.

A point of convergence between poststructuralism and post-foundationalism is to be found in the Derridean understanding of undecidability. Undecidability refers to 'a destructured social field' (Norval 2004: 143) that renders any form of decision essentially indeterminate. The

radical instability inherent to all structures is a direct result of the condition of undecidability and this defines the terrain upon which all struggles over citizenship take place. In this respect, I accept the basic claim that all orders are necessarily contingent and deconstructible. Yet poststructuralism alone does not take us far enough. It is also necessary to explain how new orders are instituted. For this, I turn to Ernesto Laclau and Chantal Mouffe's concept of 'hegemony', as a theory of 'the decision taken in an undecidable terrain' (2001: xi). Hegemony furnishes this thesis with a logic of societal articulation.

## **The Decision**

Laclau and Mouffe first developed their theory of hegemony collectively in *Hegemony and Socialist Strategy* (2001). They proffer an account of the foundations of the social that foregrounds the constitutive nature of power. If the political is marked by negativity, in the form of fundamental contingency, then the founding of the social refers to a situation of hegemony, where 'every order is the temporary and precarious articulation of contingent practices. Things could always be otherwise and every order is predicated on the exclusion of other possibilities.' (Mouffe 2013: 2). The strength of Laclau and Mouffe's account of hegemony is that it is able to show how the limits of identity and the political community are formed without making any essentialist claims. From the perspective of this thesis, I suggest that it is best understood as providing an analytic account of how the context in which struggles over citizenship is articulated.

Hegemony opens up a critical distance when investigating citizenship in its current form. There are several important consequences to this. First, it makes possible to interrogate the relationship between citizenship and dominant power relations. Citizenship in its hegemonic form – its 'modern mode', in Tully's terms – has achieved a degree of global dominance, appearing as the 'uniquely universal module for all human societies'. However, as the analysis undertaken in this chapter shows, citizenship has actually 'been spread around the world by Euroamerican expansion and continuing hegemony' (Tully 2014: 8). A second important consequence of hegemony for this thesis is that it draws attention to articulatory practices. While citizenship, like all forms of social identity, is necessarily incomplete its meaning coheres around a set of 'nodal points', which are those 'privileged

points of signification within a discourse that partially fix the meaning of practices and institutional configurations' (Howarth 2015: 203). Finally, the emancipatory potential of Laclau and Mouffe's concept of hegemony lies in its ability to envision how radical and transformational politics might proceed. Precisely because key points in discourses such as rights law and democracy are not essential but a series of contingent elements, or 'floating signifiers', then under 'certain circumstances they can be [re]articulated by rival political projects that strive to [re]fix their meaning and import them' (Ibid: 205).

### **The Ethico-political**

Undecidability and hegemony are crucial resources in a post-foundational approach to citizenship. However, as invaluable as they are, they do not exhaust the meaning and significance of citizenship. In order to understand a further dimension of citizenship it is necessary to look beyond Laclau and Mouffe's formalistic account of hegemony to another strand of post-foundational political theory: the relationship between ethics and politics.

In *Ethics and Politics After Poststructuralism* (2013), Madeleine Fagan develops a post-foundational account of ethics and politics. The task for Fagan is to understand how 'to make [ethical and political] interventions without an ethical foundation to secure them' (2013: 150). She does this by developing a concept of the 'ethico-political'. Fagan's post-foundational approach is not just critical of traditional (foundational) approaches to ethics and politics but also poststructuralist theory that often '*reverses* rather than *deconstructs* the various hierarchies that a focus on those terms often designates [emphasis original]' (Ibid: 135). For Fagan, this problematic tendency is derived philosophically from a mis-reading of Levinas that often leads to the privileging of alterity.<sup>31</sup> She argues that these are readings of Levinas which do not take pay sufficient attention to the importance of the figure of the 'third' (2009; 2013) in his work. This is the idea that our relation to the other is never a pure relation of otherness but always a negotiation with 'other others' that renders ethics impure. As James Martin puts it: 'In short, ethics is never separable from politics' (2016: 418). This leads Fagan to reject the absolute distinction between

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<sup>31</sup> In chapter one of her book (2013) Fagan primarily focuses this critique on the work of David Campbell and Simon Critchley.

ethics and politics and develop an account of the ethico-political that insists on their indissociability. The reconfiguration of ethics and politics into the ethico-political has a number of important theoretical and practical implications for thinking the relationship between rights and citizenship, which will be the subject of chapter four.

*Undecidability, hegemony* and the *ethico-political* are three primary infrastructures that I draw upon to help to navigate the terrain of citizenship. A post-foundational approach to citizenship starts from the ‘quasi-transcendental’ condition of undecidability (Marchart, 2007: 6). Founded upon an undecidable terrain, the hegemonic context in which all citizenship action is at once relatively closed and relatively open – certain practices reveal that to us. While the hegemonic decision is a formal account of social constitution that elevates ‘politics to the ultimate horizon of any social order’ (Martin 2019: 318), the ethico-political describes how any regime is marked constitutively by undecidability. An ethical politics always occurs in a (hegemonic) context that is already given, where contingent decisions can and must be made. In this sense, the ethico-political is not the adherence to a norm but a ‘critical stance’ that ‘works at the limits of theory, exposing any ethical or political closure where alterity is disavowed’ (Martin 2016: 418). These are the main theoretical resources that I draw upon to address the gap in the literature this chapter has identified.

## **Conclusion**

In addressing citizenship as a problem, the current chapter discussed three different approaches: the No Borders movement, as theorised by Anderson et al., Benhabib’s notion of democratic iterations and Engin Isin’s account of acts of citizenship. No Borders theorists and activists combine exceptional analysis with a series of very strong criticisms against citizenship. However, by not taking into account important factors in the constitution of the political – such as the ubiquity of power and the role of the constitutive outside, for example – they fail to offer an alternative model of political belonging that is viable, or even desirable. Across the rest of the chapter, I examined two different attempts to work with citizenship by theorising it in new and dynamic ways.

Both approaches are problematic but for opposing reasons. The issues with Benhabib's concept of democratic iterations relate to the theoretical framework of discourse ethics. By asserting its quasi-transcendental foundation, the concept of democratic iterations is overdetermined by its legal formalism, while also tending to exclude marginalised figures from the very political processes that are meant to result in their inclusion. In contrast, Isin's theory of acts of citizenship is predicated on not being founded in law and places those marginalised by legal citizenship at its centre. However, he does not account for the ways in which acts of citizenship interact with and transform citizenship in its legal and institutional form. Therefore, on the one hand, democratic iterations are constrained by their legalism and political institutions, whereas acts of citizenship represent a moment of pure performativity, with little or no account of how they may engage with and transform legal citizenship and its institutions. Phrased more simply, theories of citizenship are either overdetermined by pre-existing laws and institutions (Benhabib) or fail to account for how these laws and institutions can be transformed (Isin). This represents the research gap that my project intends to fill. In the next chapter I explain how I will do this by using the post-foundational framework I just sketched out to propose the concept of citizenship as method.

### 3. Citizenship as Method?

The paradox of citizenship is that it is the necessary condition of rights but also a system for the management of populations (Hindess, 2004) that leaves those caught in the interstices of the nation-state system rightless. The previous chapter surveyed different responses to the problem, none of which offered a satisfactory resolution. Responding to these failures, the current chapter functions as a bridge between the material and theoretical problems posed in the previous two chapters and the analysis across the remainder of the thesis. Drawing on the theoretical toolkit of post-foundational political theory, I propose the concept of *citizenship as method* as a new analytic framework for understanding citizenship. My aim is to delineate an approach to citizenship that addresses the theoretical and practical limitations identified in the approaches surveyed across the previous two chapters. To be more specific, there is a need for a conceptual account of citizenship that is able to navigate between approaches that are over-determined by citizenship in its institutional form (Benhabib) or unable to account for them and their transformation (Isin).

In the current chapter, I address this research gap by setting out a new analytic framework in the form of citizenship as method. I set up my own approach by way of a contrast with the acts of citizenship literature and performative approaches to citizenship more generally (Isin 2017; Isin and Nielsen 2008). I do so by using the analytic category of the (political) event to examine what constitutes an act of citizenship and to interrogate what the conditions of its success might be. In particular, I am interested in what Moya Lloyd terms ‘the politics of resignification’, by which she means ‘politics apprehended (in part) as the capacity to recite language oppositionally so that hegemonic terms take on alternative, counter-hegemonic meanings’ (2007: 129). Following the rough contours of an argument set out by Lloyd against Judith Butler, my hypothesis is that in developing a performative theory of citizenship Isin reproduces some of the problematic tendencies associated with performative theory more generally. I argue that there is a privileging of the act at the expense of an analysis of the social and historical conditions out of which an act might succeed, by which I mean, result in an event that

transforms the political. Following Lloyd's argument, I suggest that there is a need to 'eventalise' (Foucault 1991b) the act. Using the historical example of the Civil Rights Movement and in particular resistance to the Jim Crow laws, in this chapter I eventalise Rosa Parks' act of defiance to identify the 'multiplication and pluralization of causes' (Ibid: 104) that result in any political event.

The current chapter is organised as follows. The first section critically analyses the concept of acts in accordance with the category of the (political) event. I suggest that acts of citizenship tend to fail according to their own terms and that there is a need to eventalise the act. The second section 'eventalises' Rosa Parks' famous act of defiance in order to better understand the conditions that make counter-hegemonic politics possible. Here eventalisation serves as a methodological device that shifts the focus away from the act as the object of analysis to identify the factors that make transformational politics possible. The third and final section sketches out the basic framework of citizenship as method that will be deployed and further articulated across the remainder of this thesis. I propose that citizenship as method is best understood as a deconstructive negotiation of citizenship and I identify the different dimensions of what this entails.

### **3.1 Acts, Events and Eventalisation**

The task set out in this thesis is a daunting one: to rethink the theory and practice of citizenship as a vehicle for emancipation. However, this is not an act of pure novelty. I do not reject the recent developments in the field of critical citizenship studies but rather expand the range of analysis in order to understand what is involved in the processes of transformational citizenship. In the first part of this chapter I do this by measuring acts of citizenship against their own criteria to consider whether they succeed. In the literature, the defining feature of an 'act' as opposed to mere action is that acts result in 'events' (Isin 2012a). I argue that, measured against the criteria of the event, acts of citizenship tend to fail in their own terms. The question this poses is why: is it because Isin's selection of examples is inadequate or does it reflect a deeper problem in the theory of acts? I propose that it is the latter. On my

reading, Isin inherits a problem from the performative framework that informs his approach. To substantiate this claim, I will briefly reconstruct the basic tenets of how a performative approach to citizenship works alongside acts of citizenship before arguing for the need to eventalise the act.

## Acts and Events

Recall once more that an act of citizenship does not refer to citizenship as either a status or a routinised practice. Isin defines acts as ‘collective or individual deeds that rupture social-historical patterns’ (Isin and Nielsen 2008). Put differently, acts result in events through which new political subjects are constituted. The emancipatory potential here is inherent in the fact that acts potentially resignify the very meaning of citizenship. Clearly then, the aim of acts is to transform the meaning of citizenship so that a wider array of individuals and groups have access to rights. In principle, this is how a theory of acts tackles the problem of rightlessness. However, approached on its own terms, there are problems with this account: Isin does not make sufficiently clear under what conditions acts might meaningfully transform citizenship in ways that combat rightlessness. This becomes clearer when analysing the examples of acts that Isin gives in *Citizens Without Frontiers* (2012) according to an understanding of the analytic category of the political event.

So for Isin, what differentiates an *act* from mere ‘*action*’ is that it results in an *event*. Which leads to the further question: what exactly is an event? What constitutes an event – let alone a political event – is a vexed question in the fields of philosophy and political theory.<sup>32</sup> It is certainly beyond the scope of the discussion here to enter into this debate. However, it is necessary to provide some conceptual clarity as to what is meant by the term event in order to proceed. Isin gives the question a great deal of thought himself. He states that ‘events are actions that become recognizable [...] only when the site scale and duration of these actions produce a rupture in the given order’ (2012a: 131). So an event, for Isin at least, is defined as a rupture in a given order. Which leads on to a further question of how we might define such ruptures.

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<sup>32</sup> In *What is a Political Event?* (2008) Ian MacKenzie engages in an extensive investigation into the nature and meaning of the political event. I will return to a more thorough investigation of the event at the end of this section.

The notion of rupture is tied to the force of a performative, where '[w]hat may constitute rupture here is precisely that there may not be a previously existing convention that authorizes [one] to act' (Ibid: 128). The problem with Isin's definition of an event is that, while it might break with the traditional scripts of citizenship, it is not clear that the results are transformational. In an article titled 'What is a Political Event?', Iain Mackenzie gives a different definition of the political event, as that which 'produce[s] real change in the actual material constitution of things, bodies and states of affairs' (2008: 15). The difference between the two understandings of what the event and what is at stake in this difference becomes clearer through an examination of some Isin's examples of acts.

In *Citizens Without Frontiers* Isin gives twenty different examples of acts of citizenship. It is clear that, for Isin, a diverse range of actions may constitute acts.<sup>33</sup> The examples he gives range from Banksy's mural in the occupied territories of the West Bank, to WikiLeaks and even a box containing 30,000 testimonials from refugees on the border of Darfur. Taking the example of Banksy's mural, Isin justifies its status as an act of citizenship by claiming that it 'effectively turns a site of oppression into a site of contestation by symbolic and cultural capital that are not available to those who are engaged in the struggle itself' (2012a: 56). In this way, the 'act of writing', as Isin labels it, ruptures established modes of being and turns them into sites of contestation. What is unclear in this example and in the majority of examples that Isin gives, is how such deviations from established scripts actually transform political constellations to achieve real change. Or, to frame it in terms of the language of political events, while Banksy's actions might break with established modes of being, they do not constitute an event because they do not appear to result in a real change in the actual material constitution of things. What Banksy's mural contests is a long political history of established power, not just in terms of the Israel/Palestine conflict but even touching upon America's global hegemony and British colonial history in the Middle East. Against such forms of hegemonic power, Banksy's mural alone has little chance of affecting real

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<sup>33</sup> Examples Isin gives in other texts are also problematic. For instance, in his chapter *Performative Citizenship* (2017) he gives the Chinese that the Chinese artists Ai Wei Wei's recreation of the Kurdish Syrian child Alan Kurdi, who was found dead on a beach in Greece is an example of an act of citizenship. The examples are not the cause of the problem but the symptom of a deeper theoretical issue.

change. So, while it may indeed break with established scripts and, in many ways, appear both just and deviant, it is not clear that Banksy's mural, or its legacy, effected real change. As a result, I suggest that the political practices that Isin considers acts fail according to their own terms because, in the examples he gives they do not result in events, thus cannot be considered acts.

By analysing the act, in relation to the category of the event, I draw two conclusions. Firstly, there is a problem with Isin's understanding of the event. The kind of acts that redefine citizenship in meaningful ways must do more than simply deviate from 'socio-historical' patterns. As indicated previously, my aim here is not to reinvent the wheel but work with a more refined understanding of the event. At a general level, Mackenzie's definition of the event as resulting in 'real change in the actual material constitution of things, bodies and states of affairs' is a good start; but more detail is needed. In his article, MacKenzie does not give an exhaustive list of what constitutes a political event but one example he gives is the passing of laws, or more simply legislating (2008: 2). However, legislating neither exhausts the possibilities of the political event, nor are all cases of legislating political events. What he refers to as 'ordinary legislating' would be a political 'non-event' because it 'is assigned meaning which merely accepts, or possibly reinforces, established conceptions of the political' (Ibid: 15).<sup>34</sup> Similarly, the event cannot be reduced to a legalistic horizon; so another example of an event might be the September 11<sup>th</sup> terror attacks (9/11). In each case, the event is a 'turning point' that breaks with 'established conceptions of the political' – a set of criteria that Isin's set of acts clearly do not satisfy.

There is a second and related problem with how Isin understands the event. By approaching acts as events, there is a tendency to think of the event in singular terms, which then becomes the object of analysis. The problem is that events are never purely singular moments. Derrida's reading of the event of 9/11 (Borradori, Habermas, and Derrida 2009) helps illuminate this point. While his remarks on 9/11 are wide ranging and multi-faceted, I want to draw

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<sup>34</sup> MacKenzie's use of the term 'the political' is important because it hints at the fact that there is an ontological dimension to the event. Approaching the event from a post-foundational perspective, Oliver Marchart defines the event as the instituting moment of the social, where 'the play [between the ontic and the ontological] that points to the absent ground of society' (Marchart 2007: 172). For this reason the event cannot be confused with ontic occurrences because it is 'their grounding dimension or their condition of possibility' (Ibid: 21).

attention to one particular dimension: the idea that 9/11 as a 'major event' marked a radical discontinuity between before and after (Ibid: 90). However, the truth of the event is that it is not simply the 'thing' that happened because it cannot be separated out once and for all from the power relations within which it occurred and the reception it received. In the case of 9/11, the media response or the Bush government's policies. All of these factors determine its meaning. It is for this reason that when Heidegger used the term event (*Ereignis*) he always deployed it as a *verbalised* noun. While it is formally a noun it should be understood in its verbalised, thus active, sense (*Er-eignung*), preventing 'us from reifying an unfolding "process" into a mere object, it keeps us, in other words, from presenting the play of grounding/degrounding[...] as if it were leading to a final and firm ground' (Marchart 2007: 20). To be understood properly, the event must be approached in its processual sense as a 'turning point' that occurs at the level of the political, resulting in material change in the state of 'things'.

The understanding of the event outlined above challenges a central premise of acts of citizenship. A key part of the approach is to shift the object of analysis to the acts through which citizenship is constituted. However, if events are not singular happenings but 'processes' that effect material and lasting change, I argue that analysing acts alone is insufficient in describing how meaningful change occurs. I propose that the problem is a result of Isin's engagement with performative theory, where he reproduces one of its problematic features: an overemphasis on the ontological category of iterability (Lloyd 2007).

### **The Problem with Performativity**

While the literature on acts of citizenship is a diverse field, Isin is its primary architect. In developing the approach, he draws upon a broad array of theoretical resources, such as Max Weber, Pierre Bourdieu and Jacques Rancière amongst many others. Despite the range of approaches, acts of citizenship relies most heavily on performative theory and, in particular, the work of Judith Butler. As discussed already in chapter two, a central part of performative theory is iterability. By linking together repetition and alterity, the logic of iterability is what makes it possible for all forms of speech and identity to be used in new and oppositional ways and, thus take on new

meanings (Butler 2006; Derrida 1988). As Lloyd observes, within this formulation 'the concept of iterability[...] seems to offer an ontological explanation for change' (2007: 132). The intellectual debt to performativity is clear to see in Isin's theory of the act as rupture, where the act breaks with the 'existing conventions' and forms of authorisation in order to bring into being new subjects of rights (Isin and Nielsen 2008). By stressing the contingent and dynamic nature of meaning and identity, the principle of iterability provides a theoretical foundation upon which a transformative account of citizenship is premised. However, it also comes with its own set of problems, which are mostly political in nature. Iterability places too much emphasis on the capacity for language and meaning to be resignified without paying attention to the power relations that leave hegemonic forms deeply entrenched in practices and institutions. In so doing, the logic of iterability reifies the act at the expense of 'the specific social and political conditions (the exact power relations, institutions and practices) that facilitate particular acts of iteration and resignification' (Lloyd 2007: 133). Lloyd critiques Judith Butler for precisely this reason, citing Butler's problematic use of Rosa Parks as an example of the issue. Lloyd takes issue with Butler for over emphasising Parks act of resistance without considering the ways in which it is 'a product of among other things the practices and discourses of insurgency already operating in the South' (Ibid: 136).<sup>35</sup> What is required, according to Lloyd, is an 'eventalisation' of the act. In the next section I will undertake this task but first I want to clarify what I mean by eventalisation.

Eventalisation is a Foucauldian analytic category that means 'analyzing an event according to the multiple processes which constitute it' (Foucault 1991b: 76). As an analytic method, eventalisation breaks with the singularity of the event and investigates the plurality of causes by

rediscovering the connections, encounters, supports, blockages,  
plays of forces, strategies and so on which at a given moment

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<sup>35</sup> In making this argument, Lloyd is drawing on work by both Lisa Disch (1999) and Terry Lovell (2003) who both draw different conclusions about political agency in Butler's work. For Disch, Parks' act 'beautifully exemplifies Butler's contention that agency[...] is complicit with the forces it opposes' (1999 556). In contrast, Lovell argues that it does not provide 'the tools for the analysis of effective agency' by not paying enough attention to 'specific historical contexts' (2003: 1).

establish what subsequently counts as being self-evident, universal and necessary. In this sense one is indeed effecting a sort of multiplication or pluralization of causes (Ibid: 76).

If what makes an act of citizenship an ‘act’ at all is that it results in an ‘event’ and the problem with Isin’s approach is that the examples he gives do not constitute events, then I propose to undertake an eventalisation of successful acts in order to determine the conditions of their success. In so doing, I hope to provide a more comprehensive framework for thinking through how the migrant rights movement might successfully contest and transform citizenship. In carrying out this task, I adopt a historical approach that is not immediately rooted in the struggle for migrant rights by investigating the Civil Rights Movement, specifically attempts to dismantle the Jim Crow system in the South. I suggest that the comparison at this late stage is justified for two primary reasons. First, as what might tentatively be deemed a ‘successful’ counter-hegemonic rights movement, it provides a useful framework for thinking through how the immigrant rights movement might proceed. Of course this entails attention to the similarities and differences between the two struggles. Second, through a comparative analysis it draws attention to the transformative possibilities inherent to citizenship. The performative force of particular acts of citizenship are often derived from the recycling of old repertoires of struggle in new contexts. What this provides is a dynamic conception of citizenship, whereby the incorporation of a prior universal rights claim into a particular right might provide the foundation for future claims.<sup>36</sup> Consequently, eventalising acts of citizenship does not just help to refine the analytical tools deployed in the field of citizenship studies but also provides a way of understanding the political practices that constitute citizenship as a radical and transformational category.

### **3.2: Eventalising the Act**

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<sup>36</sup> It is important to emphasise that this does not imply that telic process inherent to citizenship, whereby it is destined to unfurl over history by becoming open to more claims to justice. Rather, it is to highlight the strategic possibilities that prior struggles might provide. The evolution of citizenship is by no means linear and there are no guarantees, it is always a question of politics and struggle.

The act to be eventalised is Rosa Parks' famous refusal to give up her seat on a bus in Montgomery, Alabama and her subsequent role in the Montgomery Bus Boycott. In question, however, is not the singularity of her act of defiance but how it fits into the broader civil rights movement. In particular, I am interested in the longer term practices designed to dismantle the Jim Crow system and the potential lessons for the migrant rights movement. The challenges to the Jim Crow system is such a pertinent example because 'civil rights movement remains a potent reminder that politically marginalized groups can shape the law through mobilization and collective action' (Abrams 2014: 1). Of course, any such comparison can only be analytically useful if from the outset there is clarity about the similarities and differences between the two movements. At a superficial level, when undertaking a project on citizenship the most obvious difference is that, unlike the immigrant rights movement, the participants in the civil rights movement were formally (legally) citizens. This means that their rights were legally and constitutionally enshrined in a manner that undocumented and irregular migrants do not experience. However, on closer inspection the differences are not quite so stark.

One of the central tenets of citizenship studies is that citizenship is constituted through both status (law) and substance (practice). Predicated on this analytic distinction, an act of citizenship is when the non-citizen performs a substantive form of citizenship that they do not have in status. In the case of the civil rights movement, the reverse was true: they were citizens in status but not substance. In an article comparing the civil rights and immigrant rights movements in the USA, Kathryn Abrams writes that:

For the mother sending her child to the first integrated school in her city or the Mississippi sharecropper mustering the courage to register to vote, for countless movement participants facing administrative intransigence, employer retaliation, and the ever-present threat of state-sanctioned violence, rights were never simply constitutionally established objects of federal enforcement. (Ibid: 14).

Actors in the civil rights movement might in principle have been full citizens; however, due to the many forms of exclusion and violence - often state sanctioned - that they experienced, they were in reality second class citizens. So while formally the subjects of rights, they were often prevented from accessing the rights that should have been theirs. In this respect, through their practices of rights-claiming, actors in both the immigrant and civil rights movements performed a form of citizenship that they did not experience as secure in order to challenge its meaning and bring into being new rights.

### **Rosa Parks' Act**

Returning to the question at hand: what can Rosa Parks' act and the Civil Rights Movement in general tell us about how the politics of transformational citizenship might operate? Framed in more theoretical terms, the question is about whether or not Parks' act constitutes an event and, if it does, what makes it possible? Butler claims that,

When Rosa Parks sat in the front of the bus, she had no prior right to do so guaranteed by any of the segregationist conventions of the South. And yet, in laying claim to the right for which she had no prior authorization, she endowed a certain authority on the act, and began the insurrectionary process of overthrowing those established codes of legitimacy'. (1997a: 147)

Unlike many of the examples that Isin gives, Rosa Parks' act of resistance would seem to constitute an event: it was hugely symbolic and seen as a pivotal moment in the civil rights movement. While it was by no means the end of the story, measured against the criteria outlined above, it can be seen to have produced a material turning point in constitution of political affairs. Yet, such a reading of the act in isolation conceals more than it reveals. Without diminishing the bravery and importance of Parks' protest, the act never acts alone. So, when Butler claims that Parks laid claim to a 'right for which she had no prior authorization' and 'began the insurrectionary process' she erases much of the political work prior to and after the act that makes it possible as an event. As Lloyd says, the act needs 'eventalising' - there needs to be an investigation into the conditions of its possibility as an event. In

eventalising Rosa Parks' act of defiance, the aim is to situate it within the broader history of the civil rights movement. More particularly, I am interested in how it forms part of a long-term counter-hegemonic movement to resist, dismantle and overthrow the Jim Crow laws in the Southern American states. Viewed from this perspective, Butler's claims that the performative force of Parks' act creates its own authority where 'no prior authorisation' existed and, as such, began the 'insurrectionary process' endow Parks with a radical form of agency that obscure the decades of struggle that make such agency possible. In so doing, Butler's account may prove counterproductive to the cause of transformational politics by over-emphasising subjective agency and the category of iterability at the expense of an analysis of the particular power relations at play at the time and the role of other political actors and organisations.

### **Eventalising the Act**

When Rosa Parks took a seat on a segregated bus in 1955, she was protesting against discriminatory Jim Crow laws that enforced a system of racial segregation across the Southern states in America. The end of the American Civil War, in 1865, promised a revolution in racial equality and the entry of the black population into mainstream society: 'the 13th, 14th, and 15th Amendments to the constitution that ended slavery, promised "equal protection of the laws" to both races, and granted suffrage to black males' (Dierenfield 2008: 9). However, in the post-civil war Reconstruction Era, the South diverted from the North of the country and implemented the rigid Jim Crow caste system. The Southern lawmakers promulgated a series of laws, known as the 'Black Code' that 'barred blacks from attending white schools, marrying whites, testifying in court, having a gun, or owning property' (Ibid: 10). While the amendments to the constitution promised equality, the Supreme Court backed white supremacy in a series of rulings, culminating in 'Plessy v. Ferguson, the cornerstone of the "separate but equal" doctrine' that sustained segregationist law since its 1896 ruling. Parks' act was in defiance of these laws; yet, contra Butler, it was not entirely without precedent. Prior to 1955, activists within the Civil Rights Movement challenged the Jim Crow system by employing a series of techniques that both engaged with law in the

courtroom and dissented from it, in a number of non-violent direct actions and forms of civil disobedience.

One of the primary actors in the Civil Rights Movement was the National Association for the Advancement of Colored People (NAACP). The NAACP was not exclusively a legal organisation and maintained a formal commitment to direct action. However, the NAACP tended to eschew political movements and protests that were likely to aggravate racial tensions. Instead, they focussed on law as a site of struggle for racial equality. The NAACP were committed to a

long-term plan to dismantle the legal structure of Jim Crow. After more than a decade of careful legal manoeuvring, they remained committed to a patient struggle based on the belief that American constitutional law provided the only viable means of achieving civil rights and racial equality. Confident that they were slowly but surely weakening the legal foundations of prejudice and discrimination. (Arsenault 2006: 21-22)

In the case of *Morgan v. Commonwealth of Virginia* they found an opportunity to do just that. Irene Morgan, like Parks eleven years later, was arrested on a bus from Hayes Store, Virginia to Baltimore for refusing to move when she sat in front of a white couple. The police were called and Morgan was violently arrested. Morgan was determined to fight her arrest legally and lodged an appeal to the Virginia Supreme Court. At the same time, the NAACP had been searching for suitable test cases that would challenge the constitutionality of the state's Jim Crow transit law (Ibid: 14) and took on her case. The NAACP successfully fought the case on the grounds that it was in violation of the 14th Amendment and, thus, unconstitutional. Consequently, the segregation of interstate passengers according to race was deemed unconstitutional. However, the ruling said nothing about intrastate passengers and soon after bus companies ignored the ruling and continued to enforce strict segregation policies on *inter* and *intra* state journeys.

Despite the NAACP's legal victory, the relative failure of the Morgan case to affect state law led to frustration in the tactic of challenging racism

purely through the courts. This resulted in the rise of the Congress of Racial Equality (CORE) 'a small but determined group of radical activists seized the opportunity to take the desegregation struggle out of the courts and into the streets. Inspired by an international tradition of nonviolent direct action, this response to segregationist intransigence transcended the cautious legal pragmatism of the NAACP' (Ibid: 22). CORE first arranged the 1947 Journey of Reconciliation and then the more famous Freedom Rides of 1961. Its plan, for both trips, was to travel as a mixed-race group across the Jim Crow South, challenging segregation laws when questioned and citing the legal precedent of the Morgan Case when activists were asked to move. The group expected to be met with violence and hoped it would move the government to protect them and uphold Federal law, as determined by *Morgan v. Commonwealth of Virginia*. In this way, direct action worked alongside litigation in the bid to challenge and dismantle the Jim Crow legal system. Parks' own act cannot be separated out from these acts that preceded it. It is also unlikely that it would be considered an event at all if it were not for the 1964 Civil Rights Act and the 1965 Voting Rights Act, which put an end to the Jim Crow system.<sup>37</sup> Of course, this is not to say that the struggle against racism, or for the fulfilment of civil rights, in the United States has concluded. If that was ever a suggestion, the re-emergence of white supremacy has certainly put that notion to bed. Rather, I am suggesting that this is the context, both before and after, in which we should situate Parks' act.

The historicising of Rosa Parks act carried out above problematises some of Judith Butler's key claims. In the first place, Butler contends that the act is the beginning of an insurrectionary process that overthrew segregationist laws in the South. From a historical perspective, this is patently not true. The NAACP had been organising to promote civil rights for black Americans since their inception in 1909. Furthermore, the act of protesting the injustice by refusing to move is not unprecedented either: Irene Morgan carried out a similar act eleven years earlier. This then formed the basis of legal (NAACP) and political (CORE) challenges to undermine and dismantle the

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<sup>37</sup> Naturally, this is not an exhaustive account of the civil rights movement and the dismantling of the Jim Crow system. That is beyond the scope of my aims here, which means much of the struggle is occluded. The most important example being *Brown vs Board of Education*. Lloyd (2007) offers a different reading of Parks' act and the two are compatible we are just drawing attention to different factors for the purposes of our different arguments.

Jim Crow system that both preceded and succeeded Parks' protest. Understanding the political and historical context within which Parks' act took place leads to a second issue with Butler's reading: her claim that before Parks refused to move no prior authorisation for the act existed and that the act itself performed its own authority. Clearly this is not the case. While Parks was arrested because her refusal to move was in contravention of segregation laws (Parks 2001: 63) the authority of the right she was claiming was not without precedent. While not identical in circumstance, Morgan's case had formed the basis of a successful appeal to the Supreme Court that deemed segregation unconstitutional under the 14th Amendment. The ruling was then tested in the form of direct political action, through the 1947 Journey of Reconciliation. In this way, while Parks refusal to move might have been in violation of local law, the constitutionality of the Jim Crow laws had been tested and eroded for over a decade. While insecure, the right to which Parks claimed was not wholly without authorisation, appearing to be secured in the constitution - as acknowledged by the ruling from the Supreme Court when it finally came on November 13, 1956 (Ibid: 73).<sup>38</sup> Consequently, while a performative perspective provides an ontological account of how change might take place, as the eventalisation of Parks' act demonstrates, it fails to explain the actual political processes and practices that are needed to make real transformation possible.

The question is, how does the eventalisation of Rosa Parks' act help when it comes to theorising citizenship? To recall the argument made earlier in the chapter, I proposed that acts of citizenship fails on its own terms because the acts Isin proposes do not result in the meaningful change (events) required. From the perspective of this thesis, this is a problem, because addressing lived-experiences of rightlessness requires real political transformation. Eventalising Rosa Parks' act reveals why they fail. From a theoretical perspective, the problem with acts of citizenship can be attributed to the conceptual baggage it carries over from performative approaches to theory and politics: the privileging of the ontological category of iterability at the expense of social and political conditions that make resistance effective

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<sup>38</sup> In eventalising Parks' act there is a tendency to impose a sense of narrative coherency on the civil rights movement that implies a certain teleological determination. This is, of course, not the case. Eventalisation is not a telic process but, as Foucault puts it, a reading where there is a 'plethora of intelligibilities, a deficit of necessities' (1991: 78).

and a related tendency to exclude the state as a site of radical politics. While the radical potential of acts is due in part to their

‘capacity to recite terms in new and counter-hegemonic ways, the scope for, and likely success of, such recitations *in practice* does not depend, ultimately, on the risky nature of linguistic signification. It depends far more upon the specific political and social conditions within which certain acts of resignification take place’ (Lloyd 2007: 143).

It is here that acts of citizenship run up against a limit that negates its transformational potential: making the act the primary object of analysis obscures the longer term political practices that make real change possible. If the concern is with actual transformational politics, then the privileging of the act at the expense of an understanding of the processes and practices of counter-hegemonic politics might be counter-productive. I argue that there is a need to broaden and deepen the areas of analysis: broadening the object(s) of analysis requires breaking with the singularity of the act to investigate the social and political conditions that make transformational politics possible; deepening means including the state as a necessary site of contestation and analysis. In the final section of this chapter, I propose the concept of citizenship as method as an analytic framework for theorising and practicing citizenship.

### **3.3 Citizenship as Method**

In the final section of this chapter I start to sketch out an account of citizenship as method. It is a direct response to some of the limitations in the field of citizenship studies, particularly when it comes to addressing the problem of rightlessness. Citizenship as method is a deconstructive negotiation of the terrain of citizenship. What this means, however, is far from clear. The aim of this final section of the chapter is to provide some clarification. First, by ‘negotiation’, I am referring to Derrida’s usage of the term (2002), which can be understood as a ‘technique of liberation’ (Cornell 2017). The more immediately problematic term in the formulation above is ‘method’,

particularly when read in conjunction with 'deconstruction'. Derrida makes it clear that deconstruction is not and cannot be a method (2002). However, both Gasché (1986) and Lasse Thomassen (2010) attempt to outline a deconstructive method. I delineate my own approach in conversation with theirs. Finally, accepting that it might be legitimate to speak of a deconstructive method that does not answer the question why method? What, for example, makes the term method more suitable than theory? Let me explain why now.

### **Deconstruction as and of Method**

Citizenship as method is deconstructive in its approach. Of course, this is not the simple application of a deconstructive framework (as if such a thing exists) to a pre-given object of analysis: citizenship. Rather, it requires a sensitivity to the internal limits, or aporias, that structure citizenship and cannot be overcome. In this respect, anyone looking for an epistemically stable account of citizenship will be disappointed because deconstruction puts into question any claim to essence and to stable definitions and meanings' (Thomassen 2010: 42-43). How then should we proceed? I suggest that the first step is by addressing what is conventionally understood by the term method. Derived from the Greek word *hodos*, meaning way or road, method is the road to knowledge of a particular object – in this case, citizenship. Traditionally in the social sciences method refers to the means used to gather empirical data about the world in order to secure epistemological claims. Within this formulation there is the assumption that there is an object with a knowable essence that can be learned by a subject who applies a set method. Deconstruction, of course, problematises that understanding of method.

For Derrida the objects of deconstruction are 'texts', not purely in terms of a written document but as 'any meaningful totality, and this includes practices, institutions and structures, whether philosophical, economic or otherwise' (Ibid: 44). From a post-foundation perspective, however, I suggest that Laclau and Mouffe's (2001) conception of discourse is more applicable because it 'overcomes the traditional separation between the material/real and the discursive/symbolic aspects of social reality' (Howarth 2015: 201). Discourse describes the articulatory dimension of hegemony, where a series of contingent elements are brought together and through which their meaning is constituted. A deconstructive reading pays attention to the ways in which

texts/discourses are not complete and coherent systems in and of themselves but marked constitutively by irresolvable contradictions, what Derrida calls aporias (a non-passage). To be clear, these are not contradictions in the Hegelian sense but *non-dialectisable antinomies*. An example would be the right to have rights, where the contradiction between the universal promise of rights and their concrete realisation in particular polities (citizenship) cannot simply be overcome. In this sense, the objects of citizenship as method, like all 'the objects of deconstruction are not fully constituted as objects with an essence that can be appropriated or known' (Thomassen 2010: 44). This is where the road to knowledge (method) comes up against a road block (aporia).

Aporias problematise traditional forms of method because they render the object of analysis epistemically unstable. However, while they might not be resolvable that is not the end of the story. A deconstructive approach seeks out aporias and 'attempts to "account" for these "contradictions" by "grounding" them in "infrastructures"', which are 'the *formal rules* that each time regulates differently the play of the contradictions in question' (Gasché 1986: 142). For example, in chapter four I will argue that Fagan's understanding of the ethico-political does not resolve the aporias of the right to have rights but both *reverses* and *displaces* the problem so that it is possible to approach it in a new light. For this reason, as Derrida reminds us, '[d]econstruction [...] is not *neutral*. It *intervenes* [emphasis original].' (2004: 93). The subject never leaves the object intact but displaces and, thus, rearticulates it. Here then is a further sense in which deconstruction is not a method in the conventional sense: it is not a set of neutral procedures to be applied to an object but transforms it, so we 'should speak of articulation rather than application' (Thomassen 2010: 44). This is why I use the term method, as opposed to a theory, because it captures the dynamic relationship between subject and object. Every time citizenship as method is deployed, both the object (citizenship) and the procedures (citizenship as method) are rearticulated. By which I mean, both *citizenship* and *citizenship as method* are iterable.

## Negotiating Theory and Practice

Because citizenship as method links action to knowledge it also marks the mutual implication of theory and practice. By which I mean that knowledge of a given object can be mobilised to ‘intervene in these processes of production’, problematising any simple distinction between theory and practice. As Alex Thomson observes, ‘[i]t is only once we appreciate deconstruction as a political practice in and of itself[...] that we can evaluate the contribution to be made by deconstruction to political theory or to the analysis of politics’ (2007: 5). The question I want to address now is what it means to approach deconstruction as a political practice; or, phrased differently, what does a deconstructive political practice look like? The answer being: a ‘negotiation’ (Derrida and Rottenberg 2002). A deconstructive negotiation indicates the necessity of navigating a terrain that is already given without relinquishing our ideals. Drucilla Cornell expresses it best when she says that:

negotiation ties together theory and practice, the ethical and the political, so as to shift our focus away from the theory/practice debate toward a much richer discussion of what our ethical responsibility is[...] to change the world in the name of justice’ (2017: 95)

This is not an abstract concern, however, because when it comes to negotiation, there ‘are only contexts’ (Derrida and Rottenberg 2002: 17).<sup>39</sup> As indicated in the introduction to this thesis, the logic of hegemony provides a framework for thinking through the articulation and rearticulation of the context in which struggles over citizenship play out. My analysis in chapter two suggests that modern citizenship is articulated around three primary nodal points: rights, law and democracy.<sup>40</sup> As a result these are the key areas of analysis in the coming chapters. The promise of negotiation as an analytic framework is that it addresses the two primary weaknesses in the literature

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<sup>39</sup> Note that this, for Derrida, is precisely ‘why deconstructive negotiation cannot produce general rules, “methods.” It must be adjusted to each case, to each moment with out, however, the conclusion being a relativism or empiricism’ (2002: 17).

<sup>40</sup> These are areas identified by Tully (2014) in his discussion of modern citizenship but also important objects of analysis in Benhabib’s concept of democratic iterations

on acts of citizenship: the singularity of the act as an object of analysis and the absence of institution in the framework. Conversely, etymologically derived from 'neg-otium', as 'not-ease' or 'not-quiet', negotiation describes politics as a process where there is an impossibility of stopping and the theorist cannot simply 'wash its hands of the institution' (Ibid: 25). So how does one negotiate citizenship? My answer is: tactically and strategically.

Building on an ethico-political understanding of the relationship between universal rights and citizenship in chapters four and five, I propose an account of the performative practice of rights-claiming as a means for negotiating citizenship. The advantage of a performative perspective is that it breaks with foundational approaches to rights by shifting the focus from what rights *are* to what rights *do* (Zivi 2012). Drawing on resources from the work of Michel Foucault, I also make the analytic distinction between the tactics and strategy of rights-claiming. I investigate this in more detail in chapter five but for now a military perspective helps make the distinction clearer: *strategy* is the general plan that is devised and implemented with the aim of winning a war; while *tactics* are the practices that might be deployed in the present, or near-future, in order to win the war (Golder 2015).

When it comes to citizenship as method, tactics refer to practices of rights-claiming through which citizenship is destabilised and displaced by the rights it makes possible. This is the point at which citizenship as method is closest to acts of citizenship. Because citizenship is constitutive of rights and who has these rights is contestable, citizenship can be tactically mobilised against itself in order to contest exclusion. At one level, rights-claiming works by juxtaposing a universal to a particular in order to reveal the fact that those making the claim are excluded from a universal conception of identity (Zivi, 2012). Yet these performances of the universal are never absolutely transcendent. There is a recurring theme throughout the examples used in this thesis whereby rights claiming migrants appeal to a universal principle that is inscribed within the identity of the citizenship regime they are contesting. This is a point I make in chapter five by way of the example of the French *Sans-papiers* who framed their claims in France's constitutional idiom and with reference to its revolutionary history. Modern citizenship's formal commitment to universal rights is a resource to be exploited as a rights-claiming tactic that works at the limits of the universal and particular.

The strategic dimension of citizenship as method means to expand the object of analysis. If citizenship as tactics is closest to Isin's understanding of acts, then the question of strategy marks a key point of divergence. As discussed previously, a primary innovation in the field of citizenship studies was to 'shift focus from the institution of citizenship and the citizen as individual agent to acts of citizenship' (Isin and Nielsen 2008: 2). What this move did was open up citizenship in new and potentially radical ways, by shedding it of its institutional and legal shackles. However, it is also problematic: the privileging of individual acts results in a tendency to obscure the social and political practices that make counter-hegemonic politics effective. Having learnt the lessons of Rosa Parks' act, citizenship as method addresses the need to move beyond an account of citizenship as discrete moments of contestation and towards questions of longer-term strategy. When it comes to citizenship as method: *tactics* are practices of rights-claiming which are deployed as part of a longer-term *strategy* aimed at contesting and reshaping constellations of power. Consequently, citizenship as strategy analyses the complex interaction of individual and collective forms of agency and citizenship in its institutional form(s) in a manner that breaks with the singularity of the act.

I want to finish with a brief word on the use of the illustrative case studies in the thesis. The analysis undertaken across this chapter clearly problematises the theory of acts of citizenship. The framework of acts, which places too much emphasis on iterability as an ontological explanation for change, fails to provide an adequate explanation of how political transformation occurs. The problem is that the object of analysis (solely acts) and the sites of radical citizenship (civil society *not* the state) obscure the dynamics that make counter-hegemonic politics possible. As I mentioned in the introduction to this thesis, while I am critical of Isin's account of acts I maintain the same entry point for analysis that starts from the struggles and mobilisations of marginalised groups and actors: irregular migrants. By keeping the same entry point I am able to break with hegemonic narratives of citizenship that reproduces its formal – often universalising (Tully 2014) – narratives. In this study I use a series of intensive examples to make my argument, as it allows for a greater degree of generalisation across different sites and scales. However, citizenship as method, as I propose it, is not limited

to using illustrative cases and could well be deployed in conjunction with more sociological and ethnographic methods in future. Furthermore, the cases used in this study are there to demonstrate my argument; there are of course other examples that could be used instead and others still might contradict what I am saying. My selection of cases is there to demonstrate possibilities, not necessities.

## **Conclusion**

Utilising post-foundational political theory, the current chapter proposed the concept of citizenship as method as a new conceptual framework for understanding citizenship. Citizenship as method is best understood as a deconstructive negotiation of citizenship. This is the theoretical and practical approach that will be deployed throughout this project to address the problem of rightlessness. The first section of the chapter analysed acts of citizenship in relation to the category of the event to highlight how the approach fails according to its own terms. I suggested that the problem lay with Isin's adoption of a performative framework that privileged the logic of iterability as an explanation for change at the expense of longer-term counter-hegemonic politics. In Lloyd's terms, the act needed to be 'eventualised' (2007). The second section of the chapter then undertook this task. Using eventualisation as a methodological tool, I investigated the multiple factors that made the transformational politics of the Civil Rights Movement effective. Taking on board these lessons, I proposed a new theoretical approach to citizenship that broadened and deepened the range of analysis. The final section of the chapter promulgated citizenship as method as a new approach to citizenship.

Citizenship as method is an attempt to comprehend and analyse citizenship, not as a simple object, but a process of constitution. What makes citizenship as method a slippery approach to define is that it is an intervention that does not leave its object intact, nor does citizenship as method itself remain unaltered by its particular uses. There is an intimate connection between knowledge and action that is mobilised through practices of rights-claiming tactics that contest citizenship according to its own logic. Responding to some of the limitations in the field of critical citizenship studies, citizenship

as method extends the object of analysis beyond the immediate moment of rights-claiming in order to consider questions of counter-hegemonic strategy. Citizenship as method proposes a non-prescriptive outline of what it means to theorise and practice a transformational form of citizenship that will be put to work across this thesis.

## 4: What Rights Are

Chapter one charted the development of universal (human) rights, from the Enlightenment declaration of the Rights of Man up until the contemporary moment. My analysis suggested that while the social and political context has changed, the aporias of the right and the problem of rightlessness remain as relevant and dangerous today as they were when Arendt was writing. While Arendt offers an insightful and compelling critique of universal rights and the contemporary international system, she is not able to offer a conceptual solution to the contradiction: the fact that *universal* human rights rely on membership within *particular* political communities. As discussed in chapter two, Benhabib is critical of Arendt for not being able to bridge the gap between the two forms of 'right' displayed in the right to have rights. She attributes this to Arendt's resistance to engage in any form of foundationalism. For Arendt, freedom and equality are not innate, but political principles that come into being when people act in concert to produce a 'common world' (1958). As such, there can be no rights attached to people above and beyond the political community, and the only truly universal right is the right to have rights. Yet even the foundation of that right is unclear.

Picking up where Arendt left off, Benhabib attempts to provide a conceptual solution to the problem, by founding rights in the quasi-transcendental framework of discourse ethics, yet this is equally problematic. As the example of *l'affaire du foulard* shows, Benhabib's cosmopolitan norms may inadvertently 'lead to the concretization of new forms of inequality between citizens and noncitizens' (Nash 2009: 1070). In contrast, Isin does not appear to be operating with an explicit conception of rights at all. He defines citizenship 'as the right to claim rights' (2012b: 109) but does not offer much more than that in the way of a conceptual approach or apparatus. Neither Benhabib nor Isin offer satisfactory responses to the problems Arendt's analysis of rights posed. So, is that it then, are the aporias of rights the end of the road? I suggest not.

In this chapter, I make use of contemporary post-foundational political theories of ethics, politics and the political (Fagan 2013; Marchart 2007; Laclau & Mouffe 2001; Laclau 1990) in order to rethink the terms of the problem. The

task of this chapter is to use Madeleine Fagan's concept of the 'ethico-political', as a way of 'accounting' for the aporias of rights. I do not mean that I am able to resolve the aporias altogether; rather, the ethico-political provides a framework through which the problem is reversed and displaced so that it can be reformulated in non-oppositional terms. This is the first and, in many ways, the most important of the deconstructive moves out of which I develop an understanding of citizenship as method. As will become clear, it also entails a move towards the realm of practical politics. I argue that the right to have rights is not an irresolvable contradiction but a structural aporia inherent to the relationship between ethics and politics that can be put to work by rights-claiming migrants to contest their exclusion. In developing this argument, the current chapter is conceptually paired with the subsequent one, linking together the question of 'what rights are' with 'what rights do' (Zivi, 2015: 9).<sup>41</sup> To some degree the different research questions that the two chapters explore mirrors the theory / practice distinction. However, as discussed in the previous section on citizenship as method, while this distinction is analytically useful, it cannot be maintained absolutely from a conceptual standpoint: questions of what rights *are* and what rights *do* are deeply interrelated.

The current chapter proceeds in three steps. The first section situates the aporias of the right to have rights within the broader concern with the relation between ethics and politics. In so doing, I develop the argument for a post-foundational approach (Fagan, 2013) to the problem by assessing the limitations of traditional 'foundational' approaches to ethics, particularly in relation to the politics of human rights. In the second section, I take the post-foundational framework developed previously and use it to rethink the relationship between citizenship and human rights. The final section further refines the framework of citizenship as method by deriving a political practice from the aporias of rights. I propose a form of rights-claiming that works by mobilising the internal contradictions of citizenship in order to contest and displace a given order according to the claims it makes possible.

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<sup>41</sup> While I utilise Zivi's distinction between 'what rights are' and 'what rights do', my approach is significantly different. Zivi is not particularly concerned with what rights are and suggests the important research question is what rights do (2012). As will become apparent, because the right to have rights represents the central problem this thesis addresses, unlike Zivi, I am also concerned with the question of what rights are.

## 4.1 The Ethico-Political

'Human rights are different from citizenship', claims Paulina Tambakaki (2009: 8). While at first glance this might seem to be stating the obvious, upon closer inspection the distinction is not quite so clear-cut. Tambakaki substantiates this claim with reference to the work of sociologist Gerard Delanty, who teases out some of the differences. He states that human rights

are based on an ethical and legal concept of the individual; citizenship is based on a political and legal understanding of the individual. They share a legal conception of the individual but differ with respect to their universality. Human rights are basic[...] rights that all individuals enjoy by virtue of their common humanity, whereas citizenship is specific to the members of a particular community (2000: 69).

While both Tambakaki and Delanty may be right that human rights and citizenship are not identical, Arendt's criticism of universal rights troubles this picture somewhat. The right to have rights clearly suggests that there is a necessary connection between the universal (human rights) and the particular (citizenship). Furthermore, the aporias of rights also problematise Delanty's assertion that human rights are 'rights that all individuals enjoy by virtue of their common humanity'. The analysis of rightlessness undertaken in chapter one makes it clear that 'common humanity' is not a clear guarantor of rights. What Delanty's distinction succeeds in doing is setting up the terms of the problem this chapter addresses, where the right to have rights maps more broadly onto the relationship between ethics and politics. Rethinking the aporias of rights in terms of the more fundamental tension between ethics and politics opens up a space for rethinking the nature of the problem.<sup>42</sup> This is the task I will turn to now, utilising Fagan's post-foundational understanding of the ethico-political.

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<sup>42</sup> This is an observation that Bonnie Honig also makes when she suggests that the Derridean 'distinction between the unconditional and the conditional might illuminate from a new angle Arendt's famous call for *the right to have rights* [emphasis original]' (2009: 116).

## The Limit of Ethics and Politics

No sooner had the Rights of Man been declared than critics, such as Edmund Burke, Karl Marx and Jeremy Bentham began to decry them. As Karen Zivi points out, to this day rights are criticised for their 'tendency to reinforce everything from atomistic individualism and Western imperialism to capitalist exploitation and patriarchal masculinity' (2012: 6). However, despite the many practical and theoretical problems attending to the concept of universal human rights, they have continually grown in prominence. Today they continue to inspire and authorise such a variety of rights-based social movements that they have shifted the moral register of the Western world, resulting in the U.S. state department declaring human rights to be one of the three universal languages of globalisation (quoted in Ignatieff 2003: 290). As Samuel Moyn observes, human rights have taken such hold of the radical imagination that they have come to represent the 'last utopia', proposing the 'image of another, better world of dignity and respect' (2012: 4). This is the ambivalence of rights: on the one hand, they are often used to reinforce the hegemonic power of normative constellations and even provide the grounds for the use of violence; on the other hand, they provide a universal vocabulary that can be deployed - often successfully - to confront these very same regimes. How, then, do we reconcile these opposing tendencies?

In her book *Ethics and Politics After Poststructuralism*, Fagan suggests that many of the problems with how human rights are understood and used reflect a deeper problem with the way political theory approaches ethics. She is critical of foundational approaches to ethics, whereby 'ethics provides the foundation on which arguments are built, as well as the limits to the scope of what is available for argument' (2013: 1). One example of this is the way in which human rights-based arguments are often used to justify humanitarian intervention.

Consider the case of liberal theorist Michael Ignatieff. In *Human Rights as Politics. Human Rights as Idolatry* (2003), he rigorously worked through almost every form of human rights critique imaginable, from reinforcements of nationalism to military interventionism. Yet, despite the 'minimalist' account of human rights Ignatieff proposed, he went on to author the report commissioned by the Canadian Government *The Responsibility to Protect*. In this report he makes a strong case for 'humanitarian intervention', he also

supports the 2003 Iraq War and even argues for the need for indefinite detention and extreme forms of interrogation when combatting terrorism ('The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' 2001). The apparent gap between Ignatieff's words and deeds begs the question: how it is possible that a champion of human rights may advocate policies that result in the abuse of those same rights? For Fagan, this issue arises out of the mistaken desire to posit ethics as a foundational category. To be clear, it is not that there are no ethical arguments to be made in favour of humanitarian intervention. Rather, the problem is believing that ethics can secure our claims prevents important arguments and debates from taking place. Ethics do have a place in these arguments, it is just that they cannot secure the answers once and for all (Fagan 2013: 3). In such cases, ethical and human rights arguments become a form of 'anti-politics' – despite this being a deeply *political* move – where the abstract moralism of human rights shuts down the necessary political debate.<sup>43</sup> The result being that the politics that rest on such ethical foundations often go uncontested in deeply troubling ways.

### **Ethics and Politics as Limit**

The problem with foundational accounts of ethics, as discussed above, is that there is an implicit hierarchy: ethics is privileged over politics as the grounds upon which it rests, as in the case of humanitarian intervention, when human rights stifle rather than stimulate debate. We can see this troubling tendency not just in the case of humanitarianism but also in the relationship between rights and citizenship. Arendt's critique of universal rights demonstrates how the rights that were meant to call sovereignty into question were elided with the nation to found the absolute authority of the nation-state. So what way is there out of this dilemma? I propose that a post-foundational approach recasts how we view the relationship between ethics and politics and, in so doing, offers a way of thinking through and beyond the difficulties with foundational accounts.

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<sup>43</sup> This idea of human rights as anti-politics is not particularly new or unique to Fagan and is made by theorists, such as Wendy Brown (2004) or Slavoj Žižek (2005).

A post-foundational approach does not just arise out of the failures of traditional foundational theories but also the impasse that many poststructuralist, or anti-foundational, accounts have reached. Poststructuralist theories of ethics are most often criticised for having nothing concrete to offer when it comes to making practical ethical decisions. They tend to be accused of issues such as 'relativism' (Krasner 1996), 'inconsistency' and a 'lack of content' (Cochran 1999). In response to the limits placed on the practical applicability of poststructuralist thought, there have been attempts to theorise an 'ethics of deconstruction' (Critchley 2014a). However, in trying to devise a deconstructive ethical programme that can inform practical politics, there is a tendency to reproduce the depoliticising logic that poststructuralism is meant to avoid (Thomson 2007: 202) – by which I mean, they treat certain claims as self-evident and beyond contestation.<sup>44</sup> The problem for Fagan is that theorists such as Critchley reproduce a theory-application logic, whereby ethics is called upon to inform and, thus, ground politics. As indicated in the discussion of ethics and politics in the introduction to this thesis, this tendency arises from a misreading of Levinas that allows them to assert 'the ontological primacy of the subject's relation to the Other' (Martin 2016: 418). The effect of this is that they assume ethics and politics are separate realms, where one can be called upon to inform the other. In response, Fagan develops an ontology of ethics and politics in the form of the 'ethico-political' (2013: 8). Where this approach differs is in refusing the hierarchy of either ethics or politics by insisting on investigating the limits of each as the point at which they meet and become (im)possible.

So how does a post-foundational approach differ? It is a question of limits. While some poststructuralist theorists see the limit between ethics and politics as a limitation, for Fagan it (the limit) is the point at which both terms gain their meaning and content. Her reading of Levinas, as well as the subsequent engagement with Derrida and Nancy, highlights the fact that there is no ethical realm that is not inflected and, thus, fractured by politics. Starting

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<sup>44</sup> For an extended discussion of some of the problems associated with poststructuralist theories of ethics see chapter one in Fagan's book *Ethics and Politics After Poststructuralism* (2013). She is particularly critical of David Campbell and Simon Critchley for developing an 'ethics of deconstruction' (Ibid: 24) that separates out ethics from politics and, in so doing, reproduces a foundational logic. Alex Thomson also makes a similar argument in his book *Deconstruction and Democracy* (2007), most notably in part three.

from Fagan's heterodox reading of Levinas, Fagan highlights how the ethical relation, the face-to-face experience of the Other, always implies the third – the other Other. This is not a limitation of ethics but a reminder that ethics necessarily implies plurality, thus, politics. If it is impossible to maintain an absolute distinction between ethics and politics, then it is not just *possible* but also *necessary* to theorise them in non-oppositional terms – as will become apparent later in the chapter, this has important consequences for how we conceive rights and citizenship. Once this focus on ethics and politics as limit situation is acknowledged, then a whole series of other dichotomies, such as universal/particular, unconditional/conditional and law/justice, also begins to look quite different. Fagan goes to great lengths to point out that this theoretical move has serious consequences for how we go about practical politics. However, because her text operates at a very high degree of abstraction throughout, it remains unclear what the consequences for so-called 'practical politics' actually are. So, while a focus on the ethico-political provides this project with a way to rethink the aporias of the right to have rights, this chapter draws out some of the practical political consequences. I do this by contextualising Fagan's understanding of the ethico-political within the debates over citizenship and rights.

### **Im-possible Hospitality**

The ethico-political entails a thinking of the limit, which begs the question: how does this differ from traditional (foundational) approaches to ethics and politics? Following a suggestion made by Bonnie Honig (2011), the Derridean distinction between conditional and unconditional hospitality is a useful way of thinking through the aporias of ethics and politics and, consequently, the relationship between citizenship and rights.

For Derrida, the question of hospitality is co-extensive with ethics because it refers to our most basic relation to the other. Yet at the beginning of his lecture *Step of Hospitality*, Derrida remarks that '[i]t is as though hospitality were im-possible' (2000: 75). What does it mean to say that hospitality is impossible? Well, like many of the concepts that Derrida subjects to a deconstructive reading, the im-possible refers to the way in which hospitality belongs to two discontinuous and radically heterogeneous orders: the conditional and unconditional. Between these orders there is a necessary and

irreducible conflict that makes ethics and politics 'im-possible'.<sup>45</sup> Derrida's own understanding of the unconditional is Levinasian in its origin and refers to 'the aspiration to a nonviolent relationship to the Other in their absolute singularity' (Cornell 2016: 43). When it comes to hospitality, the unconditional necessitates an infinite openness to the other, an infinite invitation to seek refuge in your land. On the other hand, there is conditional hospitality which refers to a finite and concrete set of resources, laws and rights – citizenship, perhaps. At this level, limits on hospitality must be set and this is what make hospitality im-possible. If it was unconditional then the host would be dispossessed; they would have nothing to offer, since their duties would be limitless. Yet, if it was entirely conditional then it would not be hospitality at all; there would be no duties at all. In Derrida's understanding, the unconditional is never a pure moment of transcendence because 'the unconditional law of hospitality needs the laws, it requires them. The demand is constitutive' (2000: 79) and so '[t]hey both imply and exclude each other' (Ibid: 81). Derrida's account of hospitality lends itself to a postfoundational approach because we are 'left only with *interface* as the site of the ethico-political [emphasis added]' (Fagan 2013: 148). For hospitality to exist at all, it must take place at the limit of ethics and politics: at the point of their negotiation.

What differentiates Derrida from many other poststructuralist theorists, making his work particularly amenable to a post-foundational reading, is his insistence on the indissociability of transcendence and immanence. It is often tempting to read Derrida as privileging transcendence.<sup>46</sup> For example, when he says that deconstruction is 'justice'; or when he states that '[u]nconditional hospitality is transcendent with regard to the political, the juridical, perhaps even to the ethical' (quoted in Fagan 2013: 132). Yet, in all the concepts he deconstructs, such as hospitality, law and democracy, he makes it clear that such a simple formulation is impossible. Justice is not law but there is no justice without law. Similarly, there is no

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<sup>45</sup> The 'dash' in Derrida's formulation of the 'im-possible' does a great deal of work here in signifying the constitutive dimension of limits. It is 'the edge that forms the union and the separation of the possible and the impossible' (Derrida 2001: 22).

<sup>46</sup> To reiterate, this is a tendency found in Critchley's early reading of Derrida, where the ethical (transcendent) interrupts politics from outside. However, his later work (2014b) does address this issue to some degree.

democracy without democracy-to-come but this is not something external; rather, it signifies ‘an internal dehiscence in the concept and ideal of democracy itself’ (Thomson 2007: 49). As such, Derrida’s work sets up a post-foundational approach because it is clearly not the case that there are firm ethical foundations upon which politics rest, yet nor are there no foundations. Rather, there is a groundless ground that resides at the limits of ethics and politics, where each term affirms and displaces the other.<sup>47</sup>

To summarise, a post-foundational ontology of the ethico-political requires a shift to thinking the limit: existing orders are always-already displaced from within and normative prescriptions are never wholly closed to politics. Out of this ‘the possibility emerges of thinking in terms of non-oppositional and non-hierarchical relationships’ (Fagan 2013: 147-48). According to Fagan, this non-oppositional logic does not just apply to ethics and politics but to all of the associated terms, such as: transcendence/immanence, unconditional/conditional and universal/particular. Although Fagan never makes it clear, this does have real consequences for practical politics, which will become apparent across the remainder of this chapter. What I propose is that an ethico-political framework makes it possible to theorise the right to have rights in non-oppositional terms.

## **4.2 Rights as Foundations, Foundations of Rights**

In the previous section, I set out the basis of a post-foundational theoretical framework that recasts the relationship between ethics and politics in non-oppositional terms. To do this, I engaged with Fagan’s heterodox reading of poststructuralist theory – most notably Derrida – to develop an account of the ethico-political. The aim of this section is to use this framework to rethink the aporias of rights. I do this by analysing the 1789 Declaration of the Rights of Man and the Citizen, linked as it is to the French Revolution, as the moment at which the relationship between citizenship and human rights emerges as a problem. I argue that the right to have rights does not display a contradiction between the universal and the particular but a structural feature of their

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<sup>47</sup> This is what Honig refers to as the politics of the ‘double gesture’ that is ‘a reproach to any particular order of rights and a demand that everyone should belong to one such order’ (Honig 2011: 117).

possibility that can be mobilised to contest exclusion. I draw out some of the broader implications of this rereading of the right to have rights, before addressing the kind of political practices that might follow on from this argument in the final section of this chapter.

## Man and Citizen

The development of the modern mode of citizenship is not even. It has been instituted at different times and in a variety of ways across many geographical locations. For example, American, British and French citizenship each have unique histories with real consequences for how contemporary politics is organised and practiced. However, as Tully (2014) demonstrates, there are also significant degrees of congruence in form, particularly in relation to rights, law (*nomos*) and representative democracy (*demos*). For the purposes of examining the relationship between universal rights and citizenship, here I investigate the French Declaration of the Rights of Man and the Citizen as it marks the instance where this aporetic relation appears most explicitly. However, in as far as this analysis concerns the broader structural features of the ethico-political, many of the conclusions are generalisable across multiple citizenship regimes – as I hope will become apparent as this thesis progresses.

My analysis concerns the relationship between the French Revolution and its founding document, the 1789 *Declaration of the Rights of Man and the Citizen*. I propose that the framework outlined in the previous section demonstrates that the relationship between these two moments is marked by the aporias of the ethico-political. The founding document of universal rights produces an intrinsic tension because the Declaration refers to both the rights of *man* and *citizen*: universal *man* only ever gains his rights as a citizen.<sup>48</sup> It is not just the title that displays this paradox, it is also present in the first two articles of the Declaration. Article 1 says '[m]en are born and remain free and equal in rights'; whereas Article 2 claims that '[t]he goal of any political association is the conservation of the natural and imprescriptible rights of man'. The paradox can be formulated as follows: the universal rights that men are supposedly born with require political association. As Etienne Balibar observes, the revolutionaries recognised that 'the immediate social relevance

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<sup>48</sup> Of course the highly gendered nature of the declaration, along with the French constitutional principle of 'fraternity' already mark a different form of exclusion from the universal.

of[...] rights posited the necessity and the possibility of putting them into effect, and materialized them in a constitution' (2014: 39). While the demand for universal rights calls for realisation in the particular institutions of citizenship, the universality of those rights necessarily overflows any positive political order. So we see that 'the equation Man = Citizen is not so much the definition of a political right as the affirmation of a universal right to politics' (Ibid: 50). So, while the proposition opens up a universal space for one to assert their right to be political, it is also a 'negative universality' as it introduces a fundamental indeterminacy into the political field. The paradox of universal rights is precisely this: their demand to be realised within a context they necessarily transcend introduces an infinite play between a politics of *constitution* and *insurrection* that is a structural condition of the ethico-political.

Interpreted according to an understanding of the ethico-political, the problem of the foundation of the universal allows for a rethinking of the aporias of rights. Arendt's formulation distinguished between two orders of right, an unconditional and a conditional one respectively. Following the analysis above, I take the first form of right to assert an *unconditional* right to politics. While not wholly reducible to any particular juridico-political order, the foundation of the universal (right in the singular) requires the existence of a particular political regime to be realised (rights in the plural). Thus the second form of right in the Arendtian formulation refers to a particular *conditional* rights-bearing community. The structural aporia of rights correlates with the ethico-political in asserting a right to belong to a particular political community that it must always also transcend. In so doing, it introduces a 'structural equivocation' (Balibar 2014: 53) into the political field. This is *not* a nihilistic negation of politics but an understanding of the moment of the political, where the social world is confronted with both the necessity of instituting a particular rights-bearing political community and the absence of any *final* ground upon which this society may be founded. An ethico-political understanding of the right to have rights makes it clear that both forms of right are the condition of possibility of the other. However, it also means that there is no *absolute* distinction to be made between them. The foundation of the first universal (unconditional) form of right distinguishes it from rights in their particular (conditional) existence. Otherwise it would just be another conditional order of rights derived straight from the community

without context any transcending validity. However, it also reminds us that there is no actual unconditional level to be accessed: to approach it (the unconditional) at all means we necessarily have to pass through the conditional in order to glimpse at something that necessarily escapes over the horizon. The moment of the political manifests itself in this undecidable relationship that asserts the necessity of founding the political community that it simultaneously deconstructs in the name of the universal.<sup>49</sup>

From this perspective, the aporias of the right to have rights look quite different. What started out as an unbridgeable gap between the two forms of right is not a contradiction but their mutual condition of possibility and impossibility. This means that the right to have rights should not be viewed as an irresolvable conceptual problem. However, I argue that it is necessary to go further still: the right to have rights is also a political invocation that opens up 'an indefinite sphere for the politicization of rights claims' (Ibid: 50). These claims call into question the false closure of any given political community. This will be the topic of the final section of this chapter.

### **Ethics, Politics and the Political**

Before going on to draw out some of the practical implications of this reformulation, I want to briefly anticipate some criticisms of the approach outlined above. In the process, I will clarify my conceptual schema. The first point to note is that I am not the first post-foundational theorist to concern myself with the relationship between rights and citizenship. Tambakaki (2009; 2011) has also theorised the right to have rights from a post-foundational perspective, but in a very different manner.

Tambakaki, who is working in the agonistic tradition of Chantal Mouffe, explicitly rejects any attempt to draw an innate connection between human rights and citizenship. This is evident in her claim that tying human rights to citizenship is a problem because it 'reduces politics, modern liberal democratic politics, to only one principle' (2009: 13). I see this move as a resistance to engage in a form of ethicism that is inherited from the intellectual tradition of Laclau and Mouffe. However, as Marchart makes clear, ethicism

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<sup>49</sup> I use the term 'the political' in its philosophical and ontological sense as the instituting moment of the social, as discussed in chapter three and outlined in detail by Marchart (2007).

is ‘a danger not hidden in ethics as such, but in the subsumption of politics and of the political under the ethical’ (2007: 129). As I hope should be clear by now, the framework that I have delineated up to this point does not lapse into such forms of ethicism. In the first case, the ethico-political explicitly refuses a foundational logic – or single principle, in Tambakaki’s words – upon which politics rests. Such an understanding would be to fall back into theory/application approach to ethics and politics that I reject in this project. Furthermore, while my approach implies an ontology of ethics and politics, it does not subsume the primacy of the political. It is perfectly compatible to agree that nothing (ethical) necessarily follows on from the political but that responsible decisions do happen and that they have consequences.<sup>50</sup> This is evident in the discussion above, where I linked the Declaration of the Rights and Man with the French Revolution. The association of citizenship with rights is not *essential* but that does not make it any less real or meaningful. However, this is a good moment to clarify how the ethico-political fits into a broader post-foundational framework.

The primary aim of this chapter up to now has been to reformulate the right to have rights in non-oppositional terms. I have done this by utilising Fagan’s ‘ontology of ethico-politics as “on the line” and therefore resistant to totalising closure’ (Fagan 2013: 8). To reiterate, such an approach does not eclipse the primacy of the political but merely describes the ethical and political context in which the politics of rights and citizenship occur.<sup>51</sup> Within this context, forceful ethical claims can and do happen but they do so without recourse to any absolute foundation. This approach is compatible with the core tenets of post-foundational conceptions of political ontology.

In the first instance, the ethico-political reaffirms the basic argument of *political ontology*: that there is something fundamentally political about Being. Taking the right to have rights as our example, we can see that all the universal rights (as ethical principles) are *political* through and through because they always require fulfilment in particular polities. By analysing how the universal (the Rights of Man) emerged from a particular historical struggle

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<sup>50</sup> I will return to consider the idea of the ‘responsible decision’ in more detail in chapter seven, where I analyse the relationship between radical democracy and citizenship.

<sup>51</sup> Adopting Marchart’s terminology, the ethico-political might best be described as a ‘regional’, rather than a ‘general’ or ‘first’ ontology (2007: 171).

(the French Revolution) my aim was to demonstrate that ‘universalism is always inscribed in a civilisation, even if it does seek timeless formulations for itself. It has a site, conditions of existence and a place of enunciation’ ( Balibar 2017).

Second, the ethico-political leads straight back to the question of the *ontology of the political*: its fundamental contingency. As Marchart describes, within the framework of post-foundational political thought “‘contingency’ becomes the operational term whose function is to indicate precisely this necessary impossibility of a final ground’ (2007: 26). When successful acts of institution occur, which are necessarily hegemonic, there tends to be a ‘forgetting of origins’ (Laclau 2007: 34), where the original moment of contingency, and thus the myriad of other alternatives, is erased. My argument is that because an ethico-political understanding of universal rights foregrounds the necessity of putting them (rights) into effect in concrete polities (citizenship) that they necessarily exceed, then it may also provide a framework for resisting moments of totalising closure. However, what remains to be seen is the kind of practical politics that this implies. I turn to this question now through an engagement with the example of the Calais hunger strikers.

## **Citizenship as Hunger Striking**

At 12 noon on Wednesday 2nd March 2016 a group of male, mostly Iranian, refugees in the unofficial Calais Jungle Camp sewed their lips shut and went on hunger strike. In front of them they held a list of demands that started with this sentence: ‘We are on hunger strike because we left our countries to find our human rights and unfortunately here in Europe we find none’ (CalaisHungerStrike2016 2016). Listed underneath this sentence was a list of demands. These were:

- ◇ For the European court of human rights to come to the Calais jungle and meet us
- ◇ We want an end to the forced eviction in the jungle
- ◇ We want an end of the use of tear gas
- ◇ We want an end of the attacks by fascists

◇ We want all the borders to be opened <sup>52</sup>

On the seventh day of the hunger strike, two more joined in and sewed their lips shut. They requested that this be filmed and then the videos were made available on YouTube and distributed on numerous blogs and news sites (Ibid). The two additions took the number of hunger strikers to 12 in total.

The hunger strike came in direct response to the local prefecture beginning the destruction of the North part of the Calais camp – a section that was occupied by mostly Iranian residents. However, it was also in response to less immediate causes, such as ongoing fascist and Police violence, as well as the administrative failures of the European Union, French and British Governments in processing their asylum claims. In justifying their actions, they claimed that ‘[w]e feel nobody listens to us, so we will not eat until our demands are met. We take action on behalf of all the refugees in Europe’ (Ibid). As Clare Moseley, a worker for Care4Calais put it, the hunger strikers ‘are sewing their mouths together to symbolize the fact that they've got not voice.’ (Moseley 2016).

Sewing their lips shut does not just evoke powerful images of the hunger strikers’ de facto statelessness but also the fact that they had no place from which to speak. This form of action replicates previous protests by Iranian migrants, most notably those in detention in Australia, who used the same tactic (Aidani 2010). Yet the symbolic resonances run even deeper. There is a history of prisoners in Iran who have been sentenced to death sewing their lips shut (NowHumanity 2016). When asked why they were on hunger strike, they gave reasons, such as: ‘I was a supporter of the pkk [sic], I distributed literature for them. For this they can kill me in iran [sic]’; or ‘I changed my religion from Islam to Christianity. This is punishable by death in my country’. By sewing their lips shut they signify the persecution and potential death penalties that await them should they be returned to Iran. The act illuminates the fact that there is no home to which they can return. Situated in an unofficial migrant camp on the border between two countries and without a home to return to, when seeking the rights that are supposedly attached to all people irrespective of race, class or gender, they found themselves to be rightless.

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<sup>52</sup> Any grammatical errors are copied straight from the source without correction.

A key demand made by the hunger strikers was to meet with representatives from the UN and European Court of Human Rights. This took place in the afternoon on 9<sup>th</sup> March, when the nine remaining hunger strikers met with Veronique Njo from the UNHCR (United Nations High Commissioner for Refugees), Jean-François Roger from FTDA (France Terre d'Asile) and Fanny Bertrand from the Conseil Départemental du Pas-de-Calais. However, the meeting ended without any real progress. Veronique Njo made it clear how powerless the UN were in the situation. They were only able to reaffirm the option already on offer by the prefecture, where they were given the option to go to the CAP (container camp) or the CAO (advice and respite centres across France) (Ibid). The UN also offered assurances about their right to seek asylum in France. However, no official documents or records of the meeting were kept by the UN (Ibid). Furthermore, there were many personal accounts of generalised and specific police violence within the camps, as well as a 'culture of distrust towards the French authorities' (Cragg, Mellon, and Hrifia 2016), meaning those on hunger strike did not wish to remain in France. As a one hunger striker put it, '[t]he problem is the French state doesn't re[s]pect its own laws' (CalaisHungerStrike2016 2016).

The hunger strike finally came to an end after 25 days on March 26<sup>th</sup> 2016. Yet the end of the hunger strike was only a partial victory. In the official statement from the hunger strikers they wrote that

We have decided to end our hunger strike not as a direct response to the negotiations with the French State but out of respect for those supporting us, who have a genuine concern for our welfare, and as a gesture of faith that the State abide by their limited assurances to protect and improve the conditions of those in the North of The Jungle. (Care4Calais 2016)

Among their successes were the fact that the French Government abandoned its demolition of the North section of the Calais Jungle camp and committed to general improvements in the standard of living, such as 'security, medical services, legal services, assistance for vulnerable groups including minors, clean water and a paved road allowing access for emergency services to enter the camp' (Ibid).

Their statement ended by saying '[t]here is clearly still much work to be done and this is not the end of the struggle for the human rights of refugees and asylum seekers across Europe. We invite you all to stand with us, united in humanity' (Ibid). Seven months later, in October 2016, the final eviction of the camp took place (UNHCR 2016). In the aftermath of the camp closing, migrants continued to be victims of police violence (Griffiths 2017). A full year after the camp closed, UNICEF (2017) described the living conditions of hundreds of unaccompanied minors in the Pas-de-Calais as 'catastrophic'. There are still estimated to be around 1,250 asylum seekers and migrants living in unidentified camps in Calais and Grande-Synthe. Finally, as recently as April 2019 the UN's special rapporteur for housing said that the plight of migrants across Calais 'breaches their human rights' (Chrisafis 2019).

### **4.3 Citizenship as Method: Mobilising the Ethico-political**

Conceptualised through a post-foundational framework, the relationship between citizenship and human rights looks very different. By developing an account of the ethico-political, I have argued that the right to have rights can be reformulated in non-oppositional terms. An ethico-political intervention focusses on the importance of the limit, as the point at which ethics/politics, universal/particular and unconditional/conditional become 'im-possible'. At this point, however, it is worth asking: where does this get us? For the many irregular migrants who experience the consequences of rightlessness, such as the Calais Hunger Strikers, the aporias of rights remain every bit as acute. At the time of writing: the Hostile Environment for Migrants remains in place in the United Kingdom; Trump's Zero Tolerance Policy is in full swing in the United States (Congressional Research Service 2019) and the EU continues to divert money away from search and rescue operations in the Mediterranean and towards its border protection agency, Frontex, allowing asylum seekers to drown at sea (Frontexit 2018). So while there may be no theoretical contradiction between the universal and the particular, in addressing the problems of rightlessness Simon Critchley is right to say that '[n]o

ontology[...] is going to do it for us' (2014c: 234). I have attempted to demonstrate that the right to have rights calls for a radical practice of politics that oscillates between 'a politics of permanent, uninterrupted revolution and a politics of the state as institutional order' (Balibar 2014: 53) through which the political is transformed. However, it remains undetermined what the politics are that might mitigate the dangers of rightlessness. Furthermore, despite Fagan's insistence on the importance of an account of the ethico-political for practical politics, any form of concrete politics is notably absent from her text. In answer to these questions, I outline the theoretical framework for a post-foundational practice of rights-claiming by asking, 'who is the subject of the Rights of Man?' (Rancière 2004). How this works starts to become clear through the example of the Calais Hunger Strike. On one level, their protest highlights their rightlessness. However, it also illustrates something more: the act of the hunger strike, alongside a list of demands, is a *claim* to be included within a political community and to be extended the rights that they are due but do not have.

### **Practicing the Limit**

To understand the right to have rights in non-oppositional terms means holding focus on the limit. Yet for this approach to offer meaningful ways to renegotiate the terrain upon which rightlessness is experienced, then this cannot be a purely theoretical endeavour. The necessity of thinking the ethico-political has always been about the consequences for practical politics. It is not that theory is not important, rather it is about the point at which theory and practice coincide. So how do we conceptualise a political practice of the limit? When it comes to the question of rights, the answer is to take those rights and make something of them. In 'Who is the Subject of the Rights of Man?' (2004), Rancière performs a dialectical reversal of the right to have rights to show how the paradoxes can be rethought as the foundation of a claim. What makes Rancière's approach uniquely applicable is that he articulates the structure of the claim in a manner that refuses the absolute distinction between the universal and the particular, where '[p]olitics is about that border. It is the activity that brings it back into question' (2004: 304). In so doing, he explicitly formulates a political practice of the limit.

What does it mean to say that rights-claiming is the political practice of the limit? At one level, it means that it is the point at which the universal and particular come into contact. According to Zivi, rights-claims function by juxtaposing ‘a universal to a particular or, more specifically, when the claim itself reveals a supposedly universal conception of identity to be premised upon the exclusion of precisely those who are making demands for inclusion’ (2012: 81). Here rights-claiming is a liminal activity in the sense that it works at the limits of the universal and the particular. However, while that may be the case, it is not immediately apparent that this reformulates the relationship in non-oppositional terms. Rancière’s re-working of the right to have rights takes it one step further. He suggests that we should view the predicates ‘man’ and ‘citizen’ as political subjects. ‘Political subjects are not definite collectivities’ (2004: 303); instead, they are open to contestation about who can be the subject of rights and in what cases. The relation of the subject to their rights is one of a ‘double negation’ (McNay 2014: 150): the subject of rights comes into being in the interval between the two inscriptions of right, where the universal and particular meet. Rights are the grounds for a claim that opens up a site of contestation between not just two forms of right but two worlds: ‘there is the world where all people are equal and the one where they are not. The political subject - who is the subject of the Rights of Man - bridges these two worlds, puts two worlds in one’ (Rancière 2004: 304). Consequently, Rancière reformulates the right to have rights as follows: the Rights of Man are the rights of those ‘who have not the rights that they have and have the rights that they have not’ (Ibid: 302).<sup>53</sup> How this, seemingly paradoxical, claim works becomes clearer in practice.

The Calais Hunger Strike is an exemplary case of this reworking of the right to have rights, according to the logic of double negation: the hunger strikers’ actions are not just an illustration of rightlessness but instantiate a

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<sup>53</sup> I recognise that it is something of an imposition on Rancière’s thought to deploy his approach within the post-foundational framework of ethics, politics and the political that I have laid out across this project. Following Marchart’s argument (2011), I take it to be relatively unproblematic to include Rancière as a post-foundational thinker. However, Rancière has made it consistently clear that his work is not compatible with ontological conceptions of the political (see chapter one in Rancière, 2010; see also Chambers, 2011) and that he rejects Derridean approaches to ethics and politics (see chapter four in Rancière, 2010). While many of these differences are debateable, for the purposes of this project I see it as relatively unproblematic to utilise his reworking of the right to have rights as an example of the politics of the limit.

*claim* for inclusion. Viewed through the prism of Rancière's reconfiguration, the hunger strikers demonstrated that *they have not the rights that they have*: they said they are on hunger strike because 'we left our countries to find our human rights and unfortunately here in Europe we find none'. They do not have the rights that they are supposed to have according to the Declaration of the Rights of Man, upon which the very legitimacy of French citizenship is founded and according to the various European and international human rights treaties to which France is committed. However, this is only half the story or we would be stuck in the Arendtian trap. They also show that *they have the rights that they have not*: by appearing in public and making themselves heard they demonstrate their equality as speaking beings. Adopting the method of a hunger strike is particularly effective here, for two reasons: first, because 'hunger is a universal experience of diverse significance' (Grant 2011: 115) then it is particularly easy to relate to at a human level; second, because it recycles a form of protest that situates the hunger strikers within a long tradition of radical politics and claims for justice.<sup>54</sup> These factors enable the hunger strikers to enact their universal equality as beings who are refused legal personhood but are due the same rights as those they address.

The approach to rights-claiming outlined above and exemplified by the Calais Hunger Strikers, articulates one answer to how a political practice informed by an understanding of the ethico-political might function. In the first case, we see that the logic of double negation, through which the claim operates, problematises any attempt to separate out the universal from the particular. In identifying how the hunger strikers 'have not the rights that they have' and 'have the rights that they have not' it becomes clear that the universal is already particular and vice versa. Secondly, this results in a politics that is necessarily about the limit: the limit of the universal and the particular, and rights and citizenship, where each meet and become impossible. The practice of rights-claiming mobilises the aporias of the right, where the 'strength of those rights lies in the back-and-forth movement between the first inscription of the right and the dissensual stage on which it is put to test' (Rancière 2004: 305). Finally, the practice of rights-claiming

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<sup>54</sup> Another way to approach this would be in terms of what Butler calls a politics of precarity (2009). Butler contrasts 'precariousness', as an existential condition, to 'precarity', as a political condition where precariousness is amplified (see various in Lloyd 2015).

rejects the traditional theory-application approach to ethics and politics. Rancière asks how we know what it is that rights mean and, in so doing, provides a simple answer: 'Essentially, through one's actions' (1995: 47). Rights-claiming, as a political practice, is 'organised like a proof, a system of reason' where the meaning of the rights mobilised is essentially verified by the effects they produce in reality (Ibid: 47). This means that the question of what rights *are* (ethico-political principles) cannot be separated out from what rights *do* (practices of rights-claiming). There are two primary consequences to this approach: first, it problematises the theory/practice distinction, because it is at this point that 'theory traverses the limits of its own grounds', where '[t]heorising, too, is, in this sense[...] practice' (Fagan 2013: 148) second, it clears the ground for a performative understanding of the practice of rights-claiming, which will be the theme of the next chapter.

### **Citizenship as Method: Performing the contradictions of the universal**

Rethinking the relationship between the universal and the particular is both a theoretical and a material necessity. The concrete dangers of the aporias of rights, manifest in the problem of rightlessness, can only be attenuated when those who are excluded attempt to 'make something' of the rights they do not have in order to contest their exclusion. However, the rights-claiming framework laid out above can only take us so far because an element is missing: citizenship. Rancière denigrates Arendt for identifying rights too readily with citizenship. However, the analysis undertaken across this chapter foregrounds the foundational connection between rights and citizenship that Rancière misses. This reflects a broader pattern in Rancière's overly ruptural understanding of politics, where he tends to gloss over the importance of the social world (the 'police order', in in Rancière's vocabulary). This leads him to mistakenly claim that '[t]here is no man of the Rights of Man, but there is no need for such a man' (2004: 305). However, there is a subject of rights and in the contemporary moment it is the citizen. In missing this simple fact he overlooks the conditions that make rights-claiming possible at all - the fact that at a previous point in history rights were instituted (Marchart 2011) – and

a whole repertoire of practices through which rights-claims can be made and exclusion contested.<sup>55</sup>

To correct this oversight, it is important to make a distinction that Rancière fails to consider between the *exercising* of rights, such as voting, and the *claiming* of rights, of which the Calais Hunger Strike is an example. Isin identifies the importance of this distinction when he writes that 'because citizenship is *constitutive* of rights and because who can exercise and claim these rights is itself *contestable*, citizenship is practised not only by exercising these rights but also by claiming them' (2017: 501). This dimension of Isin's theory of acts is uniquely compatible with my own approach. As a rights-claiming practice, acts of citizenship enact what Butler calls the 'performative contradiction' of the universal that 'takes place when one with no authorization to speak within and as the universal nevertheless lays claims to the term' (Butler 1997b: 368). Because citizenship makes *universal* rights possible but also names the *particular* subject of rights, acts of citizenship carried out by non-citizens are precisely how one may speak 'from a split situation of being at once authorized and de-authorized' (Ibid: 368). Building on Rancière's account, it is not that there is no subject of the Rights of Man but that this subject is never complete.

I want to finish by returning to a discussion of citizenship as method and, more specifically, how the analysis undertaken across this chapter develops the conceptual schema. In keeping with a deconstructive method, the aim was to rethink the aporias of rights, not by resolving them, but by accounting for them through a specific infrastructure: the ethico-political. An ethico-political approach refuses the separation between ethics and politics and, instead, works through a 'sensitivity to the ways in which the existing order is already challenged and displaced from within, through precisely the unsecured claims made in the name of ethics' (Fagan 2013: 8). The promise of citizenship resides in its im-possibility: the fact that it institutes the rights that call its borders into questions. Consequently, citizenship as method describes a form of rights-claiming that functions by mobilising the universality that is already inscribed within the particular. This understanding of citizenship is

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<sup>55</sup> Another way of phrasing this, one that is more in keeping with the performative perspective I expound in the following chapters, would be to observe that the force of the performative (the rights-claim) is always derived from a constative (citizenship).

situated at the limits of what is theorisable because it is only ever actualised through practice. Consequently, citizenship as method is an attempt to conceptualise how theory and practice interact by describing a form of political engagement that is at once *generalisable* and *context specific*: it is 'generalisable' because it is a mode of political action that is repeatable across multiple localities and temporalities; however, it is necessarily 'context specific' in the sense that it will always be an immanent mode of action through which one engages with the particular traditions and practices of the citizenship regime that one aims to transform. In the next chapter, *What Rights Do, I* expand on this dimension more fully in a discussion of citizenship and the (performative) practice of rights-claiming.

## Conclusion

This chapter has argued that it is possible to reformulate the right to have rights in non-oppositional terms by developing a post-foundational approach to rights-claiming. In many ways, this move is the pivotal point in the thesis, as it begins the process of rethinking the terms on which we approach the paradoxical relationship between citizenship and rights. The first step in this process was to suggest that many of the difficulties inherent to the politics of rights reflect more fundamental problems associated with traditional (foundational and anti-foundational) approaches to ethics and politics. In response, I proposed that some of these problems could be overcome by rethinking the right to have rights in terms of a post-foundational understanding of the ethico-political. An ethico-political approach highlights that it is impossible to think of transcendence as entirely separate from – thus, in opposition too – immanence. Rather it is a case of thinking the limit, as the site at which they both imply and exclude each other. Once the relationship between ethics and politics has been retheorised in non-oppositional terms, then a whole series of other related predicates, such as universal/particular and unconditional/conditional can be approached in the same way. I pursued this argument in section two of the chapter by retheorising the right to have rights in regard to the ethico-political. Adopting the post-foundational framework developed in section one, I sought to reinterpret the relationship between citizenship and human rights by analysing their joint institution.

There is an aporia inherent to the fact that the Declaration equates the rights of both *man* and *citizen*, which can be accounted for in non-oppositional terms according to an ethico-political logic. Yet this theoretical move does not make the experience of rightlessness any less acute for irregular migrants, such as the Calais Hunger Strikers. To rework the relationship between citizenship and human rights in non-oppositional terms is and always has been about political practice. In the final section of the chapter I proposed a post-foundational practice of rights-claiming. Such practices do not work by weaponizing human rights from above. Rather it is a case of destabilising citizenship from within by calling it to come good on its universal promise. Citizenship as method describes a form of rights-claiming that negotiates at the limits of the universal and the particular without succumbing to one or the other.

## 5: What Rights Do

In the previous chapter I argued that the right to have rights is not an outright contradiction but reflects the aporetic relationship between ethics and politics. An ethico-political understanding of the paradoxes of rights makes it possible to reformulate the relationship between citizenship and universal rights by developing a politics of the limit, in the form of the practice of rights-claiming. A post-foundational approach to rights draws an explicit connection between what rights *are* and what rights *do*. Consequently, the current chapter builds on the theoretical work carried out previously by shifting to a consideration of more concrete political questions. Having previously 'accounted' for the aporias of rights through Fagan's concept of the ethico-political, the task now is more practical: to engage in analysis of what rights do by rethinking the politics of rights-claiming from a performative perspective.<sup>56</sup> I do this by engaging with contemporary literature on rights and performativity. First I look at Karen Zivi's (2012) recent work on performative approaches to rights which I then supplement with Ben Golder's (2015) heterodox reading of Foucault's politics of rights. In so doing, I further advance an analytic framework of citizenship as method, which will then be deployed across chapters six and seven to analyse citizenship in its institutional form.

Why is a performative perspective so applicable? Because it helps us develop a substantive answer to the question of political practice, without reverting back to the theory-application approach to ethics and politics. A performative approach highlights the social and political context in which all right-claims occur. From this perspective, what is important has less to do with the meaning of the performative utterances we make – or the logical structure of the claim, as it is for Rancière – and is more concerned with how particular norms and conventions are mobilised and reiterated. As Judith Butler explains, the power of performative speech acts resides in how they mobilise 'sedimented' social conventions in creative ways in order to generate new meanings (1997a). Rights do not end political debate but instigate it,

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<sup>56</sup> Recall that when I say 'accounted' I do not mean that the aporias have been resolved. I am referring to the 'deconstructive move' whereby an aporia is reversed and displaced (Gasché 1986; Thomassen 2010).

leading Zivi to propose an understanding of '[r]ights claiming as a perlocutionary practice of persuasion' (Zivi 2012: 43), where their efficacy lies in the practices of citizenship that they foster, rather than the outcomes they produce.

While Zivi develops a ground-breaking theory of rights, one that is uniquely compatible within an ethico-political framework, the question of power and, thus exclusion, is never tackled head-on (Goodhart 2018). This is where Foucault's late turn to rights fits in: a Foucauldian approach still operates within a performative framework (see Golder 2015) but it adds is the element of 'strategy' and 'tactics', whereby rights are deployed instrumentally with the intention of contesting particular power relations. Consequently, this chapter is concerned with the efficacy of rights-claiming - in how rights practices might be used effectively to contest and rearticulate dominant power relations. This does not lapse back into a foundational approach to rights, where they are called upon to provide a normative framework. Rather, it is to ask how it is they might challenge hegemonic power in a manner that opens up, rather than forecloses, political possibilities. In so doing, the concern with the efficacy of rights-claiming is intended to overcome some of the limitations with the theory of acts of citizenship, where it remains unclear how these acts interact with and transform particular citizenship regimes in meaningful ways. Utilising a performative framework for rights-claiming, I argue that in order to address the shortcomings of a theory of acts, there is a need to broaden the range of analysis to consider the different sites and scales through which practices of rights-claiming by irregular migrants contest their exclusion by destabilising citizenship from within. In making this argument, I utilise the now famous case of the French *sans-papiers* movement that challenged the meaning and contents of French citizenship by calling it to account for its 'universal' foundations. There are three steps to my argument. The first step sets out the conceptual framework of a performative approach to rights-claiming. The second section engages with Foucault's late turn to rights to analyse how a performative practice of rights-claiming works to contest specific forms of injustice. Finally, the last section utilises this new framework for rights-claiming to further refine my conceptual account of citizenship as method. I do this by analysing the strategy and tactics of the French *sans-papiers* movement.

## 5.1: Rights-claiming as a performative practice

The post-foundational approach to rights and citizenship that I have set out up to now stresses the importance of rights-claiming as a politics of the limit. This is because, as Zivi writes, 'it is through the making of rights claims that we contest and constitute the meaning of individual identity, the contours of community, and the forms that political subjectivity take' (2012: 7). At first glance it would appear that there is nothing particularly original or innovative about this argument. There is a long, primarily liberal, tradition of mobilising rights to highlight injustice and contest exclusion. What makes Zivi's approach novel and, as such, particularly applicable to a post-foundational concept of citizenship is her theoretical framework. Zivi argues that 'we must understand rights claims as *performative utterances* and rights claiming as a *performative practice* [emphasis original]' (Ibid: 8). From a theoretical perspective, a performative approach to rights-claiming treads the same path as a post-foundational approach to the ethico-political: between a liberal belief in rights and a postmodern scepticism. In moving from what rights *are* to what they *do*, Zivi rejects a foundational account of rights as 'trumps' that work by shutting down political debates (Ibid: 28).<sup>57</sup> As discussed in the previous chapter, viewing rights from a foundational perspective is a profoundly depoliticising move that can have disastrous consequences. For Zivi, a performative perspective highlights the undecidable terrain upon which all practices of rights-claiming occur, where the force of the claim cannot be guaranteed by the logical structure of the demand, or the context out of which it arises. In this sense, making rights claims should be seen as the substantive content of citizenship, 'not because of the results that it engenders but because of the practices into which it draws us' (Ibid: 121). Rights-claiming is the practice through which a radical form of citizenship is performed.<sup>58</sup>

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<sup>57</sup> In chapter one of her book Zivi makes the argument that the problem with how rights are traditionally understood is that they are often viewed as trumps, where rights claiming is seen as an 'activity that can and should bring debate to an end by producing clear and secure winners' (2012: 38). This argument mirrors Fagan's critique of foundational approaches to ethics.

<sup>58</sup> This is a point that Isin also makes in his chapter 'Performative citizenship' (Isin 2017).

## Making Rights Claims

So what does a performative framework mean when it comes to rights-claiming and where does it get us? In her recent book *Making Rights Claims: A Practice of Democratic Citizenship*, Zivi argues for the importance of rights-claiming as part of an ongoing practice of democratic citizenship. There is an initial similarity with Rancière's approach, where rights-claiming enacts a performative contradiction by juxtaposing 'a universal to a particular or, more specifically, when the claim itself reveals a supposedly universal conception of identity to be premised upon the exclusion of precisely those who are making demands for inclusion' (Ibid: 81). However, unlike conventional understandings of rights, or Rancière's own account, the outcome does not follow on logically from the structure of the claim. Working with an understanding of performativity derived from speech act theory, Zivi believes that a common problem with approaches to rights is that they are too concerned with the 'illocutionary force' (Austin 1975: 109) of a speech act rather than its perlocutionary effects. In order to explain what this means, it is necessary to reconstruct the basic tenets of speech act theory. In so doing, I will identify where Zivi sits in the evolution of this intellectual tradition and what it means for understanding rights.

Performativity refers to a category of language first articulated by J. L. Austin in *How to Do Things with Words* (1975), that is a type of speech act where 'in so uttering to be doing or to state that I am doing it: it is to do it' (Austin 1975: 6). He distinguishes performative speech acts from constative ones: constative statements have a referent in the world and, as such, can operate with a true/false value; in contrast, performative speech acts do not have a corresponding truth value but produce effects.<sup>59</sup> Examples of performative speech acts are 'promising', 'marrying' and 'betting' (Ibid: 8), all of which bring into being something new. Rather than being 'true', what is important with performatives is their 'felicity', meaning whether or not they bring about the intended effects in reality. In order to analyse the felicity of performatives, Austin refers to the 'total speech act' that consists of three acts: locution, illocution and perlocution (Ibid: 147). The locutionary act is what is actually

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<sup>59</sup> The performative/constative distinction is challenged by many theorists and, in his later work, Austin himself recognized it was impossible to always maintain (see Zivi 2012: 15 for an example of this).

said through the sounds made, the illocutionary act is what one does *in* saying something and the perlocutionary act refers to what one does *by* saying something (Zivi 2012). Taking the example of getting married: the locution might refer to the saying “I do”, the illocution is actually engaging in marriage and the perlocution is the effects this brings about in reality, such as the legal consequences. For a performative speech act to be felicitous, it must satisfy these three criteria and that means that it must also take place in the proper context, for ‘it is always necessary that the circumstances in which the words are uttered should be in some way, or ways, appropriate’ (Austin 1975: 8). Returning to the example of marriage again, for the effects of the wedding to be realised it must take place within a context that authorises the actions: the person administering the marriage must be legally authorised to do so, they must not already be married etc[...] Finally, then, in Austin’s eyes the successful performative speech act refers to a ‘total speech-act in the total speech-situation’ (Ibid: 148).

The problem with Austin’s understanding of performativity is that there is a focus on the ‘proper context’ that will allow for the utterance to achieve its intended effects. As discussed in chapter two, poststructuralist theorists such as Derrida and Butler, demonstrate that the context from within which the performative derives its force is not stable enough to guarantee the effect of the speech act. From the perspective of rights-claiming, the problem is that the idea of a ‘total speech-situation’ places too much emphasis on the felicity of illocutionary acts. In contrast, Zivi claims that ‘speakers do not have perfect control over the outcome of their utterances’ (2012: 18) and we should be interested in the perlocutionary effects of a claim instead.

In ‘Signature, Event, Context’ (1988), Derrida offers an alternative reading of how performativity works in relation to its context. While not wholly negating the importance of the context from within which the speech act is performed, Derrida sees it as altogether more fragile in determining the success of the performative. This relates back to the concept of iterability discussed in chapter two. While performatives do often function successfully and this takes place in relation to a given context, the concept of iterability also means that failure is a necessary condition of their functioning. The ‘written sign carries with it a force that breaks with its context’ and this ‘breaking force’ (Ibid: 10) endows the performative with transformative

capacities. So when it comes to the rights-claiming as a political practice, the perlocutionary effects of the claim – what I *do* by making the claim, such as marriage – can never be guaranteed once and for all. A poststructuralist understanding of the performative entails a shift in what practices of rights-claiming can and should do. For Zivi, ‘politics as a practice of acting and speaking with others and[...] the value of this practice resides less in its outcomes than in simply its doing’ (Zivi 2012: 40) because rights-claiming is not the end of a political process but the beginning,

There are two key areas where Zivi’s performative approach to rights contributes to the theoretical architecture of this project. In the first case, Zivi’s understanding of performativity is uniquely compatible with a post-foundational account of the ethico-political: because the norms and institutions from which the performative derives its force are never wholly determining, foundational approaches to ethics and politics are necessarily put into question. The consequences of this are radical. As Zivi puts it, ‘the very project of political theory needs to be rethought so that it takes seriously the contingency of politics’ (Ibid: 40). The aim of rights-claiming is not to resolve institutional questions once and for all, or to do politics the right way; instead, it foregrounds politics as an open-ended and ongoing process. The second point, which follows on from this, is that less emphasis should be placed on the illocutionary force of the speech act and more on the meaning of ‘rights claiming as a perlocutionary practice of persuasion’ (Ibid: 43). That means paying attention to what happens when a speech act enters into a particular context where the effects cannot be determined in advance. As such, the success or failure of a rights-claim cannot *always* be defined in such absolute terms as whether or not specific legal rights were recognised. For this reason, Zivi does not see rights-claiming as an exceptional moment. Rather, it is a political practice of engaging with others with the aim of persuading them through the language of rights, while knowing that rights offer no firm guarantees. Rights-claiming is a process through which, ‘new ways of thinking and being come into existence’ and ‘individuals learn and practice being democratic citizens’ (Ibid: 119); it is the substantive content of an ethico-political practice of citizenship.

## Rereading the Calais Hunger Strike

A performative approach to rights-claiming prompts a rereading of the Calais Hunger Strike, discussed in the previous chapter. On one hand, seen from a more traditional understanding of rights, the hunger strike might be deemed as a failure. After 25 days the strike ended without the demands listed being fully met. The hunger strikers say they ended the strike ‘not as a direct response to the negotiations with the French State but out of respect for those supporting us, who have a genuine concern for our welfare, and as a gesture of faith that the State abide by their limited assurances to protect and improve the conditions of those in the North of The Jungle’ (Care4Calais 2016, 4). However, after the hunger strike took place, the Calais Jungle camp was demolished in October 2016. Furthermore, the fate of many of the strikers is unknown, with at least one of them being held in a detention centre in the United Kingdom, awaiting deportation back to a previous country (Ibid).

There appears to be a valid argument that because the claims of the Calais Hunger Strike went mostly unanswered, then their protest failed. One might go even further and suggest that it was because they were able to demonstrate the injustice of the situation that their demands could meaningfully intervene in established practices of bordering by centuries-old nation-states. Yet for Zivi, this does not make their protest a failure. In her book, she actually poses a very similar hypothetical situation, imagining a group of asylum seekers whose claim goes unheeded. Her argument is that because a performative approach frees the practice of rights-claiming from a pure instrumental rationality, what appears ‘a failure on one front is actually quite productive on many others (Zivi 2012: 38).

For example, we might see that the language of rights brought a group of people together who would otherwise have had little reason to join forces, or we might find that claiming rights produced a shift in ways of thinking about citizenship or statehood that were not captured in legal terms (Ibid: 38).

In effect, if we understand politics from a post-foundational perspective as an ongoing process that necessarily resists totalising closure and also recognise the limits of what ethical arguments can and should do, then it becomes

possible to see the transformative potential inherent in the rights claims of the Calais Hunger Strikers. The Calais Hunger Strike did not come out of the blue but is part of a growing number of migrant-led political protests that contest the racist and discriminatory nature of the immigration controls and citizenship criteria of western democratic nation-states. Furthermore, the movement does not stop with the end of the hunger strike but is part of a series of ongoing political projects aimed at reshaping the political community. This does not invalidate the universality of rights. Rather the perlocutionary effects are 'persuasive' in the sense that they redefine the discursive terrain into which they enter in processes of what Judith Butler calls 'perverse reiteration' (Butler 2000: 40). The hunger strikers enactment of the contradictions of the universal carries out this function: they claim they came to 'find their human rights' but find 'none'. This opens up the 'human' of universal human rights to reiteration, in both revealing its conception of universality to be 'limited and exclusionary', while also starting to 'mobilize a new set of demands' (Ibid: 40). Because the very concept of '[u]niversality belongs to an open-ended hegemonic struggle' (Ibid: 38), the so-called 'failure' of the claim does not render it invalid but brings into being a new political discourse with no definite ending.

A performative understanding of rights-claiming fits into the broader post-foundational framework of ethics, politics and the political developed in the previous chapter. It recognises that because rights claims always take place on an undecidable terrain, where no context can ever fully determine its meaning, then the outcome of the claim cannot be assured in advance. This does not signify the failure of the claim but its promise, because it is through such activities that the meanings of ourselves and our communities can be forged. This is the paradox of rights: 'we want the practice of making rights claims to end political debate, but at the same time we must recognize that their meaning and power actually derive from ongoing political engagement' (Zivi 2012: 67). In an approach that is reminiscent of Isin's understanding of acts of citizenship, for Zivi rights claiming constitutes a practice of citizenship in itself, opening up an ongoing participatory political project of subjectification, through which the subject of rights is formed and re-formed,

in processes of 'perverse reiteration'.<sup>60</sup> For this reason, Zivi rejects a traditional understanding of rights as trumps 'because it overemphasizes the possibility, perhaps even the importance, of defining and determining the success of a rights claim' (Ibid: 43). That does not mark the failure of rights but the condition of politics. Because pluralism is constitutive of modern politics itself (Critchley and Mouffe 1996), rights-claiming is one way a radical politics of citizenship is performed upon a terrain of competing, yet reasonable, demands.

## 5.2 Foucault's Politics of Rights

In many ways Zivi's account of rights-claiming is deeply attractive: rights practices describe a mode of *performing* citizenship that is always oriented towards a new and open horizon. Yet, there is also something slightly unsatisfying: in a world where some migrants feel compelled to sew their lips shut, while others drown in their thousands in the Mediterranean Sea, or die from exposure crossing the US-Mexico border, when we mobilise rights to tackle such injustice might we not rightly be concerned with their efficacy? As discussed in chapter one, this project specifically addresses the problem of rightlessness experienced by many irregular migrants. Bearing in mind the very real and precarious situations of many irregular migrants – amongst many other rights-claiming groups – the success of the rights claim is of utmost importance. While remaining committed to many of the insights of Zivi's performative account of rights-claiming, in addressing problems of rightlessness I want to extend it by asking: if rights-claiming is a perlocutionary practice of persuasion, how can it be the most persuasive?

In his review of Zivi's book, Michael Goodhart puts his finger on the problem when he asks '[i]n what conditions is the democratic potential of rights most often realized or solidified'? He suggests that answering 'such questions would require Zivi to engage more directly with power' (2018: 854). In agreement with Goodhart, I suggest that Zivi tends to overlook the role that power plays in the constitution of the social world. She goes to great lengths

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<sup>60</sup> Isin makes the connection between his own work and Zivi's performative approach to rights-claiming in his chapter 'Performative Citizenship' (2017).

to argue that a performative approach to rights-claiming should be seen as part of the radical democratic tradition, particularly citing Mouffe, where the outcome of the claim cannot be guaranteed due to the condition of undecidability.

What is occluded in Zivi's account is the fact that Mouffe also has a theory of the decision: hegemony. The logic of hegemony provides Laclau and Mouffe with an ontological principle of societal articulation that foregrounds the operation of power. Consequently, the notion of performativity does not refer to a pure moment of rupture unencumbered by the situation in which it is enacted; rather, it describes the necessary play between the constative - in the form of the institutions of power - and performative acts of 'resignification'. Judith Butler outlines this always already compromised position when she states that:

Performativity describes this relation of being implicated in that which one opposes, this turning of power against itself to produce alternative modalities of power, to establish a kind of political contestation that is not a 'pure' opposition, a 'transcendence' of contemporary relations of power, but a difficult labor of forging a future from resources inevitably impure (Butler 2011: 184).

There is no situation external to power, so the performative must operate from within it. However, neither is the performative necessarily emancipatory, as the reiteration of certain norms may always – in fact, is more likely to – sediment forms of oppression. In failing to fully address the question of power, Zivi has the tendency to reproduce certain logics, in a manner that is particularly problematic when it comes to the transformation of citizenship. Once again, Goodhart is alert to this issue when he observes that in Zivi's work there is an 'implicit assumption that rights claiming takes place within the boundaries of established political communities' (2014: 854). It is not that her approach is wrong; rather, there is a blind spot when it comes to addressing issues of inclusion/exclusion and the limits of the political community. This is where Foucault's more instrumental understanding of rights fits in: linking together the questions of tactics and strategy, he sets out

a performative approach to rights-claiming that can be directed more specifically to contest hegemonic constellations of power.

### **Foucault's Performative Theory of Rights**

To recap: the previous chapter adumbrated a post-foundational account of the ethico-political in order to reformulate the right to have rights in a non-oppositional manner. My argument was that this is only possible by developing a politics of the limit: rights-claiming. The first part of this chapter turned to the consideration of what rights-claiming is and how it functions by utilising Zivi's performative approach. Charting a course between foundational faith in human rights and postmodern critique, her approach is uniquely compatible with the post-foundational conceptual framework delineated in the previous chapter. In so doing, Zivi provides a compelling argument for the practice of making rights claims as the substantive content of (democratic) citizenship. What is missing, however, is an explanation of how a performative approach to rights addresses and attenuates specific forms of injustice, such as rightlessness. Zivi is not blind to this point, stating that 'if we take up rights in order to address injustices or inequities in the world, and if we want to assess their utility[...] we need to explore and appreciate the manner in which those effects come to be' (2017: 316). This is where the late Foucault's turn to rights helps further develop a performative theory of rights-claiming. In the previous chapter I argued that 'citizenship as method' describes a mode of practice through which citizenship is internally destabilised by the (ethical) claims it makes possible. Foucault's immanent and strategic approach to rights describes precisely this destabilizing "counterinvestment" which works within and against' (Golder 2015: 6) the dominant mode of citizenship. A Foucauldian perspective does not just illustrate this process but also adds a level of analytic refinement through his understanding of the strategic and tactical dimension of rights-claiming.

In his recent book *Foucault and the Politics of Rights* (2015), Ben Golder provides a valuable contribution to the literature on performative approaches to rights, through a heterodox reading of Foucault's later work. Foucault's turn to rights is read by many commentators as either incoherence or a capitulation to the dominant form of liberal humanism that his earlier 'genealogical' work critiqued. However, Golder makes a compelling argument

that Foucault's usage of rights is, in the most part, consistent with his earlier theoretical position but marks a shift in emphasis from 'conduct' to 'counter-conduct' (2015: 21). Foucault links the question of government to one of 'conduct', whereby, under the new biopolitical regimes of modernity, power operates to modify behaviour, as a 'conduct of conducts and a[...] question of 'government'' (2002b: 341). Against the operations of power that governed conduct, Foucault became interested in questions of 'counter-conduct' that work against dominant power, resisting and challenging governments and their management of populations. Golder suggests that the deployment of rights in Foucault's later works should be seen as 'a form of critical counter-conduct' (2015: 22) that is compatible with and an extension of his earlier work.

Foucault's concept of rights, however, is markedly different from the liberal version that would see freedom as a negative principle inscribed in constitutional law. For Foucault:

The liberty of men is never assured by the institutions and laws intended to guarantee them. This is why almost all of these laws and institutions are quite capable of being turned around—not because they are ambiguous, but simply because 'liberty' is what must be exercised[...] I think that it can never be inherent in the structure of things to guarantee the exercise of freedom. The guarantee of freedom is freedom (Foucault 2002a: 479).

While he does not use the language himself, it is apparent that Foucault's understanding of rights is inherently performative, where a 'right is nothing unless it comes to life in the defence which occasions its invocation' (1980: 80).<sup>61</sup> Golder explicitly links Zivi's understanding of rights with Foucault's when he observes that for both thinkers, it is not about what rights *are*; rather, 'the real political value of rights resides in their unpredictable afterlives' (2015: 137). In both cases, rights are not – and should not be – part of a positive political programme. Their value lies in their ability to contest power relations

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<sup>61</sup> This is a point that Golder makes throughout the book but in one section he explicitly draws a comparison with Zivi's text, saying that 'we can say that his claiming of the right is a performative gesture in the sense explored by Karen Zivi in her book' (2015: 137).

and bring into being new forms of subjectivity. What differentiates the two approaches, is that Zivi's approach to rights explicitly rejects their instrumentality, whereas Foucault's is an instrumental deployment of rights for particular purposes (Ibid: 117). I propose that this does not make the two approaches incompatible and Foucault's distinction between *tactics* and *strategy* helps explain why.

## **Tactics and Strategy**

Distinguishing between tactics and strategy introduces a level of analytic clarity that helps think through the appropriateness and efficacy of rights-claiming. Not for the first time, when it comes to Foucault, it arises out of an engagement with the military theorist, Carl von Clausewitz. From a military perspective *strategy* is the general plan that is devised and implemented with the aim of winning a war, while *tactics* are the methods that might be deployed in the present, or near-future, in order to win the war (Ibid: 119). There is a temporal difference: strategy is longer term, whereas tactics take place within an immediate to intermediate timeframe.

When it comes to the practices of rights-claiming, an instrumental view of rights sees them as a form of *tactics* which, if done effectively, are deployed as part of a longer-term strategy 'in the sense of engaging and contesting wider formations of power' (Ibid: 130-31). There is no necessary conflict between an instrumental approach to rights-claiming and Zivi's performative framework; this does not posit rights as 'trumps', nor does it reduce rights to new institutional formations or acts of legislation – such a view would be to negate the im-possibility of the ethico-political. Thinking about rights as tactics and strategy describes a process of inhabiting the internal aporias of a given system, in order to contest sedimented forms of power and open it up to a more radical future.

The manner in which Foucault deploys the liberal paradigm against itself demonstrates how this works. Referring to modern liberal constitutional democracies, Foucault states that:

If governments make human rights the structure and the very framework of their political action, that is well and good. But human rights are, above all, that which one confronts

governments with. They are the limits that one places on all possible governments (2002a: 471).

There is a double movement at play in Foucault's concept of rights: on the one hand, rights call into question the dominant liberal paradigm of government and the operations of power; on the other hand, he uses the liberal language of rights and its own institutional frameworks to do this. From a Foucauldian perspective, liberalism's formal commitment to rights provides a language of emancipation that can be used as a *tactical* resource to be deployed against governments and established forms of dominant power in a *strategic* reversal. In this way, while Foucault's critique of liberalism is certainly not reducible to liberalism and calls it into question, neither is it 'a simple opposition to nor a rejection of liberalism, but rather a contrary inhabiting of it, a destabilizing 'counterinvestment' which works within and against it' (Golder 2015: 6). I argue that this provides a conceptual framework for thinking through the radical politics of citizenship: citizenship's formal commitment to universal rights is a resource to be exploited as part of a rights-claiming strategy in a 'destabilizing counterinvestment' that works at the limits of the universal and particular.

To develop this argument, it is necessary to return once again to the point at which the modern mode of citizenship came into being: the conjunction of the Declaration of the Rights of Man and Citizen with the French Revolution that gave rise to the contemporary nation-state. The result of this historical moment is a formal commitment to universal rights at the heart of citizenship itself. Despite this fact, rights still tend to be jealously guarded within the borders of the nation-state. Furthermore, the expansion of modern citizenship around the globe has been particularly violent (Tully 2014). Utilising a Foucauldian understanding of rights-claiming that is at once *instrumental* and *immanent*, I argue that modern citizenship itself provides the ground for a strategic intervention, calling it to account for its own universal foundations. This is not simply to repeat the argument from the previous chapter that citizenship is marked by an ethico-political aporia that renders it 'im-possible'. Instead, it entails a strategic approach to rights-claiming that performatively undermines the institutions of particular citizenship regimes from within. While questioning many of the fundamental tenets of modern

citizenship, it does not mark a position of pure exteriority - as if such a thing were possible - but what Simon Critchley calls an 'interstitial distance' to the state (2014c: 226), operating within and against particular citizenship regimes at the same time. If at one level, citizenship as method describes a general form of rights-claiming that mobilises the aporias of the right to have rights, then this Foucauldian perspective describes the second, immanent and strategic, level of what it means to approach citizenship as method: it is 'to play the game of rights but not in the (state versus individual) terms seemingly dictated by the rules of the liberal game' but an attempt 'to use the game of rights to inaugurate a different game, with a different mode of relation to life' (Golder 2015: 129). In what remains of this chapter, I consider the famous case of the French *sans-papiers* in order to substantiate this argument empirically.

## **The *Sans-papiers***

On the 18th March 1996, 324 undocumented migrants, including 80 women and 100 children, occupied the Saint-Ambroise church in Paris. The occupation marked the beginning of the *sans-papiers* movement that was a response to increasingly restrictive immigration policies and laws that rendered many long-term residents of France illegal (Hayter 2000: 149-50). A striking feature of the group was that its members were all from former French colonies: the majority were from West African countries (Mali, Senegal, Guinea, and Mauritania) but there were also Mahgreb people (Tunisians, Moroccans and Algerians) as well as a member from Zaire and a couple from Haiti (Cissé 1997). Some of the *Sans-papiers* arrived illegally, some came legally but their residence permits ran out and some had asylum claims rejected. What united them is that they all lived in France and were rendered deportable due to new and ever-tighter immigration laws (Hayter 2000).

What marked them out at the time was the fact that the movement was led by the migrants themselves. Madgiguène Cissé, a Senegalese woman and one of their leading members, wrote '[t]he struggle has taught us many, many things. It has taught us first of all to be autonomous' (Cissé 1997). Central to the group's action is a rejection of their illegality and the insistence on their legitimacy in France. They draw on their shared heritage of French colonisation to claim that 'it's natural that we turn to France. It's the country we know, the one whose language we have learned, whose culture we have integrated a little' (Ibid). Going even further, they highlight the forms

of neo-colonialism that are still ongoing and were a factor in their choices to emigrate. France continues to implement subtle forms of 'domination' and 'exploitation' across the *Françafrique* - its former colonies in sub-Saharan Africa. Cissé gives the example of '[s]tructural adjustment policies, which are little by little strangling our countries' (Ibid). This is historical and social background that at once demonstrates their need to migrate and how their fortunes are already intimately bound up with France.

Having highlighted the legitimacy of their presence in France, the *Sans-papiers* demanded their right to stay with regularised residence. In their manifesto, which was published by the newspaper *Libération* on 25 February 1997, they state:

We the Sans-Papiers of France, in signing this appeal, have decided to come out of the shadows. From now on, in spite of the dangers, it is not only our faces but also our names which will be known. We declare:

Like all others without papers, we are people like everyone else. Most of us have been living among you for years. We came to France with the intention of working here and because we had been told that France was the 'homeland of the Rights of Man': we could no longer bear the poverty and the oppression which was rife in our countries, we wanted our children to have full stomachs, and we dreamed of freedom.

Most of us entered France legally. We have been arbitrarily thrown into illegality both by the hardening of successive laws which enabled the authorities to stop renewing our permit to stay, and by restrictions introduced on the right to asylum which is now given only sparingly. We pay our taxes, our rent, our bills and our social security contributions – when we are allowed regular employment! When we are not unemployed or in casual employment, we work hard in the rag trade, the leather trade, the construction industry, catering, cleaning[...] We face working conditions employers impose on us which you can refuse more easily than we can, because being without papers makes us without rights. We know this suits plenty of people. We produce wealth, and we enrich France with our diversity[...]

We demand papers so that we are no longer victims of arbitrary treatment by the authorities, employers and landlords. We demand papers so that we are no longer vulnerable to informants and

blackmailers. We demand papers so that we no longer suffer the humiliation of controls based on our skin, detentions, deportations, the break-up of our families, the constant fear. The prime minister of France had promised that families would not be separated: we demand that this promise finally be kept and that the principles of humanity often proclaimed by the government be implemented. We demand that the European and international conventions, to which the French Republic has subscribed, are respected.

We rely on the support of a great many French people, whose own liberties may be under threat if our rights continue to be ignored. Since the examples of Italy, Spain, Portugal and on several occasions France itself, demonstrate that overall regularisation is entirely possible, we demand our regularisation. We are not in hiding. We have come out into the daylight. (quoted in Hayter 2000: 143)

The *sans-papiers* were evicted from the Saint-Ambroise church on 22<sup>nd</sup> March. Following this initial occupation in Paris, the movement spread across the country, with more than 25 collectives set up around France. They then occupied the Saint-Bernard church, also in Paris. In this time, a number of men went on hunger strike, there were two major street protests and they also set up 'the Sans-Papiers National Coordinating Committee' (*Coordination Nationale des Sans-Papiers*). Simultaneously, the movement universalised its demands, calling for the legalisation of all so-called "illegal immigrants" and even for free movement and the opening of frontiers, in general. It was no longer just a campaign to stop the deportation of particular individuals, but rather for the "regularisation" of all immigrants who did not have the correct immigration documents' (Ibid: 142)

After the occupation of Saint-Ambroise, 22 of the initial occupiers were given regularised residence. On 23 August 1996, the police broke into Saint-Bernard church and evicted the *Sans-papiers*. Most of the *Sans-papiers* were then arrested. Finally, by January 1997 the majority of the Saint-Bernard occupiers were released. Of the 324 original protesters, 103 had received temporary papers, 19 had been deported, two were in jail (Ibid: 144).

The *Sans-papiers* were protesting a growing trend in France that saw immigration rules growing harsher but the immediate cause of this was the *Pasqua Laws*, which were first introduced by the right-wing interior minister Charles Pasqua

in 1986. The issue abated to some degree in 1988 when the socialist government returned to power and repealed the laws. In 1993 the issue returned to prominence when Pasqua and the right once again returned to power. This was accompanied by a series of new measures, such as increased surveillance and the criminalisation of hospitality. The most serious issue was that the new laws cancelled the automatic right to renewal of ten-year residence permits, often substituting them for 'temporary one-year permits for many categories of residents, thus immediately making the situation of thousands of people precarious and potentially illegal' (Ibid: 145).

Finally, in June 1997 the left returned to power and Lionel Jospin, the new prime minister, announced that the regularisation process for all *Sans-papiers* would be sped up. Yet this was not an unmitigated success. 150,000 migrants applied, but only 75,000 were granted papers and the rest were once again rendered deportable. More than a decade later the *Sans-papiers* continue to struggle for their rights. In 2008, the autonomous *Coordination 75 des Sans-Papiers* occupied the union hall of the General Confederation of Labour in a bid to highlight their place in the labour market and demand their rights. By 2010, 600 *sans-papiers* had joined the action across 42 different sites (McNevin 2011: 94). At the same time the movement has spread to other countries, with groups such as the *sins-papeles* in Spain and *Kein Mensch ist illegal* in Germany joining in the ongoing fight for migrant rights (Hayter 2000).

### 4.3 Citizenship as Method: Strategy and Tactics

Analysed from a performative perspective, the rights claims of the *Sans-papiers* illustrate many of the different facets of citizenship as method.<sup>62</sup> Similar to the Calais Hunger Strike, their rights claims work through the logic of a double negation: in their manifesto they write that 'we are people like everyone else' but also recognise that 'being without papers makes us without rights' (quoted in Hayter 2000: 143). Where the *Sans-papiers* start to diverge from the Calais Hunger Strike is through their strategic inversion of citizenship and the tactics they use to do it. As Cissé explained in her text *The Sans-Papiers: a woman draws the first lessons* (1997), they felt that it was necessary to insist on

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<sup>62</sup> This is a heavily modified version of the argument I made in my article 'The Rights Claims of the *Sans-papiers*: Transgressing the borders of citizenship' (Rees 2017).

their autonomy. While they accepted some help from NGOs, they refused to allow them to speak and act on their behalf. In Mae Ngai's terms, the *sans-papiers* enacted a form of citizenship that is 'simultaneously a social reality and legal impossibility' (2014: 4) by appearing in public as responsible and capable citizens in all but status.

The opening of the *Sans-papiers* manifesto typifies how they position themselves and their movement to enact an 'im-possible' form of citizenship. The reference to coming 'out of the shadows' is tied to the creation of a name and the construction of a form of political subjectivity. There are several important dimensions to the act of naming themselves and their struggle in this way. At the most basic level it legitimises their claims, rendering them as political by acting on behalf of a group.<sup>63</sup> Beyond this, the creation of a name identifies one of the dimensions of rights-claiming identified by Zivi, where the claim brought together a diverse group of migrants from different nationalities and with different histories. Such practices might well lead to shifts in how French citizenship is understood that are not captured in legal terms (Zivi 2012: 38). Finally, the decision to name themselves the '*Sans-papiers*' references their position of liminality: they refuse to identify with any illegality, as so-called 'illegal immigrants', but as those whose only lack was a document – thus, potential citizens. This split positionality enacts the performative contradiction of the universal. More importantly, however, is the cultural resonance of the name that forms part of their strategy to engage with and expand the meaning and contents of French citizenship. The name '*Sans-papiers*' situates their own cause within the narrative of French Revolutionary history by referencing the struggle for emancipation of the *sans-culottes* – a name given to the lower classes of 18th century France who became radicalised as part of the revolution (Arendt 1958: 218; Gündoğdu 2015: 195). This is a tactic the *Sans-papiers* continually deploy, situating their movement in relation to French revolutionary history in order to appeal to the universality that is embedded in the identity and institutions of French citizenship. Another example being how in the manifesto they appeal directly to the revolutionary dimension of French citizenship, saying they moved there because they 'had been told that France was the 'homeland of the Rights of

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<sup>63</sup> This is a point Arendt makes in her essay on 'Civil Disobedience' (Arendt 1972) that will be discussed more fully in the next chapter.

Man” (Hayter 2000: 142). Their words were supported by actions, carrying out many of their protests and direct actions at symbolic sites from the revolution, in an attempt to situate themselves as internal to its emancipatory narrative.<sup>64</sup>

A performative framework for rights-claiming that distinguishes between tactics and strategy adds a level of analytic refinement needed to explain how emancipatory politics happens. Adopting the idiom of the revolutionary origins of French citizenship provides a moral language that authorises the legally unauthorised actions of the *Sans-papiers*. This is a *tactical* form of engagement with the institutions that leaves them symbolically stateless and, hence, rightless. However, while they did not reject French citizenship out of hand, nor can their claims be reconciled fully within its terms; they are best understood, from a *strategic* perspective as a destabilising 'counter-investment' designed to contest and reorganise the broader relations of power. Yet there is a political danger here that an understanding of strategy also helps navigate. Golder identifies this when he writes that the most obvious risk with this tactical form of rights-claiming 'is the possibility that one's efforts to subvert, appropriate, or redeploy will only result in the strengthening of the operative terms of the master discourse' (2015: 160). The danger is that by using the language of French citizenship to ground their claims there is the possibility that they might reinforce rather than destabilise hegemonic power relations. This is the argument that McNevin (2011) makes against the *Sans-papiers*, in particular, but also acts of citizenship, in general, when she worries that interpreting all politics through the language of citizenship might foreclose a more radical future .

So is this the case when it comes to the *Sans-papiers*? Fortunately, an understanding of strategy helps to navigate this problem as well. I argue that the *Sans-papiers* do not negate the radicality of their claim by also appealing to the institutions of citizenship that oppressed them. As Butler observes:

Seeking recourse to an established discourse may, at the same time, be the act of “making a new claim,” and this is not necessarily to extend an old logic or to enter into a mechanism

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<sup>64</sup> There are many examples of the *Sans-papiers* deploying this tactic, another being in the manifesto when they say 'we pay our taxes', echoing the famous demand 'no taxation without representation' from the American Revolution. See chapter five in Gündogdu (2015) for a fuller account of this tactic.

by which the claimant is assimilated into an existing regime. The established discourse remains established only by being perpetually re-established, so it risks itself in the very repetition it requires (2000: 41).

The strategy underpinning the *Sans-papiers* is not designed to leave pre-existing power relations untouched but formulates new claims out of old discourses. This is evident in the fact that their demands cannot be accommodated within either the existing institutions of French citizenship or pre-existing human rights norms. In regard to French citizenship, the movement started out as a demand for their own regulation, it progressed to demand 'the regularisation without conditions of all the *sans-papiers* in Europe [emphasis original]' (Hayter 2000: 144) and even led to the more radical claim - and now popular rallying cry - that 'no one is illegal', challenging the very legality of all immigration controls. So, at one level their demands cannot be reduced to the statutes of French citizenship that asserts its sovereign right to manage its borders. Yet, to go further, their claims also challenge the content of human rights norms. The *Sans-papiers* claim a set of universal rights that are not recognised in the UDHR or any of its supporting texts and institutional mechanisms. Article 13 asserts the individual right to freedom of movement both within and beyond the borders of the state but this right is qualified by an omission, where no universal right is asserted to reside in another country (UN General Assembly 1948). In this way, the *sans-papiers*, who found their claims were not recognised under the sign of the universal, did not reject the universal altogether but strategically mobilise it against itself in order to renegotiate and resignify its meaning.

Citizenship as method describes a rights-claiming practice carried out by non-citizens who contest their exclusion from citizenship and, in the process, call for the transformation of that same community. Situated on the border between rights and rightlessness, the claimant enacts a form of liminal citizenship by inhabiting and performing the aporias of rights. As the case of the *Sans-papiers* illustrates, because citizenship makes the rights that call its borders into question possible, it is untenable to maintain the simple opposition between rights (universal) and citizenship (particular). Or, to put it differently, they found their claims in a form of transcendence that is already

immanent. However, it is not enough to stop here. Utilising the distinction between tactics and strategy, citizenship as method reframes the object of analysis in comparison to acts of citizenship. The primary – and still important – innovation of Isin’s was to shift the object of analysis away from status and practice, and towards the acts through which citizenship is constituted. This is apparent in *Citizens Without Frontiers* (2012), where Isin emphasises individual acts, such as WikiLeaks, Banksy and Lulzsec as successful acts of citizenship. Yet, as discussed previously, it is not clear that these would constitute ‘acts’ in the manner that Isin understands the term.<sup>65</sup>

Adopting a Foucauldian line of thought, I suggest that acts of citizenship names an approach to rights-claiming that is all tactics and no strategy. What do I mean by this? That these acts successfully mobilise the aporias of the right to have rights but that they fail to effectively challenge power because the object of analysis is confined to the ruptural moment of the claim. The truth is that the act never acts alone but takes place on a discursive terrain shaped by the operations of hegemonic power. Citizenship as method broadens and deepens the objects of analysis to consider the ways in which different claims interact and take place at different sites and scales, as part of a broader form of counter-hegemonic politics. Consequently, the *sans-papiers* and the Calais Hunger Strike should not be viewed as acts in isolation but as parts in the broader ecology of the movement for migrants’ rights that forms part of an unfinished project.

## Conclusion

The analysis in this chapter builds on the conceptual framework developed in the previous one to argue for a performative practice of rights-claiming as the politics of the limit. An ethico-political reading of the right to have rights demonstrates that the very foundation of rights is dependent upon the existence of citizenship, without which rights would have no sphere from which to be drawn or implemented. Conversely, universal rights provide the foundation and legitimating principle of the laws and institutions of modern citizenship. This is the paradox of the ‘doctrine of citizenship’, whereby ‘that

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<sup>65</sup> I am referring here to the discussions of acts in chapters two and three, where what defines an act is that it results in an ‘event’.

doctrine may find itself rendered conceptually riven precisely by the emancipatory claims it has made possible' (Butler 2000: 40). Citizenship as method brings this structural contradiction to the fore: non-citizens such as the *Sans-papiers*, make forceful yet insecure ethical claims by constituting themselves as 'im-possible' citizens. This is where the analysis of rights-claiming as a performative practice substantiates the more theoretical argument made in the previous chapter. A practice of rights-claiming is a deconstructive move that reverses and displaces the aporias of rights. Analysed from a performative perspective, the rights-claims of the *sans-papiers* illustrate this moment: the *sans-papiers* do not invoke a transcendent universality to found their claims; instead, theirs is an immanent practice of politics that works by mobilising the universality that is inscribed in a particular citizenship regime to bring into being new political formations.

Yet a post-foundational framework for analysis necessitates going further. It is not enough to simply develop an account of rights-claiming that fits in with the conceptual schema of the ethico-political; it is also necessary to demonstrate how it substantively challenges hegemonic constellations of power. In order to address material problems, such as rightlessness, then rights-claiming must form part of a broader counter-hegemonic strategy. As Zivi puts it, '[r]ights-claiming that destabilizes and displaces, that remakes relations of power and forms of subjectivity, is the result of ongoing political engagement at a variety of levels often entailing a multiplicity of political strategies' (2017: 316). This is where the distinction between tactics and strategy aids analysis. Citizenship as method describes a rights-claiming tactic that works through an awareness of how citizenship is challenged and destabilised from within, in the name of rights. In addition, it also addresses the weakness identified with the literature on acts of citizenship by expanding the area under analysis to consider the question of strategy. This is the task of the next two chapters: to engage in an analysis of citizenship in its institutional and legal form in order to understand how the rights that it instantiates can be mobilised to subvert its own institutional arrangements from within. Tully's analysis in *On Global Citizenship* identified the two primary institutional features around which the modern mode of citizenship is organised: the rule of law (*nomos*) and democracy (*demos*). In order to theorise modern citizenship in its current form, as well as to understand its

transformational possibilities, law and democracy are essential areas of analysis. Applying the framework developed across the last two chapters, the theoretical and political task of the next pair of chapters is to analyse how practices of rights-claiming, works with and against the two institutions of citizenship: negotiating the limit between their unconditional (justice and democracy to-come) and conditional (law and instituted democracy) orders. As the cases of the *Sans-papiers* and Calais Hunger Strike attest, rightlessness remains a live issue and the struggle for migrant's rights is ongoing. In the words of the Calais Hunger Strikers, 'there is clearly still much work to be done and this is not the end of the struggle for the human rights of refugees and asylum seekers across Europe' (Care4Calais 2016).

## 6. The *Nomos* of Citizenship

In a short text titled *What We Owe to the "Sans-papiers"*, Etienne Balibar wrote that 'we owe them[...] for having recreated citizenship among us, since the latter is not an institution nor a status, but a collective practice' (2000). Undoubtedly, there is more than a grain of truth to Balibar's claim: I argued in the previous chapter that in enacting a legally impossible form of citizenship the *Sans-papiers* challenged and enriched both French citizenship and universal rights. The task of this chapter is to contribute to an underdeveloped area of study in the domain of critical citizenship studies: law. As exemplified by Engin Isin's work, the great innovation and success of the resurgence in citizenship, as an area of study, has been to identify the tension between citizenship as status and as practice. In so doing, theorists have tended to foreground the ways in which legally marginalised figures, such as the irregular migrant, complicate understandings of inclusion and exclusion in order to challenge and redefine the meaning(s) of citizenship. Central to this project is the claim that citizenship as a political practice is prior to and the condition of possibility of citizenship as a legal status (Isin 2008: 17).

The problem is that legal citizenship remains of great importance to those contesting rightlessness. We can see this by returning to the example of the *sans-papiers*. On the one hand, they were very successful. Not only were they able to shift the discourse on undocumented migration - repositioning themselves and others from illegal and criminal to potential citizens - but they were also able to gain real concessions. When the new socialist government came to power in 1997, they announced that the regularisation of *Sans-papiers* would be fast tracked (Hayter 2000: 145) As a result, over 150,000 undocumented migrants applied. However, of those that applied, only 75,000 were granted papers and, even then, it was for one year only. A further 63,000 were refused and made subject to deportation, forcing many back into hiding (Ibid: 145). Further to this, the controversial Pasqua Laws that were the catalyst for the *sans-papiers* movement were not repealed by the new socialist government as expected. In drawing attention to the equivocal outcome of the *Sans-papiers* movement, I am not trying to underplay their achievements –

which were many and important. Instead, I want to highlight the fact that, in the struggle for migrant rights, citizenship as a legal category remains of central importance. The current chapter addresses this underdeveloped area of critical citizenship studies by rethinking the relationship between contemporary approaches to citizenship and law. In so doing, I navigate between the two poles highlighted in chapter two: the overdetermination of citizenship by law (Benhabib's democratic iterations) on one hand and its absence (acts of citizenship) on the other. The purpose of this chapter is not to provide a comprehensive theory of law and/or citizenship as a legal category. My aims are more modest. Rather, the current chapter serves the purpose of this thesis more generally in that it builds the conceptual apparatus of citizenship as method: the task is to apply the deconstructive framework set out previously to investigate how practices of rights-claiming by irregular migrants come up against, interact with and might transform particular legal orders.

In undertaking this investigation, I start from the premise that law is political: law both shapes political possibilities (Cover 1982; Hunt 1993) and is responsive to social and political contexts (Klarman 2004). I investigate the role that *law* plays in helping to constitute (hegemonic) social relations (Hunt 1993); the possibility of transformation and, thus, justice that is inscribed within *legal systems* due to the logic of precedent (Derrida 2002); and the threats and possibilities that particular constitutional *legal orders* offer when it comes to practices of rights-claiming. Robert Cover's concept of 'jurisgenerativity' (1982) is of particular importance to this chapter, because it helps me to theorise how particular legal orders can be contested and displaced by new claims they authorise but are not secured in their statutes. I explore the hypothesis that because universal rights are enshrined in the constitutional texts of modern citizenship, law represents a key site of contestation. Practices of rights-claiming mobilise law's constitutive ethico-political aporia in order to generate new meanings and bend it towards justice.

I make this claim in three steps. Section one engages with the question of what it means to approach citizenship as a legal construct. Deploying Alan Hunt's social theory of law, I use the example of the 'hostile environment' for migrants in the United Kingdom to demonstrate how law is constitutive of social relations, producing different political subjects in a continuum from

*citizens to others*. Section two approaches law in its institutional form through an investigation into the Derridean relationship between law and justice. Utilising the case of *BA (Nigeria) v SSHD*, I argue that because universal rights are encoded in the constitution of modern citizenship regimes, the claiming of rights can demonstrably redefine the meaning of particular laws. Section three addresses the limitations of litigation as a site of radical politics to argue for an approach to law that extends beyond the confines of the courtroom. Working with an expanded understanding of law, I use the example of French farmer Cedric Herrou, who was arrested for offering hospitality to migrants, to argue for the jurisgenerative (Cover 1982) potential of rights-claiming.

## 6.1 Constituting Citizenship

The question I address in this section is: what does it mean to understand citizenship as a legal category? It is of course a truism to observe that how we theorise law is of the utmost relevance. However, in the contemporary literature on citizenship, the question of law tends to be treated somewhat reductively: in legal terms, citizenship is defined relatively simply, as a status and side-lined in favour of the more interesting question of how citizenship operates as a political practice. What is missed is how law shapes social formations and practices. In response, this chapter sets out to correct this tendency by using Hunt's 'constitutive' theory of law to think through the social operation of law and its role in securing an equilibrium between state and civil society (Hunt 1993: 236). I suggest that recognising the constitutive dimension of law represents both a *threat* and an *opportunity* to the emancipatory potential of rights-claiming practices by irregular migrants.

A central tenet of acts of citizenship is the claim that citizenship is first and foremost a form of political subjectivity and not a legal status. What is occluded in this simplistic formulation is an understanding of how citizenship shapes political possibilities as a legal category. It is difficult to define exactly how Isin and other theorists of acts of citizenship view law, because this is a task they never undertake themselves. However, when Isin approaches citizenship as status, there is an implicit assumption that legal citizenship operates as a coherent whole according to a binary logic of inside/outside that produces citizens and others. This approach echoes a 'legal imperialist'

understanding of law where it is conceived as a coherent series of rules around which particular societies are organised. H.L.A. Hart's analysis in *The Concept of Law* (1961) epitomises this jurisprudential tradition. For Hart, law functions as a unitary and stable system through a series of primary and secondary rules (1958). Despite its dominance, this understanding of law is problematic for at least two reasons. In the first case, many theorists, such as Richard Dworkin (2010), Stanley Fish (1988) and Hunt (1993), have attempted to show that law cannot maintain its coherence as a unitary whole – this is a point that I will return to in more detail in the next section.

A second critique, made primarily by Hunt, is to reject the overly institutional understanding of law. He suggests that 'in place of an institutional perspective that focuses on courts and professions[...] attention be directed to the study of law in everyday life' (1993: 327). The question is, why might we want to understand how law works in everyday life? For two reasons: first, because it helps to understand how law produces citizens and others by securing hegemonic social relations; second, it also opens the door to imagining how the law can be contested and transformed. Or, to put it in Hunt's terms, law is 'at one and the same time a mechanism that contributes to both the mechanisms of social domination and to the potential for human emancipation' (Ibid: 329).

In place of understanding law as rules, Hunt proposes that we view it as a 'constitutive mode of regulation' (Ibid: 301). So what does it mean to understand law in this way? As indicated above, in developing his account of law, Hunt is explicitly working against the dominant understanding of it as a system of rules. His argument takes a Foucauldian turn, suggesting that we understand law in terms of 'governance' because it 'opens up a space to think of government as a process rather than as an institution' (Ibid: 305). Engaging with Michel Foucault's later work, Hunt derives an understanding of law as regulation. What is important about this move is that the 'conception of law as a totalizing and transcendent unity is superseded by [the] historically specific production of regulatory devices that mediate between state and civil society and between state and individual' (Ibid: 292). Regulation links law to discipline as part of a set of discursive practices where, in modernity, power operates across a series of dispersed and localised sites. However, Foucault lacks an understanding of how the state fits into this picture. In this regard,

Hunt sees Antonio Gramsci's concept of hegemony as a necessary supplement that helps to explain how particular discursive constellations come to dominate (Ibid: 295). Law is 'constitutive' in the sense that it functions in coordination with hegemony to shape social relations without ever being totalising, because 'this centralizing hegemonic process is always incomplete' (Ibid: 11). What makes Hunt's theory of law so valuable is that it breaks out of a narrow institutional focus while maintaining the importance of the state. However, it also works at a high degree of abstraction. To demonstrate what it means, I want to turn to the example of the hostile environment for migrants in the United Kingdom.

### **The Hostile Environment**

The 'hostile environment' is a set of government policies rooted in the 2014 and 2016 Immigration Acts. These policies exemplify how law and hegemony combine as a form of governance to constitute – although never fully – the meaning and contents of citizenship. My aim here is not to go into the minutiae of the policy, but to observe the discursive articulation that results in a particularly exclusionary form of political belonging and set of immigration controls. What is of interest is that the 'hostile environment' is not just a matter of legislation in the narrow sense but it illustrates how the laws operate to constitute social relations and define common sense. In the first case, the hostile environment depends upon an understanding of new technologies of bordering that operate according to a governmental logic (Bigo 2002). The key tenets of the hostile environment include a growing deportation regime and the increased use of mass charter flights and indefinite detention (Anderson, Gibney, and Paoletti 2011; De Genova 2010). Running in tandem to new practices of bordering has been the *illegalisation* of irregular migrants. The 2014 and 2016 immigration acts led to laws whereby undocumented migrants are criminalised for doing the bare necessities of what it takes to survive, such as renting accommodation, working and going to the doctor (Liberty 2019). As the UN Special Rapporteur on racism observed, '[t]hese laws have created a framework that deputizes immigration enforcement to private citizens and civil servants in a range of areas' (OHCHR 2019), where teachers, doctors, landlords and employers, amongst others, are all supposed to monitor and enforce immigration laws. Power is not

condensed in a central space but dispersed across the social field, where the practices of bordering extend beyond the formal mechanism of the state and are embedded in many aspects of everyday life.

The hostile environment illustrates how law works to regulate conduct, because these policies can only successfully shift the burden of border enforcement onto civil society by blending coercion with consent. On one level, an anti-migrant discourse is constructed through the right-wing press and other cultural determinants, such as the Home Office's now infamous 'Go Home' vans, to generate consent.<sup>66</sup> However, the law itself plays a constitutive role in defining the discursive environment and determining the 'common sense' view of migration from which consent is derived. As the human rights group Liberty observes, the 'hostile environment is by its very nature discriminatory, so it is no surprise that it encourages discriminatory – even racist – behaviour' (2019: 6). The extended criminalisation of migrants' very existence, alongside the demand for civil society to enforce immigration laws, leaves irregular migrants with an insecure legal and political standing, often rendering them rightless. In so doing, the hostile environment constitutes a particularly exclusionary form of citizenship.

The example of the hostile environment demonstrates what it means to understand law as a constitutive mode of regulation. The law works to define the scope and meaning of citizenship at a particular historical juncture. At its most basic level, immigration law defines who is and is not a citizen in regard to their deportability because 'the citizen qua citizen is immune from deportation power' (add: 553). In this way, immigration law and its corollary, practices of bordering, must be understood as 'techniques of citizenship' (Walters 2002: 267). However, this cannot be reduced to a simple and relatively static idea of citizenship as legal status demarcating the boundaries of belonging, as theorists of acts tend to argue. A constitutive theory reminds us that 'law is an important constituent of the conditions of social practices' (Hunt 1993: 3) – 'hostile' laws create particularly violent forms of political belonging. As the UN Special Rapporteur observed, the hostile environment policies articulate citizenship in particularly racialised terms, where the 'exercise of immigration enforcement by private citizens and civil servants'

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<sup>66</sup> For a comprehensive overview of the politics of the hostile environment see *Go Home? The politics of immigration controversies* (H. Jones et al. 2017).

leads to racial profiling as ‘a predictable and arguably incentivized outcome’ (OHCHR 2019).<sup>67</sup> Not only does the hostile environment heavily racialise the boundaries of belonging; it exacerbates the problem of rightlessness. By criminalising migration and extending practices of bordering deep into civil society, irregular migrants’ legal and political standing, and thus personhood, is experienced as particularly insecure. The hostile environment laws define a particularly exclusionary form citizenship in both status and practice by mediating the relationship between the state, civil society and individuals at a particular historical juncture.

I want to conclude this section by way of three observations. First, while citizenship and immigration represent distinct spheres of law in legal practice, from a theoretical perspective I propose that they need to be thought in conjunction. They are mutually constitutive. This is an important point because contesting practices of bordering are also ways of re-articulating citizenship. Second, an understanding of law as part of a constitutive mode of regulation problematises any easy distinction between citizenship as status and as practice. As discussed in chapter one, legal status shapes our political possibilities. Finally, I suggest that, theorised in this way, law also presents opportunities for citizenship studies: because law is a process of social regulation that secures forms of social domination, it also ‘points toward a understanding of the conditions of possibility of counterhegemonic strategies that can challenge existing forms of domination’ (Hunt 1993: 333). To put it another way, law is political. It not only shapes social and political relations but is also a product of them. The task now is to apply the deconstructive approach to citizenship developed in the preceding chapters to analyse how law can be challenged through practices of rights-claiming.

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<sup>67</sup> It’s important to note that the hostile environment does not only affect irregular migrants but, as the UN Special Rapporteur observed, also to’ racial and ethnic minority individuals with regular status, and many who are British citizens and have been entitled to this citizenship as far back as the colonial era’ (OHCHR 2019). It’s no coincidence that the Windrush Scandal occurred in the context of the hostile environment.

## 6.2 A Post-foundational Approach: Law, justice and the mystical

Rightlessness is the material problem this thesis addresses. It is the result of the insecure legal and political standing of many irregular migrants today. So if the practices of rights-claiming discussed in previous chapters are to operate at anything more than the level of abstraction, then it is necessary to show how they challenge and transform citizenship as a legal entity. The aim of the current section is to utilise the deconstructive framework developed previously to rethink the question of law. I contend that law is structured by an ethico-political aporia, manifest in the 'im-possible' relationship between an unconditional order of justice and the conditional order of law. In the current section, I investigate two questions: first, how justice is possible from within *legal systems*? Second, how do different *legal orders* affect the possibility of justice? By which I mean, how does citizenship fit into this formulation? I argue that because universal rights are encoded into the constitutional texts that found particular citizenship regimes, claiming rights from within processes of litigation is one way that law can be challenged and bent towards justice. In exploring this, I understand 'litigation as a distinct method of social protest' (Klarman 2004: 7) that comes with important possibilities and limitations that I address later in the chapter.

### The Mystical and the Possibility of Justice

A deconstructive understanding of law can be boiled down to one seemingly simple question that Derrida poses in *The Force of Law*. He asks 'what permits judgement... [and] what judgement itself authorizes?' (2002: 231)<sup>68</sup> It is not just a question of what authorises judgement (law), but also how a judgement might be just - how law corresponds to the principle of justice. To frame it in the terms set up in this study, the relationship between justice and law maps onto the ethico-political framework discussed in chapter four. Just as with

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<sup>68</sup> In keeping with the approach laid out in chapters three and four, I am interpreting Derrida's thought according to a post-foundational framework. I suggest that this logic is explicit in Derrida's own work, when in *The Force of Law* he states that the 'mystical' foundations of law exceeds 'the opposition between founded and unfounded, or between any foundationalism or anti-foundationalism' (2002: 242).

hospitality, or the right to have rights, justice and law are structured by the unconditional/conditional aporia. Justice is 'unconditional' because it is concerned with the realisation of the ethical relation (Cornell 2016). In contrast, law is inherently 'conditional' and deconstructible because it concerns rules and norms. Justice and law imply and exclude each other: for law to be *just* it must appeal to a justice that necessarily exceeds all law, yet the realisation of justice requires recourse to law to gain any content at all (Derrida 2002: 237-38). That is why justice and law can be understood in terms of the ethico-political logic discussed previously. In each case, the unconditional (universal rights and justice) asserts the necessity of being put into effect in a conditional order (citizenship and law) that it also necessarily transcends.

Rather than re-treading the same ground concerning the paradoxical nature of the political, my aim is to consider the more concrete question that Derrida asks: [h]ow to reconcile the act of justice that must always concern singularity[...] in a unique situation, with rule, norm, value?' (Ibid: 245) Rephrased, we might ask: how is justice be possible within law? Or, in a more generalised sense, how does the play between the conditional and the unconditional work within the institutional confines of law? The answer lies in the performative structure of the legal system; more specifically, in the logic of legal precedent. However, I argue that it is law's aporetic structure that makes justice possible. I will set out this argument by way of a contrast between the Derridean logic of deconstruction and the Habermasian theory of rational reconstruction.

The possibility of justice is a question of foundations. It is a question of whether or not the violence that founds the law is acknowledged or concealed in its day-to-day operation. Here violence refers to the fact that the justification of the founding act is never fully present. Derrida highlights the act of violence upon which all legal orders are founded through his discussion of the mystical foundations of authority. In its most basic form, this refers to the fact that '[l]aw never catches up with its projected justification' (Cornell 1989: 1049). As Derrida observes, foundations are mystical because they have a specific temporality: they are marked by the grammatical category of the 'future anterior' (2002: 269). What does this mean? Because these acts lack the authority that they require, all foundational moments both 'posit' and

'promise'. Recall again the French Revolution, where the new French Republic was founded on the principles of the Rights of Man. To this day, the preamble to the French Constitution continues to assert that the 'French people solemnly proclaim their attachment to the Rights of Man'. The constitution that *posits* the existence of the French state is predicated upon the principles of the *Rights of Man*. However, as discussed in chapter four, those rights are dependent upon creation of a political community to be realized, which is why the *Declaration* equates the rights of 'man' and 'citizen'. This means that the act of foundation is also a *promise*; it is a positing that 'permits and promises' (Ibid: 272). In this respect, the foundational act is never fully justified because the rights that authorise it cannot exist until it is already in place.

The mystical nature of foundations is inscribed in legal systems through the logic of iterability. The law that is being founded works retrospectively to justify the violence of the moment of foundation. This means that 'positing is already iterability, a call for self-preserving repetition. Preservation in its turn refounds, so that it can preserve what it claims to found.' (Ibid: 272) The establishment of law works on the assumption that it can be repeated time and again and that each repetition refers back to an origin that can never be fully determining. Because justice needs law but can never be reduced to law and the logic of iterability inscribes law with a dynamic principle for change, iterability is the possibility of justice. It is the mechanism through which law can be contested and renewed.

The practical implications of a deconstructive approach become clear through a comparison with the Habermasian project of rational reconstruction. In chapter two, I argued that Benhabib's understanding of citizenship was problematic because it is overdetermined by its legal framework. The problem is that Benhabib, who is working in the Habermasian tradition, attempts to conceal the contingency of foundations. As part of his 'co-originality thesis' (2001), Habermas addresses this problem of authoritative foundations. He is concerned with the fact that in modern constitutional democracies, there is a paradoxical relationship between democracy and law. Or, as Lasse Thomassen poses the question: [h]ow can the process of constitution-making itself be constitutional? Inherent in this formulation is an infinite regress, whereby 'in order for democratic constitution making to be legitimate, it must already be constitutional'

(Thomassen 2006: 179). Habermas' co-originality thesis is supposed to overcome the paradox of foundational acts. He argues that they do not reveal an absence of *absolute* authority in constitutional democracies; rather it is a paradox that 'resolves itself in the dimension of historical time, provided one conceives the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations' (Habermas 2001: 768). Benhabib's concept of democratic iterations are precisely these ongoing processes of constitutional learning.

The problem with a reconstructive approach is that it does not acknowledge the contingency of the founding act but attempts to domesticate it; to situate it as internal to the narrative of political community and, thus, immunise the political from transformational politics. One can see how this works when Habermas says that the ongoing process of constitutional learning is predicated on the

normative assumptions that later generations will start with the same standards as the founders[...] The descendants can learn from past mistakes only if they are "in the same boat" as their forebears[...] All participants must be able to recognize the project as the same throughout history and to judge it from the same perspective. (Ibid: 775)

There is a clear distinction between a deconstructive approach to law that insists on its mystical foundations and the project of rational reconstruction that conceals them. Drucilla Cornell suggests that the 'practical erasure of the mystical foundation of authority by the legal system must be told as a horror story' (1989: 1047). Why this might be a 'horror story' is far from clear, so let me explain by way of an example. Turning to the court case of *BA (Nigeria) v SSHD*, in what follows I attempt to draw out the practical consequences of this debate.

### **Citizenship as Litigation: *Ba (Nigeria) v SSHD***

On the 20th May 2005 a Nigerian citizen who had been living in the United Kingdom for 17 years was served with a deportation order. As the first respondent in the case

*BA (Nigeria) v Secretary of State for the Home Department*, BA had been granted indefinite leave to remain on the 25th May 1994 on the basis of a marriage to a British citizen, by whom he had four children. BA was served with the deportation order following his release from a 10-year prison sentence for the conspiracy to import class A drugs. BA appealed the order on human rights grounds to the asylum and immigration tribunal, but the appeal failed, and he was once again served with a deportation order on the 25th May 2007.<sup>69</sup>

A further submission as to why he should not be deported was made, which the Secretary of State agreed to hear. However, the deportation order was not revoked and directions were given for him to be removed from the country on the 29th December 2007. Prior to being deported, BA applied for judicial review, claiming that he had an in-country right of appeal while he waited to hear whether his deportation order was to be revoked. Permission was given and his case was reviewed by the United Kingdom Supreme Court on the 30th July 2009.

Under both the Geneva Convention Relating to the Status of Refugees (also known as the 1951 Refugee Convention) and Article 3 of the European Convention on Human Rights (ECHR), the state has an inescapable obligation to allow an asylum seeker who has made an unsuccessful claim to remain in the country until their appeal is heard. While the 1951 Refugee Convention has no formal enforcement mechanisms, the ECHR has been encoded into U.K. law through the 1998 Human Rights Act and, as such, is legally enforceable at both national and European level. A series of measures were in place through the 2002 Nationality, Immigration and Asylum Act to deal with scenarios similar to BA's; however, as the official judgement makes clear, 'on occasion the meaning that is given to them is the subject of controversy'. In the case of *BA (Nigeria) v SSHD* the court was concerned with the meaning of the statute found in Part 5 of the Nationality, Immigration and Asylum Act, as to whether or not the right to not be deported when there is an asylum or human rights claim still applied when a second claim was made. Under Rule 353 of the Immigration Rules, the state's obligations still applied when a claim was deemed to be a 'fresh claim' but it was unclear whether this applied to all appeals and what exactly constitutes a fresh claim.

Section 92(4)a of the 2002 Act states that when an 'asylum or human rights claim is made' it will always generate an in-country right of appeal. What is remarkable

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<sup>69</sup> Unless otherwise stated the case study is referencing the reasoned decision (UKSC 7 2009).

is that although no reference is made to the need for the claim to be a 'deemed fresh claim', the QC for the Secretary of State argued that a further sentence should be read into this section along the lines of 'as long as the Secretary of State agrees that it is a fresh asylum or human rights claim as defined in Immigration Rule 353' (Yeo 2009). The QC for the Secretary of State claimed that this must be construed into the Act to avoid absurdity, where the 'intention of parliament when enacting this provision had to be derived from the context, legislative history and the requirements of international instruments'. To support the claim, she cited the case of *R v Secretary of State for the Home Department, ex p Onibiyo* where the expression 'an asylum claim, or human rights claim' was interpreted in a similar way in relation to fresh claims.

In contrast, Mr Husain, who was acting on behalf of BA argued that, while the wording of the rule had remained the same, the legislative context in which it was to be interpreted had changed. The previous case had been carried out under the 1993 Immigration Act, whereas the 2002 Act had provisions for preventing appeals from being used to abuse the system in resisting deportation. However, BA's case did not fall under any of these provisions. As such, Lord Hope, as the lead judge, recognised that while 'the phrase in question has remained, in essence, unchanged... the system in which it must be made to work is very different'. The judgement Lord Hope made came down to balancing two competing principles: the immigration appeals system must not be burdened with worthless repeat claims but procedures must also be in place to ensure the United Kingdom respected its international obligations - the 1951 Refugee Convention and Article 3 of the ECHR. He found that to interpret the phrase as the QC had, as implying an additional sentence, was not supported by the new legislative context set out in the 2002 Act. Further, it risked undermining the 'beneficial objects of the Refugee Convention'. As such, he found in favour of BA and asserted his right, under international human rights law, to an in-country right of appeal.

The case of *BA Nigeria v SSHD* was important because it clarified an old point of law in a new legislative context to find that 'where a human rights claim is made it will always generate an in-country right of appeal, *if it generates a right of appeal at all* [emphasis original]' (Yeo, 2009). The case then set a precedent that was repeated in further cases, such as the subsequent case of *R (on the application of Waqar) v Secretary of State for the Home Department*, to successfully contest further deportations on human rights grounds.

## Iterability at the Heart of Law

Recall that because justice cannot be reduced to law once and for all, the possibility of justice resides in the iterability of law: the logic of legal precedent. The case of *BA (Nigeria) v SSHD* draws out a number of the key dimensions inherent to a post-foundational theory of law that make justice possible, particularly in relation to iterability. These highlight the insufficiencies of both an understanding of law as a stable body of rules and a Habermasian position. I will deal with each in turn now.

At the most fundamental level, the case problematises many of the assumptions of legal positivists, such as H.L.A. Hart, who believe that the meaning of law forms a coherent and unchanging centre that can be applied with minimal interpretation. The case of *BA Nigeria* was heard by the United Kingdom Supreme Court precisely because the meaning of the relevant statute was unclear and subject to controversy. For legal positivists, while there may often be uncertainty around the facts of a case, at a certain point there is always a 'core', 'germ' 'embryon' of meaning that acts as an 'authoritative mark' (Hart 1961: 119) at which point interpretation stops and a rule can be properly applied. This is evident in how precedent apparently reflects the stability of law. For Hart, there are always 'plain cases' that are 'constantly recurring in similar contexts to which general expressions were clearly applicable' (Ibid: 123). There are also 'borderline cases', whereby if the immediate rule is unclear, then it can be clarified by secondary rules. However, the case of *BA Nigeria* would appear to contradict the claims of legal positivists: not only was the meaning of how the law applies to the case at hand unclear but it could not even be clarified by reference to either further rules or precedent.

The argument made by the QC for the Secretary of State highlights the often-ambiguous meaning inherent to law with exceptional clarity. Because in this particular case the statute was unclear and could not be clarified through reference to any further rules, or in relation to a similar preceding case of *Onibiyo* (1996), the QC argued that Immigration Rule 353 required supplementation via a further, entirely absent, sentence. This argument was not upheld and, as such, the Secretary of State lost the case. The consequence was that the whole framework around fresh claims took on a new meaning because this case was then cited as a precedent in future cases. As the legal

scholar Stanley Fish observes, because the meaning of law has no absolutely authoritative moment but is always open to interpretation

rather than the past controlling the present, the present controls the past by providing the perspective from which the two must be brought into line. The truth about precedent then is the opposite of the story we tell about it; precedent is the process by which the past gets produced by the present so that it can then be cited as the producer of the present. (1988: 893)

The case of *BA Nigeria* problematises many of the arguments made by legal positivists. This is not to deny that 'plain cases' do exist and that the operation of legal precedent helps to stabilise law and the operation of the justice system. However, it is also true that what is now viewed as a plain case had once been contested and settled and, as such, 'it is always possible, and indeed likely, that what has apparently been settled will become unsettled, and argument will begin again' (Ibid: 900). Which is not necessarily a bad thing. In fact, it is the possibility of justice.

The case of *BA Nigeria* also highlights what is at stake in the difference between a deconstructive and reconstructive understanding of foundations. The difference between the two positions stems from how we are to interpret the law's silence, which is a matter of whether the law is fundamentally a conservative self-justifying system or can be truly transformational. I argue that it is only by acknowledging the 'mystical foundations' of law that it can be part of a transformational political project.

What do I mean by the law's silence and what does this have to do with the two different positions indicated above? A deconstructive approach to law insists that '[s]ilence[...] is to be constructed as the 'not yet thought', not the 'self-evident that need not be spoken' (1989: 1060). *BA Nigeria's* case turned on the silence in the law. This is the gap that the QC for the Secretary of State argued implied another, entirely absent, sentence. The QC's claim was predicated on fact that the 'to avoid an absurdity,' the interpretation of the silence must be 'self-evident'. If you accept that the law can and should be read within an authoritative context, then this position makes sense. Therein lies the problem with the co-originality thesis: the paradoxes of the founding

myth are concealed through constitutional learning processes, thus placing limits on how these silences are to be interpreted. If in these processes founders and descendants are all 'in the same boat', whereby we all recognize the political project as 'the same throughout history' and 'judge it from the same perspective,' then how we are to read these silences is determined in advance. There are real political consequences to this because it means that any challengers to the law by groups, such as migrants, that were not initially recognised in constitutional texts cannot be heard.<sup>70</sup> Phrased differently, those who are not in the same boat, yet wash up on the same shores, cannot be seen or heard within the bounds of the law. That does not mean that iterability is not present in the legal system, just that its effects are radically circumscribed. By concealing the violence of the founding moment, iterability is no longer an ontological explanation for change but a part of 'the operational force of the legal myths that seemingly create a self-justifying system' (Ibid: 1058). The result is that universal rights are seen as being limited to those who are bound to the nation's history.

On the other hand, a deconstructive understanding of foundations invites a different reading of law's silence. It is to recognise that, as was the case with *BA Nigeria*, the law might entail unforeseen (ethical) obligations that open it up to new meanings. Because the act of foundation can never be its own justification and that this absence of authority is inscribed in law through its 'fabulous retroactivity' (Derrida 1986: 10), the silence must be read as the not-yet-thought. This holds law open to new claims that can transform its meaning in the present. *BA Nigeria's* case highlight exactly how this works. There is a crucial distinction between this case and some others that may appear similar at first. The difference can be understood according to the logic of the 'event' discussed in chapter three, because the case does not merely 'cite' or 'repeat' the law but constitutes a 'rupture' in its meaning. In the everyday operation of the legal system, irregular migrants can and do successfully contest deportations in court. Such cases happen frequently and they might well be just decisions, but they do not necessarily constitute an 'event'. In contrast, I suggest that cases such as *BA Nigeria* operate quite differently. *BA*

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<sup>70</sup> See Cornell (1990) where she makes a similar argument about the need to hold open the mystical foundations of law in her reading of the *Bowers v. Hardwick* case.

*Nigeria* is an example of how new judgements may not just reproduce legal meaning but rupture and resignify it. Where the meaning of the law was unclear in relation to who had an in-country right of appeal to contest a deportation order – more specifically, what might constitute a fresh claim under Immigration Rule 353 – the judgement clarified the point of law. As a result, and due to the operation of precedent, the judgement generated a new norm for future cases so that ‘where a human rights claim is made it will always generate an in-country right of appeal’ (Yeo 2009). At work here is not just the absence of authority, manifest in the law’s silence, but also its iterability where the statute in question took on a new meaning. The deconstructibility of law is what makes it possible for the legal system to be transformed rather than just evolve and that is why its erasure is a ‘horror story’. ‘Deconstruction is justice’ because it recognises that the ‘not yet thought’ is inscribed in the legal order from the very beginning.

### **Law, Citizenship and Rights**

In approaching law from a post-foundational theoretical perspective, my aim was to locate the ethico-political aporia at the heart of law and demonstrate its practical consequences. Despite this, when it comes to citizenship and rights, a number of questions remain unanswered. A deconstructive understanding of law explains *how* justice happens in specific cases but not *why* it happens. What is to say that law’s instability tends towards justice? Might it not be equally likely - maybe even more likely - to be exercised by and in aid of more hegemonic forms of power? This also leads to a second question posed by Cornell, if ‘no descriptive set of current conditions for justice can be identified as justice, does that mean that all legal systems are equal’ (1989: 1058)? Finally, where does citizenship and rights fit into all of this? These are the questions that I want to answer now. I contend that the drive to make law more just is made possible by the fact that universal rights are encoded into the constitutional texts that found political communities and their laws.

Combining Derrida’s own account of law with the position I developed in the two previous chapters, I argue that if deconstruction is justice, then the claiming of rights from within legal institutional settings is how this deconstructive gesture is enacted. In this regard, *BA Nigeria* demonstrates how the aporias of rights are embedded in the documents that legally define

citizenship, providing a strategy for contesting rightlessness. Returning to the case of *BA Nigeria*, my aim here is to fill in Derrida's account of law, which naturally operates at a very high degree of abstraction, with more context regarding the concrete ways in which the aporias of rights manifest themselves in particular *legal orders*; as opposed to legal/justice systems more generally, where legal precedent (iterability) is the condition of transformation, thus, justice. The official judgement in the case of *BA Nigeria* is of particular interest in this respect: in setting out their rationale, the judges highlight the paradoxes involved in modern citizenship regimes that enshrine universal rights in their constitutional documents.

In coming to its verdict, the Judgment written for *BA Nigeria* cites the court's obligations in regard to both the ECHR and the 1951 Refugee convention.<sup>71</sup> The reference to the 1951 convention is of particular relevance, as it was introduced with the explicit intention of addressing conditions of statelessness identified by Hannah Arendt. It asserts the right of political refugees to seek asylum and the obligation on states to accept them. There is a tension inherent in the fact that the obligation the court refers to are to recognise that the first respondent (BA) has a right to have a rights, which comes into conflict with the sovereign right of nation-states to police their borders, as evidenced by the Home Secretary's attempts to deport BA. Recall that in the first section of the chapter I argued that deportation is constitutive of citizenship, both as a formal legal status (an identity defined in domestic and international law) and as a normative ideal (Anderson, Gibney, and Paoletti 2011: 553). What the Judgment reveals is the aporetic terrain upon which the law and, in particular, the modern mode of citizenship are founded. The constitutional texts that define the meaning and authority of the law create obligations that overflow its jurisdiction. Yet, in the case of the 1951 Refugee Convention, they do not just negate the law but also insist upon its necessity. In modern citizenship regimes, mobilising this aporia through rights-claims is precisely how law can be bent towards justice.

Rights claims made from within legal institutional settings enact a deconstructive gesture that makes justice possible, '[taking] place in the interval that separates the undeconstructibility of justice from the

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<sup>71</sup> Both the ECHR and the 1951 Convention are legally binding but the difference is that the 1951 has no formal enforcement mechanisms above and beyond the state.

deconstructibility of law' (Derrida 2002: 243). The decision that had to be made in *BA Nigeria's* judgement took place between a particular legal statute with an unstable meaning and the universal principles upon which it was founded. The judgement found that 'where a human rights claim is made it will always generate an in-country right of appeal'. Working from within the legal institutional setting, the rights-claim operates as an ethico-political injunction that makes the just decision possible: it at once demands transformation and change by re-signifying the meaning of the law but is also faithful to the experience of order and continuity because it is a call for a place within the law. The rights claim made by *BA* enacts a deconstructive gesture within a particular legal order to negotiate the limit between law and justice and resignify the meaning of statute.

The task set for the second part of this chapter was twofold: to develop the framework for a deconstructive approach to law and then to use this framework to demonstrate how rights-claiming may substantively challenge and resignify citizenship and immigration law. My argument proceeded through a number of steps. In the first case, utilising Derrida's work on law, the aim was to demonstrate the ethico-political ground upon which all legal systems are founded. From this, I attempted to demonstrate how this aporia manifests itself within the institutional structure of the justice system, where iterability functions through the operation of precedent. Central to this argument is a deconstructive logic, where justice is possible precisely because the meaning of law is never fully stable, and every new judgement might resignify it in new ways. Shifting the domain more specifically to citizenship and immigration law, the third step in my argument was to claim that the deconstructive moment is internal to citizenship as a legal category precisely because the constitutional documents that found juridico-political communities enshrine universal rights. The case of *BA Nigeria* illustrates how claiming rights from within the legal system mobilises the aporias of rights in concrete ways to challenge and resignify particular laws. As the eventalisation of Rosa Parks' act undertaken in chapter three demonstrated, litigation has an important place in counter-hegemonic politics. For example, the case of *Morgan v. Virginia* did not just change the law but also laid the groundwork for political action in civil society, such as the Freedom Riders. However, litigation has its limitations when it comes to transformational politics, nor

does it exhaust the realm of law. In the final section of the chapter I discuss both of these points in relation to acts of civil disobedience carried out by French farmer Cedric Herrou.

## **Citizenship as Disobedient Fraternity**

*At times it was hard to know who was on trial, the smuggler or the state.*

(Nossiter 2017)

Cédric Herrou is an olive and poultry farmer from the Roya Valley on the French-Italian border. He was arrested for enacting a form of solidarity that violated French laws, providing aid to refugees travelling into and across France from Italy. Herrou did not deny that his actions were illegal. When asked by the Judge why he broke the law, Herrou responded '[t]here are people dying on the side of the road. It's not right. There are children who are not safe. It is enraging to see children, at 2 in the morning, completely dehydrated. I am a Frenchman.' (Nossiter 2017)

Herrou's acts of solidarity were a direct response to the ongoing refugee crisis in Europe, where there were deep divisions, both domestically in France and across the continent, about how to deal with the growing number of migrants coming to Europe. Living on the French-Italian border, Herrou was situated at a key transit point between Italy and France. Migrants who successfully managed to cross the Mediterranean sea into Italy often head north to try and cross the mountainous border into France (Agerholm 2018).

By summer 2017, Herrou had become the *de facto* leader of a small ring of citizen smugglers that would smuggle migrants across the border from Italy into France but without accepting money. At the time, the Italian border city of Ventimiglia had a Red Cross camp that contained some 800 migrant men, whereas the many women and children were housed in the city's church of Sant'Antonio da Padova. Herrou would frequently travel across an unmanned section of the border to Ventimiglia to collect migrants. He would take them back to his farm in the Roya Valley, where he had set up two small campers for them to sleep and hide in. In October 2016, Herrou estimated that he had helped more than 200 migrants in this way. On top of this, his accomplices in the informal network he had formed had helped dozens more (Nossiter 2016).

Herrou was first arrested on August 2017. He was caught with a van full of migrants that he was transporting across the border. On this occasion, he was absolved on humanitarian grounds. However, following his arrest he received a great deal of publicity. His continued action alongside his rising profile led to a second arrest in October 2017. In response to the publicity, the Judge in his case asked, '[w]hy so much press?' To which Herrou replied, 'It is right that society should know about all this.' (Nossiter 2017). This time, the humanitarian basis of his work did not absolve him.

Following a series of high profile news stories, most notably by the *New York Times*, Herrou had developed a large following and a great deal of support. His support was derived from the notion that he was upholding basic French values. This was the argument that his lawyer made in court. His lawyer, Zia Oloumi, told the court

Remember the last word in the French Republic's motto, "Liberté, Egalité, Fraternité". They are saying M. Herrou is endangering the Republic. On the contrary, I think he is defending its values. You see, you have got this value, fraternity, and the dictionary is quite clear. Think about the impact of your decision on the practical application of the idea of fraternity. (Ibid)

Oloumi's defence was only partially successful. On February 10<sup>th</sup> 2017, Herrou was found guilty. However, he was treated leniently, escaping without going to prison and with a suspended €3,000 fine for aiding illegal arrivals (Chrisafis 2017).

That was not the end of the story. Herrou challenged the decision in France's highest court and his conviction was overturned. Citing the French republic's motto of "Liberty, Equality, Fraternity", the Constitutional Council found that while his actions were illegal according to statute, they should not be criminalised due to the principle of fraternity; 'freedom to help another, for humanitarian reasons, follows from the principle of fraternity, without consideration of the legality of their presence on the national territory'. The judges found that by 'banning all help provided to an undocumented foreigner', the law had not 'maintained balance between the principle of fraternity' and 'preserving public order' (RFI 2018).

The case was significant from a jurisprudential perspective, because the constitutional value of fraternity meant that 'the constitutional court asked parliament to get rid of the amendments which enable the prosecution of Cédric Herrou and

others like him' (Ibid). Parliament was required to bring statute in line with principle, meaning that Herrou and other activists providing aid to irregular migrants should no longer be criminalised.

### **6.3 Citizenship Beyond Legality: The politics of civil disobedience**

Litigation is a distinct form of political practice and, as the example of the civil rights movement showed, it has an important role in transformational political practice. However, as the legal theorist Robert Cover says, while judges may be people of peace, they are also people of violence because '[t]heirs is a jurispathic office'; that is, 'judges characteristically do not create law, but kill it' (1982: 53). The jurispathic, in Cover's terms, refers to the ways in which the court system more often than not operates to close down legal meaning and, thus, reinforce hegemonic power. While the meaning of law can be contested, resignified and enriched through litigation, it is equally - arguably more - likely that new meanings will be killed off as they come up against state power. However, that is not the end of the road when it comes to law. As Hunt observes, '[l]itigation 'failure' may, paradoxically, provide the conditions of 'success' that compel a movement forward' because they are 'instances of a dying discourse' (1993: 240). The task of the final section of this chapter is to explain what this means and how it might work. Navigating between the overdetermination of law (democratic iterations) and its rejection (acts of citizenship), I argue for a transformational practice of citizenship that mobilises law's constitutive aporia in order to generate new legal meanings and authorise actions that it cannot control in what Cover calls 'jurisgenerative' political processes (1982: 18). Utilising the example of Cedric Herrou's civil disobedience, I conceptualise the sites of transformational citizenship practices that are carved out through a negotiation between the state and civil society. In so doing, I both deploy and further refine the conceptual apparatus of citizenship as method.

## Law, Justice and the Jurisgenerative

Extending the analysis of law outside the courtroom and into a broader social terrain also requires us to go beyond the Derridean analysis. However, it does not mean rejecting it altogether. The distinction between law and justice remains both valid and useful. The limitation in Derrida's approach is that he did not investigate how the applications of law, as a body of rules and norms, might have social effects that extend beyond the confines of formal institutions. What is missed in an overly institutional understanding of law and justice is their 'jurisgenerative' potential. Jurisgenerativity is a concept originally proposed by Cover in his influential essay *Nomos and Narrative* (1982). He outlines an understanding of law where '[w]e inhabit a *nomos* - a normative universe' (Ibid: 4). The consequences of this are profound, for the meaning of the legal 'universe' cannot be delimited to the formal institutions of law and its mechanisms for social control.

Cover argues that there is a key distinction to be made between 'law as power' and 'law as meaning' (Ibid: 18). 'Law as power' broadly maps onto the framework developed in section one: it does not just refer to the operations of state power but also law's capacity to constitute (hegemonic) social relations by mediating between the state and civil society. Hunt's constitutive theory of law, remember, highlights how law both constitutes social practices but is also the product of social and political practice – this is an important point I will return to shortly. In contrast to 'law as power' there is 'law as meaning', that refers to the fact that no 'set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning' (Ibid: 4) and these narratives are always multiple and contestable. Jurisgenerative political processes take place when the tension between these two terms play out in creative ways. Because legal principles acquire meanings that they cannot control, the *nomos* we inhabit makes possible new claims to justice that are in excess of formal processes of law making and existing laws. These jurisgenerative processes call established state law into question and anticipate new forms of justice that are not formally recognised by existing constellations of power.<sup>72</sup>

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<sup>72</sup> Once again there is a distinction to be drawn between the deconstructive approach adopted across this thesis and Benhabib's concept of democratic iterations. Benhabib also utilises the concept of jurisgenerativity in her own work but her insistence on the authoritative nature of

Cover's understanding of jurisgenerativity fits neatly with the ethico-political framework delineated previously by demonstrating how particular legal orders can be contested and displaced from within. Consequently, it is also an important resource in rethinking the relationship between the state and practices of rights-claiming that take place in civil society. The transformational potential of jurisgenerative politics resides in its capacity to hold open the founding act of violence: they mobilise the aporetic relationship between law and justice to generate new legal meanings that brings law back into the political field as a site of contestation and struggle. Putting all the pieces of the puzzle back together, a legal space of political contestation starts to emerge, whereby particular legal orders can be turned back on themselves as part of a rights-claiming strategy. So how does this work? A constitutive theory of law highlights the fact that law is political through and through: it both helps to secure hegemonic relations but is also the 'product of the play and struggle of social relations' (Hunt 1993: 3). Consequently, the transformational potential of law resides in its jurisgenerative capacity to redefine legal meanings that institutional legal forms are responsive too, albeit potentially very slowly.<sup>73</sup> I argue that law's generative potential can be put to work through practices of rights-claiming that attempt to renegotiate common sense legal meanings. These are precisely the kind of negotiations with the state that citizenship as method entails and we can see how this works in the example of Cedric Herrou, whose civil disobedience destabilised French Constitutional law according to its own logic.

### **The Just Politics of Civil Disobedience**

Cover's account of law's jurisgenerativity helps to situate Herrou's actions within an understanding of legal citizenship. Clearly, those actions cannot be

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foundations places limits on the possibility for new legal meanings to arise. This is also incompatible with Cover's approach, because he insists that, [t]he return to foundational acts can never be prevented or entirely domesticated' (Cover 1982: 24).

<sup>73</sup> This is not a purely theoretical point, but one that has historical precedent in the civil rights movement. In his book *From Jim Crow to Civil Rights* (2004) Michael Klarman asks how it is that the case of *Brown v Board of Education* that nominally ended segregation could arrive at such a different conclusion to *Plessy vs Ferguson* that legally enshrined segregation, seeing as both decisions were predicated on an unchanged constitutional text. He argues that it is as a result of the changing social and political context, where 'because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times' (Ibid: 5).

easily reconciled within the law because they were illegal, as was the presence of the migrants he was helping. However, nor were his actions completely other to the law because his defence successfully mobilised the law. In that sense, Herrou's civil disobedience also troubles a key principle of acts of citizenship: the fact that '*acts of citizenship do not need to be founded in law or enacted in the name of law* [emphasis original]' (Isin 2008: 39). While his actions might have been illegal, the *just* foundations of his actions were 'enacted in the name of law'. This is reflected in the reasoned decision given by the judges in Herrou's case, where they acknowledged that in 'banning all help provided to an undocumented foreigner' there was an imbalance between law's two modalities: the 'principle of fraternity' and 'preserving public order'. The jurisgenerative potential of Herrou's civil disobedience mobilises law's ethical dimension (the principle of fraternity) against its political one (preserving public order) to generate new legal meanings: the constitutional court called upon parliament to amend the law so that humanitarian aid was no longer criminalised. As a repertoire of action, the jurisgenerative potential of civil disobedience works according to the same deconstructive logic of rights-claiming delineated previously. When organisations and individuals, such as Herrou, carry out acts that are *just* but not *legal*, they enact a deconstructive gesture that reveals particular laws to be in violation of their own internal logic.<sup>74</sup> Herrou's civil disobedience exemplifies the movement of justice, deconstructing the law as part of the drive to make it more just.

Herrou's case does not merely reflect on law more generally, but specifically highlights the generative potential of citizenship. In this example, the constitutional principle of fraternity, the very basis of the common bonds of citizenship, entails a set of rights and duties towards non-citizens that call French law into question. In coming to their verdict, the court relied heavily on an interpretation of France's national motto: 'Liberty, Equality and Fraternity.' What makes this reasoning particularly relevant to the question of citizenship is the fact that within French law, the motto is not merely symbolic but represents constitutionally enshrined principles. Read in conjunction with the universal principles of liberty and equality that make up the other two

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<sup>74</sup> Interestingly, Herrou's example shows us that exercising impossible duties – ones that are not recognised in statute – forms part of a rights-claiming repertoire of protest. This is a point that Isin also makes (Isin 2008)

thirds of the constitutional triad, they found that the 'freedom to help another, for humanitarian reasons, follows from the principle of fraternity, without consideration of the legality of their presence on the national territory' (Boudou 2018). Despite the fact that Herrou's actions were illegal, his successful defence was predicated on the fact that he was not endangering French citizenship but 'defending its values'. His civil disobedience was framed in constitutional terms and this was recognised by the courts. Hannah Arendt wanted to find 'a constitutional niche for civil disobedience' for precisely these reasons: while civil disobedience may not be in accordance with the statutes of law, it is in keeping with its spirit (1972: 83). In Herrou's case, rather than seeing his actions as illegal, his civil disobedience is the point at which the excess of justice over law manifests itself in the form of action. Consequently, Herrou did not reject French law but engaged in what Cover calls a form of 'redemptive constitutionalism' (1982: 24) by calling on the state to account for its universal promise.

The principle of fraternity that defines the common bond of all citizens simultaneously entails ethical obligations to others, exposing the contingent foundations of all articulations of 'the people'. Out of this aporia the possibility of a new understanding of legal citizenship starts to emerge. So on the one hand, contemporary citizenship is particularly problematic. Returning to the discussion at the beginning of the chapter, the hostile environment laws and policies shape social practices in particularly problematic and racist terms. The result is a particularly exclusionary form of citizenship and an ever-hardening border between citizens and migrants – a border that citizens themselves are asked to police. A jurisgenerative politics might start to pick apart such distinctions because law can also authorise new meanings and generate other forms of social practice. The irregular migrant has an important place in the political processes that rearticulate citizenship. As Lisa Lowe observes, because 'law is the apparatus that binds and seals the universality of the political body of the nation then the 'immigrant', produced by the law as margin and threat to that symbolic whole, is precisely a generative site for the critique of that universality' (1996: 8-9). If citizenship is founded upon a constitutive aporia, then the rights-claiming migrant appears as the very possibility of citizenship coming good on its promise by calling it to do justice to its universal foundations. This is not to fetishise the migrant but to observe

that their very presence troubles the logic of citizenship. These 'generative' practices of citizenship start to unpick the hard border between citizens and migrants by reversing and displacing the terms in which the opposition is conceived. This is not to erase citizenship altogether, but to open up the possibility of less exclusionary forms of legal and political belonging in the future.

## Conclusion

Utilising the theoretical framework adumbrated previously, my aim in this chapter was to bring law back into the political arena and challenge an overly rigid distinction between citizenship as 'status' and as 'practice' that is often exhibited by theorists of citizenship. I was not trying to propose an all-encompassing conceptualisation of citizenship and law but to fill a gap in the literature by framing the political spaces in which legal citizenship is contested and rearticulated. In this respect, the current chapter performed an important function in developing the conceptual apparatus of citizenship as method by investigating how practices of rights-claiming *negotiate* with the state. I argued that, because modern citizenship regimes embed universal rights in their founding documents, the law is a key site of contestation over the meaning and contents of citizenship. In the struggle against rightlessness, the law can be both disabling and enabling. Hunt's understanding of law as a 'constitutive mode of regulation', combined with the example of the hostile environment, illustrates how the law can shape citizenship and its practices in particularly exclusionary ways. Irregular migrants experience such forms of legal citizenship in disabling terms, undermining their legal and political standing and exacerbating the experience of rightlessness. However, the law can also be enabling. As the case of *BA Nigeria* shows, legal orders are a living body of meaning that can be contested and redefined by claiming rights from within the legal system. Yet nor should contestations over the meaning of law be confined to the courtroom. The constitutive tension between the unconditional order of justice and a conditional realm of law can be rendered fruitful through jurisgenerative political processes. These practices, as was the case with Herrou's acts of disobedient fraternity, utilise the 'normative universe of meaning' that law creates in order to make new claims to justice

that are not (yet) recognised in statute. In this way, the law can provide the foundation for new claims to rights that open citizenship up to new possibilities that are not over-determined by old models.

## 7. Renewing the *Demos*

In *On Global Citizenship*, James Tully identifies the two primary features around which contemporary citizenship is organised: law (nomos) and democracy (demos). The preceding chapter investigated citizenship through the lens of law. The aim was to develop a post-foundational account of law that highlights its emancipatory potential. The current chapter builds on this argument by turning its attention to democracy, as the other primary institution of citizenship. If law is, initially at least, conceived as problematic in the fight against rightlessness, then the opposite is true for democracy. Because under democratic regimes the space of power remains empty (Lefort 1988) and citizens are the authors and not just the subjects of the laws (Benhabib 2004), then democracy might provide a dynamic site for change. However, François Crépeau (2014) argues that by not extending the vote to non-citizens, representative democracies contain a structural limitation that negatively impacts migrants' rights. In the field of critical citizenship studies, the democratic nature of citizenship is not ignored altogether (Isin 2017); however, the role that democracy might play in transformational practices of citizenship is often overlooked. Similarly, many of the advances made in the field of citizenship studies have not been integrated into democratic theory. In order to address these shortcomings, in this chapter I propose to bring together insights from both citizenship studies and radical democratic thought. More specifically, I intend to use the figure of the rights-claiming irregular migrant as the locus around which to explore processes of the democratisation of democracy: the drive to bring existing democracies into line with their principles.

The current chapter arises out of a constructive engagement with the radical democratic theory of Laclau and Mouffe in order to ask: who is the subject of radical democracy? By which I mean, who does the work that makes democracy 'radical'? In the contemporary moment, radical democrats tend to give a populist answer: the subject of radical democratic action is the populist articulation of the people (Mouffe 2018; Laclau 2005). Of course, a radical democratic notion of 'the people' is not the same as an essentialist understanding of the national community. However, I suggest that there is a

tendency in the theory and practice of populist politics to discriminate against migrants due to radical democracy's theoretical dependence on the work of Claude Lefort. In contrast to Laclau and Mouffe, I propose a different subject of radical democracy. I advance the thesis that the rights-claiming non-citizen (hereafter, irregular migrant), who enacts an impossible form of citizenship is the subject of radical democracy. My own answer arises out of a constructive engagement with the radical democratic tradition. However, in keeping with the deconstructive approach to citizenship developed across this thesis, it also goes beyond Laclau and Mouffe's more formal theory of democracy (Norval 2004). Utilising Derrida's concept of democracy-to-come, I view democracy as constructing a 'specific form of subjectivity arising from the experience of the undecidable' (Norval 2004: 141). The responsible decisions that institute democracies also shape its subjects.

Where my own argument contributes to democratic theory is by incorporating insights from the critical citizenship studies literature. There is a problematic tendency within (radical) democratic theory to subsume citizenship under the question of democracy. Neither Laclau or Derrida commit citizenship to serious analysis. Mouffe does address the place of citizenship within her account of democracy (Mouffe 2018; 2005; 1992a); however, as will be discussed later in the chapter, it carries over some of the problematic tendencies associated with populist politics. I use the framework of citizenship as method to propose an alternate practice of radical democracy, in the form of rights-claiming and a different radical democratic subject: the irregular migrant. In developing this argument, I draw on the example of the migrant-led youth movement Let Us Learn, who campaign for equality in access to higher education for non-citizens. Their case is particularly pertinent due the manner in which Let Us Learn's activists are constituted as ideal democratic subjects by the institutions of the state.

The current chapter is organised as follows. Section one, gives a broad outline of Laclau and Mouffe's understanding of radical democracy. I discuss Laclau's structural conception of democracy and how this fits in with the radical democratic project, particularly in relation to the 'populist moment' (Mouffe 2018: 11). Section two develops a critique of the depoliticising tendencies inherent to Laclau and Mouffe's populist turn. Here I draw on the particular structural problems that contemporary representative (liberal)

democracies pose to migrant rights, before outlining an alternative approach through Derrida's concept of 'democracy-to-come'. The final section brings together insights from the field of citizenship studies with democratic theory to propose a revised politics of the radical democracy. I will argue that a populist politics, rooted in an ontological account of antagonism, fails to develop a sustainably reflexive political practice. In response, I propose rights-claiming as an alternate practice of radical democracy because it is better able to deal with pluralism. The example of Let Us Learn is used to support this claim because their rights-claiming practices mobilise the rhetoric of the ideal citizen to problematise their exclusion from citizenship privileges.

## 7.1 The Radical Democratic Tradition

In the history of Western political thought citizenship and democracy are deeply intertwined. As Balibar observes, this relationship is not a 'natural one' (2015: 2) and is fraught with irresolvable tensions. This tension can be formulated in terms of what Chantal Mouffe identifies as the 'democratic paradox': there is a tension in liberal democracies between freedom and equality - between liberal ideas of universal rights and individual liberty, and democratic forms of equality and popular sovereignty (Mouffe 2009: 5). In addressing this problem, the first section of this chapter delineates the basic contours of radical democracy, particularly the work of Laclau and Mouffe. Although it is a diverse school of thought (see Critchley 2014c), radical democratic theorists tend to share a set of ideas that correspond with the post-foundational theoretical framework adopted thus far in this thesis. Radical democrats claim that: 1) democracy is not an institution but a political practice, 2) that the political needs to be understood ontologically and that 3) civil society, rather than the state, is the primary site of democratic politics (Little and Lloyd 2009: 3). For radical democrats, democracy is not just a regime but a *disruptive* process that, in Rancière's words, 'at once legitimizes and delegitimizes every set of institutions or the power of any one set of people' (2010: 60). In what follows I outline Laclau's structural understanding of democracy, in relation to the concept of hegemony. I then sketch out its relationship to Laclau and Mouffe's radical democratic project before turning

to a discussion of populism as Laclau and Mouffe's answer to the question of the subject of radical democracy.

## Hegemony and Democracy

Laclau states that democracy '*is the only truly political regime* [emphasis original]' (2001: 10). This assertion pertains to the fact that for Laclau (and Mouffe) hegemony should be seen as the central category of political analysis. Laclau and Mouffe's work is one of the earliest sustained engagements with the political consequences of poststructuralism. Central to their analysis was a new theory of hegemony that provided them with a political account of the discursive foundations of society. Laclau defines hegemony as 'the type of political relations by which a particularity assumes the representation of an (impossible) universality entirely incommensurable with it. It is, as a result, a relation of a transient and contingent *incarnation* [emphasis original]' (Ibid: 5). At its core, the concept of hegemony provides Laclau and Mouffe with a theory of *the political*, understood as the decision taken upon an undecidable terrain (Laclau and Mouffe 2001).

The importance of the 'infrastructure' (Norval 2004) of undecidability signals Laclau's debt to the deconstructive tradition. As previously discussed, for Laclau, '[u]ndecidability should be literally taken as that condition from which no course of action necessarily follows' (1996: 78). Where Laclau departs from Derrida - or, more accurately, builds on deconstruction - is through his theorising of the decision. If nothing necessarily follows from the terrain of undecidability, yet clearly new political forms are instituted, then how are these decisions made? Laclau refuses to ground his account of the decision in either an essentialist or ethicist logic.<sup>75</sup> Instead, the 'passage between undecidability and the decision is conceptualized as an act of politics through and through' (2004: 143).<sup>76</sup> Because the decision cannot be guided by a rule, it is both self-grounding and comes at the expense of other possibilities, by which I mean alternative political forms.

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<sup>75</sup> By 'essentialist' I mean an appeal to metaphysical forms of foundation and by 'ethicist' I refer to the idea that ethics can provide a foundation for the political.

<sup>76</sup> It is important to observe that for Laclau power is not purely negative but ubiquitous. In this way it is not purely opposed to freedom. Although it may place limits on freedom, it is also the condition of its possibility (1996).

If hegemony is the ultimate political logic, then for Laclau democracy is the only properly *political* institutional form because it is the 'type of regime which makes fully visible the contingent character of the hegemonic link' (Laclau 2001: 5). Because the instituting moment of the social arises out of the condition of undecidability, then every (hegemonic) political order presents the interests of a particular group as universal at the expense of other possibilities. In so doing, it conceals its own, contingent, political foundations. The emancipatory potential of democracy is inherent in the fact that it makes contingency visible. Here Laclau is indebted to Lefort's observation that in democratic societies the place of power remains empty (Lefort, 1988): the structure of democracy does not presuppose the political programmes that are its content. So while at different times different political projects may occupy the place of power, if any of them ever filled it completely, then it would no longer be a democratic order. In this way, democracy institutionalises the political difference.<sup>77</sup> As Laclau observes

One has to conclude that an ontological difference between the ontic contents of the aims advanced by the various political forces and a specific ontological dimension permeating those contents, which lies in the permanent assertion of their contingent nature, is constitutive of democracy (2001: 8).

This is why democratic regimes are the only truly political institutional forms and it is crucial because it means that democracy is a political structure through which (hegemonic) power relations can be continually challenged.

Laclau's *structural* theory of democracy is of value to this thesis because it identifies an institutional setting through which rightlessness can be contested and citizenship radically renegotiated. An example of this is a recent referendum that took place in Switzerland. In February 2017 a new law was put to the Swiss people via a referendum that proposed to ease the pathway to citizenship for young immigrants. High levels of migration, combined with strict rules about naturalisation mean that Switzerland has a relatively large foreign population of around 25%. It was proposed that children of second

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<sup>77</sup> Recall that the political difference refers to the play between politics and the political that mirrors the ontic/ontological divide (Marchart, 2007).

generation immigrants born in Switzerland should face a faster and simpler route to citizenship. The proposal ended up passing with 60.4% of the vote and majority of Cantons in favour (swissinfo.ch 2017). What the Swiss example demonstrates is how the structure of democracy, which institutes contingency, might be mobilised to rearticulate the meaning of citizenship. This is what is missed by theorists of acts of citizenship, when the question of democracy is absent from their analysis. It is not just that the *contents* of Swiss citizenship were renegotiated, where more people were accorded its status; rather, its *meaning* was resignified as well, changing the identity of who counts as a citizen.

### **Radical Democracy and the Populist Moment**

Laclau proposes a structural theory of democracy that is borne out of the poststructuralist tradition but also goes beyond it, through the foregrounding of the logic of hegemony – this is what makes it post-foundational. The radical potential of democracy is that it institutionalises the political difference. However, the political project of radical democracy proposed by Laclau and Mouffe cannot be reduced to democracy in its institutional form. Instead, it is better understood as a ‘process of disruption and a practice of political contestation’ (Little and Lloyd 2009: 7), functioning more as a method of ongoing political engagement.

Laclau and Mouffe first propose their theory of radical democracy collectively in *Hegemony and Socialist Strategy* (2001). Although committed to the question of socialism, their understanding of radical democracy critiques and reorients the Marxist tradition. Similarly, they do not reject the central tenets of liberal democracy altogether but intend to ‘radicalise’ it according to its own constitutive principles. As Mouffe puts it, it is a project aimed towards the “radicalization” of the ethico-political principles of liberal democratic regime, “liberty and equality for all” (2018: 39). The two authors reject the simple reform/revolution binary in favour of transformational politics. Radical democracy attempts to fill the place of power by establishing ‘a new hegemonic order within the constitutional liberal-democratic framework’ (Ibid: 45). Laclau and Mouffe’s theory of hegemony does not just define how the radical democratic project critically engages with liberal democracy, it also offers a critique of Marxist economic determinism, emphasising the

contingent and fundamentally political constitution of the social. This leads to a reorientation in the relationship between socialism and democracy. Contra Marxism, they propose that 'socialism is *one* of the components for a project of radical democracy, not vice versa' (Ibid: 178). Not only does this break with the traditional socialist logic but it also rejects the left-wing notion of the working class as the revolutionary subject. Radical democracy entails a commitment to a plurality of demands that cannot ultimately be reduced to the logic of class. Consequently, there is a need to build alliances and an equivalence between the demands of diverse groups, such as 'anti-racism, anti-sexism, and anti-capitalism' (2001: 182). A radical conception of democracy, one that foregrounds the political constitution of the social through the logic of hegemony, functions through an immanent critique, rather than rejection, of liberal democracy by emphasising the antagonistic nature of the social and the competing claims of a plurality of actors.

The structure of democracy holds open the space of power and the task of radical democracy is to fill that space with new (counter)hegemonic projects. A question I pose in this chapter is: who does that work? Laclau argues that the 'subject' stands between 'the undecidability of the structure and the decision' (1996: 56). With this in mind, to rephrase my question in more precise terms, I ask: who is the subject of radical democracy? Laclau and more recently Mouffe's work on populism provides an answer to that question. In her recent book *For a Left Populism* (2018) Mouffe states that in the present moment, as existing hegemonies are disarticulated, there is the possibility of 'a new subject of collective action – the people – capable of reconfiguring the social order experienced as unjust' (2018: 11).

In the populist moment, the two authors claim that the subject of radical democracy is 'the people'. Of course, this does not refer to 'the people' in a nativist sense. Mouffe states that it 'is not an empirical referent but a discursive political construction. It does not exist prior to its performative articulation and cannot be apprehended through sociological categories.' (Ibid: 62). The people is articulated by drawing equivalences across a plurality of demands through the designation of a common enemy.<sup>78</sup> This move is

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<sup>78</sup> Mouffe's argument here is predicated on Carl Schmitt's friend/enemy distinction (1932). For Mouffe, the friend/enemy divide describes the necessarily antagonistic dimension of the political (see Mouffe, 2013).

crucial because the drawing of a political frontier along the lines of we/they is decisive in the construction of any form of the 'people' (Mouffe, *Ibid*: 63). It is 'by entering into equivalence with other democratic demands, like those of immigrants or the feminists, that they acquire a radical democratic dimension' (*Ibid*: 64). The transformational potential of populism resides in the fact that it 'is a discourse that brings into being what it claims to represent: the people' (Thomassen 2019: 329). If the people are constructed through hegemonic political struggle, then they can always be re-articulated through counter-hegemonic intervention.

Laclau proffers a structural theory of democracy, as the only truly political regime because the space of power remains empty. However, he also goes beyond Lefort to argue that 'democracy requires the constant and active production of that emptiness' (2001: 12). In an abstract sense, this is the aim of radical democracy: to fill the space of power with new counter-hegemonic projects. A plurality of actors form chains of equivalence to contest violence and inequality. In so doing, they redefine notions of 'the people'. When it comes to contesting rightlessness, the promise of radical democracy resides in the fact that who counts as a democratic actor is not defined by law or national origin. Migrants might form chains of equivalences with other groups and social movements to re-hegemonise the space of power, potentially transforming citizenship.

## **7.2 Problems with Populism: The double bind of migration**

On the face of it, Laclau and Mouffe's understanding of democracy is an important resource for thinking through the transformation of citizenship. Representative democracy is potentially a site for transformational politics because it institutionalises the political difference. The radical democratic project theorises the politics through which transformation might occur, in the form of new hegemonic articulations. Yet there are also problems inherent to Laclau and Mouffe's understanding of democracy, most notably when it comes to the question of migrant rights. Radical democracy is inscribed with a hidden depoliticising tendency that is carried over from its intellectual

dependence on Lefort's work (Thomson 2007). Liberal (representative) democracies contain a structural problem that affects migrants' rights and I argue that this tends to be reproduced in radical democracy, most notably in the populist turn. Returning once again to the work of Derrida, I suggest that a deconstructive approach to democracy – one that acknowledges that it is structured by an ethico-political aporia – offers a route out of the problems of radical democracy. Phrased differently, I propose that there is more to democracy than Laclau's purely structural account. This requires rethinking the subject of radical democracy through the relationship between citizenship and democracy.

### **Democracy and/as Totalitarianism**

While there are important differences, Laclau and Mouffe's project of radical democracy draws many of its resources from the work of Lefort. In particular, they are dependent upon his theoretical distinction between totalitarianism and democracy.<sup>79</sup> As discussed in the previous section, according to Lefort modern democracy is characterised by the fact that the 'locus of power becomes *an empty place*'. This is a radical departure because[...] Democracy is instituted and sustained by the *dissolution of the markers of certainty*' (1988: 19). This is why for Laclau democracy is the only truly political regime because it holds open the question of what society is by keeping visible its contingent foundations. Totalitarianism does the opposite: it is 'the development of the fantasy of the People-as-One, the beginnings of a quest for a substantial identity, for a social body which is welded to its head... for a state free of division' (1986: 20). As Thomson observes, this provides Laclau and Mouffe with a 'philosophical *and* historical account to which they can refer' to guarantee 'the radical potential of democracy itself' (2007: 46). Unfortunately, in the process, they reproduce some of the problems associated with Lefort's work, thus negating the radicality of their own project.

Simon Critchley (2014) and Alex Thomson (2004) have criticised Lefort for drawing a simplistic and overly rigid distinction between totalitarianism and democracy. At one extreme, a totalitarian system that signified the end of

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<sup>79</sup> For a full account of Laclau and Mouffe's dependence on Lefort's work, see chapter three in Thomson's *Deconstruction and Democracy* (2004).

politics is a counter-factual because it would also mean that any form of resistance is unimaginable. At the other extreme, Critchley points out that [i]t is doubtful... that Western liberal democratic societies are committed to the full equality and development of all their citizens or to genuine possession of power by the people' (2014a: 211). The idea that liberal democracies are the ontic institutionalisation of the ontological difference is predicated on an idealised division between totalitarianism and democracy, which does not hold in practice. Using the example of the irregular migrant, I will show that this does not hold in practice, meaning Lefort is at risk of becoming an apologist for liberal democracy (Ibid: 211-12).

The problem of migrant rights is a question of citizenship; or, more precisely, a lack of it. This means that they cannot vote, run for office and lack access to many of the channels for justice usually afforded to citizens. They also fear being detained and deported. On the face of it, democracy would seem to provide an avenue to redress these problems. The structure of democracy institutionalises contingency, thus providing a mechanism for political renewal that might expand rights to non-citizens. Furthermore, the project of radical democracy, particularly in its left-wing populist form (Mouffe 2018), mobilises the inherent potential in democracy through counter-hegemonic processes that rearticulate the notion of 'the people'. At an abstract level, these arguments are compelling. However, a purely structural understanding of democracy, conjoined with populist articulations of the people, runs up against a limit of representative democracies, negatively affecting the struggle for migrant rights.

The problem stems from the fact that, as François Crépeau observes, '[m]igrants face a structural limitation of electoral democracies. Politicians, even those with a moral compass, have little incentive to protect migrants' rights, if by doing so they risk losing the polls' (2014).<sup>80</sup> The very fact that migrants have no formal voice, by which I mean a right to vote, in democratic processes, means that far too often migrants are the object, rather than the

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<sup>80</sup> Crépeau is arguing at a general level but this is a view that is reinforced by the legal scholars Emily Carasco and Tanya Basok in their reading of the Canadian court case *Andrews v. Law Society of British Columbia*. She also finds that '[n]on-citizens are lacking in political power and as such vulnerable to having their interests overlooked and their right to equal concern and respect violated. They are among those groups in society whose needs and wishes elected officials have no apparent interest in attending' (2010: 1).

subject, of debates. The result being that '[m]igration is one policy area where politicians can make outrageous statements without facing any consequences at the polls – indeed they may benefit from them' (Ibid). Consequently, this structural problem tends to lead on to a broader discursive one: Despite overwhelming evidence that migrants objectively benefit their host societies, they are still viewed in a negative light. Due in large part to the repetition by elected politicians, democratic populations often view migrants as a drain on public resources and housing, stealing citizens jobs and increasing crime, amongst a whole range of other issues. Crépeau concludes that the 'culture of impunity around anti-migrant rhetoric remains because migrants are not, and will never be, politically represented at the national level, as they are not citizens' (Ibid).<sup>81</sup> In the current moment, this argument appears to be borne out by the rising tide of right-wing nationalist and xenophobic populism.

Now of course a left-wing populist project as advocated by Laclau and Mouffe is radically different to its right-wing counterparts. While a radical democratic project engages with the institutions of liberal democracy, it does so with the intention of transforming them. Therefore, might not the same structural limitations apply? In the abstract, the answer is yes but in practice, I suggest no. Within left-wing populist movements there is a double bind when it comes to migration, where the structural limitations of democracy incentivise leaders to be biased against migrants which in turn constitutes the democratic will in narrow terms.

For Crépeau, the problem is inherent to electoral (representative) democracies. But there is no escaping representation, as Laclau observes, '*representative* democracy is not a second best...it is *the only possible* democracy (2001: 13). What he means by representation of course is highly specific and certainly cannot be reduced to how it traditionally functions in liberal democracies. As discussed in the first section of this chapter, 'the function of the representative cannot be purely passive, transmitting a will constituted elsewhere, but that it has to play an active role in the constitution of that will' (Ibid: 13). The left-wing populist promise is that because representation is constitutive of what it represents, then it can rearticulate the people in new

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<sup>81</sup> The argument that non-citizens will 'never' be politically represented at the national level is not necessarily true. Luicy Pedroza (2019) analyses cases of 'denizen enfranchisement' that have taken place. Furthermore, she makes a strong normative argument regarding the potential for denizen enfranchisement to transform citizenship.

ways. However, this performative dimension of representation is not an unencumbered moment of pure performativity. The performative force of such 'representative claims', to borrow Michael Saward's (2010) terminology, is always a consequence of its citation of authoritative an original. Herein lies the problem: because 'representation re-presents already existing meanings, practices and structures' (Thomassen 2019: 336), the populist discourse that claims to represent the people is always likely to carry over the structural limitations of representative democracy.

There is a populist democratic double bind that limits migrants' rights and can be stated as follows: first, because populist leaders operate within the confines of electoral democracies there is a structural tendency to produce anti-migrant rhetoric; second, because the representative in part produces what it represents, they are likely to constitute a democratic will that is anti-migrant, thus re-enforcing populist leaders likely bias against migrants and in favour of established conceptions of the people – for example, workers and students - who have an established place in society. Consequently, it is a double bind which is also a vicious circle, where each feeds the other. Despite the best (theoretical) intentions of Laclau and Mouffe, the populist articulation of 'the people' reproduces a depoliticising logic that might actually immunise democratic politics from pluralist interpretations of the demos.<sup>82</sup> In this sense, contra Lefort, it would seem that it is correct to ask: 'Does not present-day democracy conceal a totalitarian threat? Is not democracy another, perhaps more subtle, form of totalitarianism?' (Lacoue-Labarthe and Nancy 1997: 122). I suggest that Laclau and Mouffe's own project of radical democracy is better served by going beyond Laclau's purely structural theory of democracy and, then, by reposing the question of the subject of radical democracy.

### **Deconstruction and Democracy-to-come**

Through an engagement with the deconstructive tradition, Laclau develops a structural theory of democracy that contains important insights. However, as important as these insights are, they do not exhaust the relevance of deconstruction when it comes to thinking through democratic politics. I argue that Laclau pays insufficient attention to the full consequences of the

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<sup>82</sup> This is an argument that Jan-Werner Müller makes in *What is Populism?* (Müller 2017).

infrastructure of undecidability. More specifically, I will reconsider Laclau's assertion that nothing necessarily follows from the structural condition of undecidability. By paying attention to the form of decision that institutes democracies, it becomes apparent that there is a certain 'contouring' that takes place that institutes a minimal democratic ethos (Norval 2004: 141). I am not suggesting that radical democracy and Derrida's account of democracy-to-come are incompatible but that the effects of undecidability both *precede* and *succeed* the (hegemonic) decision. Acknowledging how democratic decisions constitute particular subjects makes it possible to transition from Laclau's structural account of democracy to thinking through different forms of emancipatory democratic politics.

Laclau and Mouffe's account of hegemony is a political logic, describing how the decision is made on an undecidable terrain. However, Norval cautions that it is important not to 'pass too quickly from undecidability to the decision' (Ibid: 147). Deconstruction does not only foreground the non-essential nature of instituted orders; it also requires a close reading of how a decision came to be made at all. So what kind of decision institutes democratic orders? The answer, for Derrida, is a 'responsible one'. Derrida maintains that 'a [responsible] decision can only come into being in a space that exceeds the calculable program that would destroy all responsibility' (Keenan 1997: 12). Such a decision could not properly be called responsible - or even a decision, for that matter - if it simply followed a rule. It is impossible to take responsibility for a decision if the outcome is already dictated by following a rule.

The question of the responsible decision leads directly on to that of the subject. The experience of the (necessarily responsible) decision, out of which democratic hegemonies are formed, marks the subject constitutively. This is where Laclau and Derrida diverge: while Laclau provides an account of the institution of hegemony, a Derridean understanding of undecidability furnishes us with an account of the consequences that follow from decisions that institute specifically democratic forms of hegemony. Consequently, Norval observes that the 'experience of the undecidable already entails a certain contouring of the relation to the other and, thus, could serve as a minimum, negative delimitation from which a democratic form of subjectivity could be said to arise' (2004: 151). With these distinctions in mind, it is possible

to formulate the differences between Derrida's concept of democracy and Laclau and Mouffe's.

The notion of democracy-to-come appears, at least superficially, as one of Derrida's most problematic phrases. It refers to an 'antinomy at the heart of the democratic [that] has long been recognized... it is the one between freedom and equality - that constitutive and diabolical couple of democracy' (Derrida 2005a: 48). There is here a superficial similarity with radical democracy. Mouffe states that 'the problem[...] is not the ideals of modern democracy, but the fact that its political principles are a long way from being implemented' (Mouffe 1992b:13-14). The difference is that Laclau and Mouffe want to narrow the gap between actual democracies and its ethico-political ideals; whereas, for Derrida, democracy is itself ethico-political – it is structured by a constitutive ethico-political aporia. This is where the question of the (democratic) subject returns. For Derrida, there is no absolute distinction to be made between subject and object. As indicated previously, it is the distinctive account of the subject that is constituted through the responsible decision that opens up democracy to the Other. So, while democracy always needs a conditional existence, of laws and community, it is also open to 'a politics, a friendship, a justice which begin by breaking with their naturalness or their homogeneity, with their alleged place of origin' (Derrida 2005b: 105). Once again, we find a political structure determined by a constitutive ethico-political aporia: between the necessity of its *conditional* existence in the form of democratic institutions and the *unconditional* principles of justice, freedom and equality that refer to the 'to-come'. What is essential to understand in this formulation is that democracy is not simply rendered problematic through the disjuncture between the universality of the task and the particularity of its existence but a deeper internal flaw in its structure. The "'to-come" not only points to a promise but suggests that democracy will never in a sense be in existence: not because it will be deferred but because it will always remain aporetic in its structure' (Derrida 2005a: 86). This internal flaw defines both the project of democracy and its subject, through a relation to alterity and represents an important point of political intervention.

At this point, I want to summarise my theorisation of democracy, before going on to consider the place of citizenship within democratic

thought. My aim was to develop a conception of democracy suitable for the approach to citizenship outlined thus far in this thesis. In this respect, deconstruction has a central role to play. I agree with Norval that 'democracy could be argued to be an embodiment or institutionalisation of the experience of the undecidable' (2004: 153). There are two dimensions to this statement. The first, deriving from Laclau, is the theorisation of the decision through his account of hegemony. Laclau's insight is particularly pertinent, as it leads him to claim that democracy is the only truly political regime, precisely because it institutionalises contingency. The foregrounding of contingency clears space for a truly radical renegotiation of the political, right at the heart of citizenship. However, Laclau's account of democracy that remains at the level of structure does not go far enough. In particular, I have sought to rethink Laclau's assertion that undecidability is the condition from which no course of action necessarily follows. A closer analysis of Derrida's logic highlights that, while nothing may necessarily follow from an undecidable terrain, that does not mean that the form of the decision carries no consequences. Undecidability is not an ontological void but a highly structured terrain. As such, democracy does more than just open up the social, it also contours subjects with an ethos that sustains it.<sup>83</sup> Linking together an understanding of democracy as structure (Laclau) and ethos (Derrida), the following section will investigate the political processes of the democratisation of democracy by bringing democratic thought into conversation with insights from the field of citizenship studies.

## **Citizenship as the Responsible Subject: Let Us Learn**

*"They built such a tall wall that we couldn't climb over it, so we had to break it down."*

Let Us Learn is a migrant-led youth movement in the UK, campaigning for equal access to higher education. The group comprises over 850 young migrants, all aged between 18 and 24, with a core set of 20 members, who meet, organise and campaign together regularly. Although they come from over 70 different countries

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<sup>83</sup> I use the term 'ethos' very carefully here, as it is not a procedure that guides actions; rather it is, as Fagan describes it, a 'relation without content', where 'subjectivity is structured as response' to forms of alterity (Fagan 2013: 141).

between them, what they all share is that they were brought to the United Kingdom at a young age and say that they 'have grown up here and are proud to call Britain our home' (Let Us Learn 2017).

The catalyst for the group was when one of its founding members, Chrisann Jarrett, was offered a place at the London School of Economics (LSE) to study law. However, despite the fact that she had moved from Jamaica to the United Kingdom when she was eight years old and that she had Discretionary Leave to Remain (DLR), her immigration status meant that she was unable to register as a home student. This meant that she would have to pay £16,000 a year in fees - as opposed to £9,000 - but also that she wasn't eligible for any form of student finance either. The effect was that she was unable to afford to study, deferred her place and took up an internship at Just for Kids Law.

It turned out that Chrisann was lucky and when she informed LSE about her situation, she was offered a full scholarship and was able to take her place on the course the following year. However, during her time at Just for Kids Law, a legal charity that offers support for young people in difficulty, she met a number of other young migrants experiencing the same difficulties accessing higher education. With the support of Just for Kids Law, they formed Let Us Learn.

The group's first major action was the #younggiftedandblocked/Young, Gifted and Blocked Campaign. The aim of the campaign was to bring attention to precisely the problem that Chrisann and the other group members had experienced trying to access university. The campaign explored a number of different avenues in trying to secure funding for young migrants without the correct immigration status. They petitioned 'universities to set up scholarships or bursaries so they could carry on learning, and pursue our educational and career ambitions'. Let Us Learn achieved some success with this aim, with many universities such as the LSE, Queen Mary and De Montfort setting up differing scholarship schemes for migrant students with good grades who are unable to access student loans. Its members also pursued British citizenship, however, that proved more difficult (Let Us Learn n.d.).

Let Us Learn's biggest early success came in the courtroom in the case of *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills*. The group took aim at the legal eligibility criteria for government student finance that, in their words, 'are narrowly drawn, and exclude large numbers of young people who have grown up in the UK, and even some who have become British citizens' (Ibid).

The case was brought by 20 year old Beaurish Tigere, who came to the UK from Zambia aged six with her two parents and went to school in York. Her story aligns with Chrisann's and the other Let Us Learners: she achieved top grades, was head girl at her school and was offered a university place, only to find that because of her Immigration status of DLR, she was ineligible for funding and could not attend. Aside from bringing the legal challenge, Let Us Learn gained widespread media coverage promoting their cause, in local newspapers, The Guardian and even on BBC Newsnight. The case was heard at the Supreme Court on Wednesday 24th June 2015 and Let Us learn mobilised over 50 young migrants to demonstrate outside the court. A month later the decision was delivered and they found that 'the blanket exclusionary rule preventing anyone except UK citizens or those with indefinite leave to remain in the UK from applying for student loans was disproportionate and could not be justified' (Bowcott 2015). In delivering her judgement, Lady Hale found that:

The numbers affected are not insignificant but a tiny proportion of the student loans which are made every year[...] These young people will find it hard to understand why they are allowed access to all the public services, including cash welfare benefits, but are denied access to this one benefit which is a repayable loan. (UKSC 57 2015)

The verdict meant that several of Let Us Learn activists and hundreds of other young migrants with long term residence were able to access student finance for the academic year 2015-16. The result was also back-dated for students who started 2014-15 and who met the criteria.

The Supreme Court Judgement was a success but Let Us Learn's activists were aware that it was not a complete win (Makinde 2019). The judgement only applied to young migrants who met specific criteria regarding their legal status and length of legal standing in the UK. Further, the decision was only temporary, pending a further consultation by the Department for Business Innovation and Skills. Consequently, Let Us Learn broadened and deepened its work, providing leadership training to young migrants, providing workshops and giving regular performances and talks at high profile public events.

While Let Us learn has achieved considerable success, its members continue to campaign to promote migrant-led youth community leaders and expand their reach into new areas of policy. They broadened the scope of their campaigning to contest

the hostile environment and joined up with other migrant rights groups, such as the American Dreamers and Windrush generation migrants (Makinde 2019).

### **7.3 Citizenship, Democracy and the Non-Citizen**

Democratic decisions shape both the structure and subjects of democracy. But who is the subject of democracy? In the present moment, it is the citizen. Given this fact, it is surprising how little attention Derrida and Laclau devote to the question of citizenship. How, then, does citizenship fit into radical democratic tradition? Is citizenship to be subordinated to democracy, or might there be more to it than that? Might not citizenship be a central component in processes of the democratisation of democracy? The question of citizenship is almost entirely absent from Laclau's writing. Similarly, Derrida overlooks the transformational potential of citizenship. Citizenship barely figures in his thought and when it does it appears to be more of an impediment beyond which democracy must aspire. He states that '[w]hen I speak of the democracy to come[...] I am thinking of a democracy that would no longer be bound in any essential way to citizenship'; or, somewhat half-heartedly, he says 'I am not against citizenship[...] But the rights of man must also be extended beyond citizenship' (2004: 97). Mouffe does attend the question in more detail and I will turn to this shortly. However, even then, she primarily 'envisages citizenship as a form of political identity' (1992: 30) that is subsumed by the democratic project. Despite this absence, in both Laclau and Derrida's thought the subject has a central role to play in processes of democratisation. If the subject of liberal democracy is the citizen, who, then, is the subject of radical democracy? Utilising the framework of citizenship as method, I argue that the tension between citizenship and democracy can be mobilised through practices of rights-claiming and out of this formulation the irregular migrant emerges as the archetypal subject of radical democracy. To substantiate this argument, I will investigate how the migrant-led youth movement Let Us Learn enact themselves as citizens in order to expose the constitutive aporias of democratic democracy.

## Citizenship and Radical Democracy

While Laclau tends not address the question of citizenship, Mouffe, his long term collaborator, considers it on a number of occasions (2009; 1992a; 2018). She proposes an active conception of citizenship that is 'governed by the ethico-political principles of the liberal democratic *politeia*: liberty and equality for all' (2018: 66). A key element of her approach to citizenship is its anti-essentialist component. Rather than linking citizenship to a conception of national origin, she asks '[w]hat kind of identity should a project of 'radical and plural democracy' aim at constructing?' Concluding that '[s]uch a project requires the creation of new political identities in terms of radical democratic citizens' (1992: 28). Mouffe's anti-essentialist exploration of the question of citizenship in radical democratic thought contains many promising insights. However, there are also some problematic elements. Of concern here is how Mouffe subordinates citizenship in relation to the project of radical democracy and the populist articulation of an antagonistic frontier.

In *The Return of the Political* (2005), Mouffe is concerned with developing an account of citizenship that navigates between the liberal and republican versions: republican citizenship subsumes the identity of the individual under that of the common good of the community; on the other hand, liberalism reduces the citizen to a legal status, where the citizen is an individual bearer of rights, with no conception of the common good. Mouffe attempts to reconcile the positive dimensions of liberal and republican citizenship. She does this by claiming that citizenship is best understood as a grammar of conduct, whereby to act as a citizen is to be 'governed by the extension of the ethico-political principles of liberty and equality' (2018: 66). This means that citizenship is not predicated on an essentialist logic because 'those principles are open to many competing interpretations, [so] one has to acknowledge that a conclusive political community can never be realized' (Mouffe 1992: 30). Citizenship is not a status but 'a form of political identity that is created through identification with the political principles of modern pluralist democracy, i.e., the assertion of liberty and equality for all' (Mouffe 2018: 66). This means that citizenship is not in opposition to her conception of populism but serves as a locus around which a populist construction of the people might be organised.

Mouffe gives numerous examples of how populist movements articulate new forms of radical democratic citizenship, such as Podemos in Spain, Jean-Luc Mélenchon in France and Jeremy Corbyn's Labour Party in the United Kingdom. In each case there is the construction of a frontier between the people and the elites. Such as the Labour Party's slogan 'for the many, not the few' or Podemos's which juxtaposes the people to the establishment elites (la 'casta') (Ibid: 20-21). She argues that because a left populist notion of the people is a discursive construct their actions are governed by principles of freedom and equality, then there is the potential to build 'chains of equivalences' with actors who might otherwise be marginalised, such as irregular migrants. Yet, as I alluded to earlier, there is a problem: as Paolo Gerbaudo puts it,

when encased in national space the [populist] discourse of citizenship might be used by other actors as a means of exclusion towards migrants and other non-citizens, as seen for example in Donald Trump's discourse and in the Brexit referendum campaign' (2017: 242).

While Mouffe's radical democratic project pays lip service to the struggles of irregular migrants, a populist politics often ends up entrenching a problematic discourse. This is not only evident in the cases of Brexit and Trump but also in France, where Marine Le Pen's National Front outpolled the left populist leader Jean-Luc Mélenchon, or the collective success of the Five Star Movement and Matteo Salvini's Northern League in Italy – although this coalition has recently fallen apart.

So what is the source of this problem? At a theoretical level, it concerns Mouffe's understanding of how the ethico-political principles of equality and liberty relate to the subject of radical democracy: the people. There is an ambiguity in how she conceptualises the ethico-political which is manifest in her language: at times liberty and equality are principles that the 'people' identify with to become radical democratic citizens; whereas at other times they 'govern' conduct (2018; 2009). What is clear is that ethico-political principles found the people – never absolutely, of course. It is this reference to the people that leads theorists such as Müller to say that populism has a

pluralism problem, because populism ‘promises to make good on democracy’s highest ideals (“Let the people rule!”)... where the danger comes, in other words, from within the democratic world [and] the end result is a form of politics that is blatantly antidemocratic’ (2017: 6). Coming from a liberal democratic perspective, Müller is concerned that unrestrained representations of the people negate a commitment to pluralism. To a certain degree, his criticism is wide of the mark. Mouffe goes to great lengths to demonstrate that the people is not an empirical referent but a discursive surface. The populist articulation of the people is not a unity but constituted through a variety of subject positions, such as race, class and gender amongst many others, and these differences are not erased. As Thomassen puts it, the strength of populism is that it

shows the representational character of the people of democracy, populism is indeed a permanent shadow of democracy. But it is a shadow that does not so much threaten democracy as disclose how it works. The risk of anti-pluralism associated with populism is not specific to populism, but a risk of any discourse, including democratic ones. (Thomassen 2019: 343)

Despite this, the fact that a populist logic has been more successfully implemented by right-wing projects, such as Donald Trump or Brexit, ought to give Mouffe pause for thought.<sup>84</sup> While I agree with Thomassen that disclosing the political logic by which the people is constituted is a strength, the problem is that it is almost entirely a theoretical move that is not matched in practice. A populist project articulates a political frontier without providing a reflexive mechanism through which such political constructions can be contested. What left populists fail to see is that, to some, the construction of a frontier might feel like a wall.

The way out of this problem is through an alternate conception of the ethico-political, which also entails a rethinking of the radical democratic subject. In the previous section I laid the groundwork for this new approach by developing an understanding of democracy as *structure* and *ethos*. So how

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<sup>84</sup> This is a point Ben Pitcher (2019) makes when he looks at how a populist politics mobilised racism during the 2016 Brexit referendum.

do they differ? As indicated above, for Mouffe one becomes a radical democratic citizen through their identification with ethico-political principles, and this is how a conception of the 'people' is founded (2018; 2005). The irony here is that as a theorist so committed to prioritising the political over the ethical, she inadvertently reproduces an ethicist logic. The problem is that in suggesting that the ethico-political 'governs' our conduct as citizens Mouffe engages in a theory-application approach to ethics and politics, where there is an assumption that 'one can inform or act as a foundation for the other' (Fagan 2013: 7), which can have profoundly de-politicising tendencies. We can see this in the case of a populist politics which tend to erase pluralism. In contrast, the conception of democracy I set out above *is* ethico-political: democratic citizenship is constitutive of the freedom and equality that Mouffe wants it to be based upon. What this introduces, as Vassilios Paipais suggests, is 'the possibility of a post-foundational politics faithful both to the experience of order and continuity and to that of temporality and change' (2015: 219). This is where my approach departs from Mouffe's conception of radical democracy: because democratic citizenship is founded upon an ethico-political aporia I argue that this can be mobilised through a political practice of rights-claiming by irregular migrants.

### **Citizenship as Method: Practicing radical democracy**

The problem with a left populism is that it tends to fetishise the idea of the frontier at the expense of developing a sustainably reflexive political practice. Utilising the framework of citizenship as method, I propose a practice of rights-claiming that works through a deconstructive negotiation of democratic citizenship. The difference is that populism *locates*, citizenship as method *dislocates*: underpinned by an ontological account of antagonism, a left populism draws a frontier that locates the people; whereas my approach mobilises the constitutive (ethico-political) aporias of democratic citizenship through practices of rights-claiming that both imply and exclude order. A deconstructive approach, as Thomson observes, is not 'strictly incompatible with the project of radical democracy, but... overflows it and exceeds it' (Thomson 2007: 50). With these differences in mind, I want to return to the question of the subject of democracy. In the contemporary moment, it is the citizen but the consequences of this are more far reaching than tends to be

realised. Contra the liberal position, citizenship is not just a status; nor is it simply a practice. Following the argument made by theorists of acts, citizenship is best understood as a form of political subjectivity (Isin 2012a; Isin and Nielsen 2008; McNevin 2011). It is worth recapping what it means to understand citizenship as political subjectivity. Theorists such as Foucault are interested in how ethical or moral subjects come into being. As Isin observes, 'what makes subjectivity political is not only that it is creative, inventive, and autonomous but that it also articulates an injustice and demands or claims its redress' (2012a: 109). Consequently, to approach citizenship as political subjectivity is to be interested in the 'creative, inventive and autonomous' acts through which subjects substantively constitute themselves as citizens (Ibid: 109).

The case of Let Us Learn is a particularly good example because of how the group's campaigners use the apparatus of the state to constitute themselves as citizens. Key to this is the role that education plays in the formation of the (democratic) citizen. In a paper on the subject of citizenship and education, the political theorist Will Kymlicka observes that '[i]t is widely accepted that a basic task of schooling is to prepare each new generation for their responsibilities as citizens' (1999: 1).<sup>85</sup> The manner in which Kymlicka joins together ideas of the citizen and their responsibilities suggest the role that education plays in not just producing the citizen as a subject but an ethical subject. This reading is supported when Kymlicka goes on to emphasise that education is not just imperative to the subject formation of citizens, but citizens of a very specific kind: the democratic citizen. He states that

education is not just a matter of learning the basic facts about the institutions and procedures of political life; it also involves acquiring a range of dispositions, virtues, and loyalties which are intimately bound up with the practice of democratic citizenship (Ibid: 1).

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<sup>85</sup> It is worth noting that Foucault offers a somewhat different and altogether less positive account of the role that education plays in the formation of the subject. He states that schools serve the same social functions as prison and mental institutions - to define, classify, control, and regulate people (Foucault 1991a). I would suggest that this does not undermine my argument but supports it: if institutions, such as schools, govern the conduct of conduct, then Let Us Learn's rights-claiming is an example of counter-conduct.

Education does not just produce the citizen subject; rather, in its ideal form at least, education is a process of subject formation that contours citizens with a democratic ethos (Norval 2004). However, such processes are not innately transformational. What makes them radical is how Let Us Learn's campaigners perform an 'im-possible' citizenship as part of a rights-claiming practice.

Let Us Learn's approach is informed by an early meeting with London-based community organiser Carlos Saavedra. He told the group to make use of their own narratives, saying 'our stories were our most powerful and motivating asset' (Let Us Learn). They adopt and invert narratives of educational aspiration by aligning their own stories with the rhetoric of the good citizen in order to reveal the contradictions in government policy. For Let Us Learn, citizenship is a method of rights-claiming and the analytic distinction between tactics and strategy helps frame their actions. At the most fundamental level, they *tactically* mobilise the aporias of rights, democracy and citizenship. The Universal Declaration of Human Rights states that 'higher education shall be equally accessible to all on the basis of merit' (1948). By emphasising their excellent records in education, both academically and in extra-curricular roles, they demonstrate that they are the subjects of rights in substance, if not law. Let Us Learn also engage in an immanent mode of rights-claiming that works by tactically deploying the United Kingdom's understanding of democratic citizenship against itself to reveal its contradictions. Let Us Learn's campaigners invoke the government's own rhetoric around education and citizenship to show how it is in contradiction with the particular laws that prohibit them from accessing tuition fees for higher education. This invocation reveals that they are, in their own words, 'young, gifted and blocked'. In so doing, the group's activists inhabit what Thomson describes as an 'internal dehiscence in the concept and ideal of democracy [and citizenship] itself' (Thomson 2007: 49): the gap between democracy's promise and its fulfilment. This is the opportunity for radical democratic theory that comes with understanding citizenship as political subjectivity: democracy is predicated on the existence of equal citizens acting responsibly. When those who are responsible but not equal highlight their inequality, they challenge democracy according to its own logic.

The tension between citizenship and democracy is a vehicle for transformation because citizenship does not just name the democratic subject but calls it into question. It is for precisely this reason that I propose the subject of radical democracy is the *rights-claiming irregular migrant*. To clarify my argument, at the current historical juncture I approach the irregular migrant as an archetype of the analytic figure of the non-citizen. Here, the non-citizen does not refer to an absolute other to citizenship; rather, according to Tambakaki, '[n]oncitizenship captures the journey to citizenship, the quest to be included in citizenship' (2015: 933).<sup>86</sup> What makes rights-claiming migrants, such as Let Us Learn, the subject(s) of radical democracy is not just that they *reveal* the constitutive aporias of democratic citizenship but that they also *mobilise* them, as part of a counter-hegemonic political practice, which leads on to the question of strategy.

At a strategic level, Let Us Learn aims to do more than just negotiate access to higher education for its members, it also contests the fundamentally unjust articulation of citizenship in the United Kingdom. In their own words, in the battle for citizenship their aim is not to climb over the wall but to 'break it down'. This comes across in the group's responses to a House of Lords consultation on Citizenship and Civic Participation. They said that '[t]o us, citizenship is a complicated concept. In some ways, legal citizenship is our Holy Grail'. (Let Us Learn 2017). Yet, at the same time, they also recognise that because of the difficulties in obtaining it and the damage exclusion does 'the "Holy Grail" may in the end be tainted' (Ibid). While they aspire to citizenship, they also wish to transform it, noting that '[i]f it were easier to obtain, we would feel differently' (Ibid). So, despite the success of its court case, the group continued to campaign, expanding their campaign into new areas. As Makinde writes, '[a]lthough Let Us Learn started as an educational campaign in 2014, it has since recognised that the hurdles young migrants face go beyond education. We have also started to voice our concerns about the impact of the hostile environment' (2019: 121-22). In so doing, they formed part of a vibrant ecology of rights-based movements in the United Kingdom committed to contesting and dismantling the hostile environment through

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<sup>86</sup> Tambakaki is not making a positive argument about the non-citizen here. She worries that the telic nature of non-citizenship might allow for access to citizenship for those excluded but is fundamentally depoliticising because it re-enforces the dominate logic of citizenship. This is a problem I raised in chapter two and will address more fully in the final chapter.

both direct action and legal and democratic channels.<sup>87</sup> Contesting the hostile environment forms chains of equivalences across a variety of subject positions, including citizens and non-citizens. For example, while migrant-led Let Us learn were contesting their exclusion from higher education, the Joint Council for the Welfare of Immigrants, a civil society-based charity, were successfully challenging the government's 'right to rent scheme' in court (Liberty 2019: 33). However, the equivalences formed across subject positions do not articulate a new counter-hegemonic frontier but contest the terms in which citizenship is currently constructed. As I argued in the previous chapter, because the hostile environment articulates a particularly exclusionary form of citizenship then the counter-hegemonic interventions that attempt to dismantle it also start to redefine the meaning and contents of citizenship in the United Kingdom.

To be clear, I am not arguing that Let Us Learn and all of those who contest the hostile environment have been wholly successful, it remains in place and the struggle is ongoing. Instead, my aim was to delineate an alternate framework for the practice of radical democratic citizenship, in the form of rights-claiming, that does not reproduce the problematic elements of a populist discourse. My argument is predicated on a deconstructive approach to democracy that highlights not just its structure, *qua* hegemony, but also its ethos – the indissociability of structure and ethos. I agree with Norval that democratic decisions contour its subjects. Where my own approach diverges is that, in rethinking the subject of radical democracy, I am not just interested in how openness to the Other is inscribed in democratic subjects; instead, to approach citizenship as subjectivity highlights democracy's openness *through* the Other. If the populist articulation of 'the people' contains a hidden structural bias against migrants then a deconstructive approach reverses this problem: the rights-claiming migrant is the subject of radical democracy because they challenge and displace the existing order from within.

Finally, it is possible to summarise the two contrasting visions of radical democratic activity: the *left populist project* aims at a new articulation of 'the "people" against the "oligarchy"' (Mouffe 2018: 79) by drawing a we/they frontier; whereas *citizenship as method* proposes a practice of rights-claiming

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<sup>87</sup> The human rights group Liberty (2019) have produced a report documenting the variety of different actors contesting the hostile environment, both through formal channels and direct action.

that foregrounds the irregular migrant as the agent of democratic renewal. It is the difference between, on the one hand, an approach that is rooted in an ontological understanding of antagonism and seeks to *locate* a new hegemonic articulation and, on the other hand, one that foregrounds a *dislocatory* experience through practices of rights-claiming that insist on both *order* and *change*. By starting from a different conception of how the ethico-political is mobilised and rethinking the question of the subject, I suggest that citizenship as method sets out the kind of reflexive political practice a truly radical democracy requires. In keeping with a traditional radical democratic project, citizenship as method contests existing hegemonic forms and attempts to bring into being new articulations; however, it does not do so by reproducing the same exclusionary logic but by making us think again about who counts as a citizen and what counts as citizenship. The difference is that Mouffe wants to fill the same form with new content; whereas citizenship as method rethinks the very terms on which democratic citizenship is conceived by advocating a new subject of radical democracy (the irregular migrant) and a different set of practices (rights-claiming).

## Conclusion

This chapter explored the proposition that the antinomy between citizenship and democracy is the motor for the transformation of the political (Balibar, 2015) and that the subject proper to radical democracy is the irregular migrant. My point of departure was Laclau and Mouffe's project of radical democracy. Although the logic of hegemony, as a theory of the decision, is an important addition to a deconstructive approach, I argued that their account of radical democracy contains some depoliticising tendencies: a purely structural theory of democracy, combined with a populist articulation of the people, reproduces a structural tendency to discriminate against migrants. In keeping with the deconstructive approach deployed throughout this project, I argued that there is more to democracy than just the institutionalisation of contingency. Adopting a deconstructive position, there is a constitutive aporia where 'democracy... is necessarily always informed by democracy to come and that, in fact, the aporetic structure of democracy to come is only ever played out in actual attempts at democracy' (Fagan 2013: 13). The final section of the chapter

put this understanding of democracy to work. Utilising insights from the field of citizenship studies, I argued for the importance of theorising citizenship and democracy in conjunction. Contra Mouffe, citizenship is not subordinated to democracy as practice of contestation but is that which *contests*. As the example of Let Us Learn illustrates, the subject of radical democracy does not close the gap between the ideal of democracy and its reality but internally displaces the democratic order through the claims it makes possible. By bringing radical democracy into conversation with the field of citizenship studies, I suggest that there is a mutually beneficial relationship: democracy provides both a structure and *ethos* for the radical contestation of rightlessness and approaching citizenship as subjectivity foregrounds the irregular migrant as the political subject of democratic renewal precisely because they perform the constitutive aporia(s) of democracy.

## 8. Negotiating Citizenship

*'I prefer the word "negotiation" to more noble words... there is always something about negotiation that is a little dirty, that gets one's hands dirty.*

(Derrida 2002: 13)

The problem with citizenship, as Sanjay Seth puts it, is that it is 'fully adequate nowhere' (Seth 2009: 337). Citizenship is both a solution and a problem. It cannot be grasped wholly as an institution, nor a practice. Citizenship is not universal but neither is it purely particular. It is at once ethical and political and exists somewhere on the limit between transcendence and immanence. These are the difficulties one confronts when trying to theorise citizenship. Citizenship as method is an attempt to come to terms with its many aporias without thinking they can be resolved. In this respect, it is not a theory of citizenship in a conventional sense; yet nor does it give up on trying to theorise citizenship. Instead, citizenship as method approaches citizenship in its dynamic and liminal form, as a negotiation between categories, such as universal and particular, ethics and politics, and status and practice. In a sense, citizenship as method is itself 'fully adequate nowhere' and that might be its strength.

Despite the difficulties that come with theorising citizenship, there is no shying away from the task at hand. Citizenship as method is not a neutral, or passive, activity but an intervention into citizenship, which has been the purpose of this thesis all along. The aim has been to rethink the aporias of rights, manifest in the material and political problem of rightlessness, by developing a new conceptual account of citizenship. Adopting a post-foundational theoretical framework, my primary argument has been that because citizenship is constitutive of rights and because those same rights can be mobilised to challenge the borders of citizenship, then the relationship between citizenship and universal rights needs to be thought in non-oppositional terms. In developing this argument, I have charted a course between approaches to citizenship that were overdetermined by its legal and institutional form and those that tended to overemphasise its ruptural and active dimension.

In this final chapter, I pull the different threads of my argument back together in order to provide a conceptual account of citizenship as a vehicle for social transformation. The aim of the current chapter is to clearly identify where and how this thesis contributes to the field of citizenship studies. I do this by sketching out seven propositions for approaching and understanding citizenship as method. I then turn to the example of human rights violations along the Southern border of the United States, in particular at the Clint Immigration facility in Texas, to illustrate how this new approach might help to navigate contestations over citizenship and rights. I argue that citizenship as method provides a rights-claiming framework that helps think through the contestation of dominant power in ways that do not just address immediate forms of injustice but also might open up the horizon of citizenship to new forms of political belonging.

To develop this argument, the current chapter is organised in two parts. The first section demonstrates how this thesis has broadened and deepened the range of analysis in the field of citizenship critical citizenship studies and its implications through seven propositions for approaching citizenship as method. The second section turns to the example of human rights violations caused by the United States immigration policies, specifically focussing on the Clint Immigration Facility in Texas. I juxtapose two different rights-based responses to the problem: one calls for the expansion of the migrant detention infrastructure in order to provide safe and sanitary conditions; the second is the movement to 'abolish ICE' (Immigration and Customs Enforcement), which denies the legitimacy of detention centres, such as Clint, altogether. On my reading, the move to abolish ICE does not just address the immediate problem but helps to think through how contestations over citizenship and rights might pave the way for more radical forms of political belonging in the future.

## **8.1 Citizenship as Method: Negotiating the Im-possible**

Arising out of a critical engagement with the field of citizenship studies, most notably the acts of citizenship literature, this thesis proposed the concept of

citizenship as method. Citizenship as method is a *deconstructive negotiation of citizenship*. To put it less succinctly but in more precise theoretical terms, it is an ethico-political negotiation of a hegemonically articulated context: citizenship. As discussed previously, although citizenship as method is deconstructive, it is not purely Derridean. The analytic framework deployed throughout this thesis depends upon post-foundational understandings of discourse and hegemony. A post-foundational approach does not just foreground the constitutive nature of power but also describes how the contemporary context (modern citizenship) is discursively articulated around key nodal points: rights, law and democracy. The question is, how does one negotiate this context? My argument has been, through strategic practices of rights-claiming that tactically mobilise the aporias of rights. I use the term negotiation over more 'noble' words because it conveys the 'to-and-fro between two positions, two places, two choices. One must always go from one to the other[...] negotiation is the impossibility of establishing oneself anywhere' (Derrida and Rottenberg 2002: 12). There is a necessary movement and constant (re)negotiation between the universal and the particular, the ethical and the political but also between civil society and the state that breaks with any singular conception of the event.

Utilising the framework of negotiation, citizenship as method contributes to the field of citizenship studies through a broadening and deepening: first, it 'broadens' the field by shifting away from a big bang theory of the act and towards an analysis of citizenship as an ongoing political process; second and relatedly, is a 'deepening' that arises as a result of the necessity of rethinking the site(s) of citizenship, to include both civil society and the state. While a 'broadening' and 'deepening' represent a relatively modest shift in approach, the consequences are far-reaching. I want to draw out some of these 'consequences' now in the form of seven propositions that characterise citizenship as method as a deconstructive negotiation.

*Proposition One:* Citizenship as Method is an impure process. Citizenship as method is 'impure' because there is no moment of pure transcendence and it is a 'process' because it does not offer a utopian vision for how citizenship can or should be. This formulation can be phrased more precisely within the terms of this project: citizenship as method is a framework for negotiating the dual

(ethico-political) imperative of realising universal rights in a political community they necessarily exceed. In this sense, the practices of rights-claiming that citizenship as method proposes are impure because there is no moment of absolute transcendence. An unconditional order of rights is always conditioned by a particular order of citizenship. This is why, negotiation is not a second best, or a relinquishing of an ideal, because '[o]ne does not negotiate between exchangeable and negotiable things. Rather, one negotiates by engaging the non-negotiable in negotiation (Ibid:13). The rights-claiming framework adumbrated across chapters four and five describes precisely this practice. Rejecting foundationalist approaches to rights and citizenship, I argued that rights-claiming is a practice of challenging and displacing a given order of citizenship from within, through the ethical claims it authorises but remain unsecured. This is a dynamic that has been visible throughout this project: for example, both Cedric Herrou and the *Sans-papiers* framed their demands within the French constitutional idiom and Let Us Learn (LUL) position themselves as ideal democratic subjects in relation to the apparatus of the British state. In each case, the force of their claim(s) was derived from an ethical principle embedded in the community itself.

If rights will always exceed the particular communities in which they are realised, then negotiation is necessarily also an ongoing 'process' because there can be no final form that citizenship can take. Accepting that there is no normative blueprint for citizenship entails rethinking the terms of the problem. In a recent article on the question of dealing with irregular migration, McNevin asks '[w]hat if, rather than seeking solutions, we learned to live with 'the problem?' (2017: 256). On the face of it, this does not seem like a satisfactory answer to the problem of rightlessness that this thesis addresses. However, McNevin is not advocating the maintenance of the status quo. Her point is that any approach to the struggles over citizenship must start with an acknowledgment of the political dimension of the problem: the fact that 'different justice claims frequently sit in tension with each other and do not lend themselves to obvious reconciliation' (Ibid: 256). This is not to give up on the fight for justice but to acknowledge that any final solution to the problem of citizenship is not just impossible but also undesirable. We can see this in the case of Let Us Learn (LUL), discussed in chapter seven. LUL's campaigners say that for them citizenship is 'Holy Grail'; but at the same time acknowledge

that the “Holy Grail” may in the end be tainted’. These are the kind of ethico-political negotiations that citizenship as method entails. It is a case of making a virtue out of impurity, where impurity means the ‘contamination of pure things, naturally, in the name of purity’ (Derrida and Rottenberg 2002: 14). Negotiation does not mean to sit on the fence. Nor does it require the compromise of all values. Instead, it is the acknowledgment that all theory and politics takes place upon a terrain that is already given and that needs to be navigated tactically and strategically, which leads on to the second proposition.

*Proposition Two: Citizenship as Method is not Singular.* To approach citizenship as method in terms of a process is not simply to reject the idea of a final solution to the problem but also to break with an understanding of the singularity of the event. The problem with acts of citizenship is that, informed by a performative framework, it relies too heavily on iterability as an ontological explanation for change. The result being that the act becomes the primary object of concern. To counter this tendency, citizenship as method *broadens* the range of analysis to include the social and political conditions that make counter-hegemonic politics possible. As discussed in chapter three, this involves thinking the event not in terms of a singularity but as an ‘unfolding process’ (Marchart 2007: 20). From a methodological standpoint, this approach is informed by the lessons learnt from the eventalisation of Rosa Parks’ act of defiance. What eventalisation brings to the fore is the fact that the possibility of the event – or counter-hegemonic resignification, to put it in performative terms – resides not simply in the breaking of the traditional scripts of citizenship but in the social and political conditions that both constrain and enable action. As a methodological and analytic device, the eventalisation of acts has an important futural dimension in this thesis. As Lloyd observes, ‘by filling out some of the details concerning Rosa Parks’ actions, it is possible to begin to sketch, in non-prescriptive fashion, what factors *might* be needed for successful defiance [emphasis original]’ (Lloyd 2007: 134). By broadening the range of analysis, a deconstructive negotiation moves beyond the realm of pure theory and becomes a question of how to achieve particular effects from within certain contexts. Here citizenship as method necessitates going beyond a Derridean understanding of negotiation,

where both Laclau and Mouffe's concept of hegemony and Foucault's distinction between tactics and strategy are important resources.

First, citizenship as method is not a blind process of negotiations but entails an analysis of the discursive articulation of citizenship in the present moment in order to understand how it can be challenged and re-articulated. For example, how citizenship is articulated around certain nodal points, such as rights, law and democracy and, as such, how these represent key sites of analysis and intervention. Second, citizenship as method provides a set of resources that help to negotiate this context: a rights-claiming framework that distinguishes between tactics and strategy. So, by tactics I mean a rights-claiming practice that mobilises the aporias of rights in order to make forceful claims; whereas the question of strategy arises out of a broader analytic of power in order to understand the multiple sites and scales at which citizenship can be contested and resignified. In this regard, strategy is directly informed by the eventalisation of prior acts. We can see how this works in the case of the *Sans-papiers*, who were not happy to simply contest their own exclusion and, thus, potentially re-enforce the legitimacy of the 'master discourse' that defines the problem in the first place. Instead, they wanted to resignify the meaning of French citizenship itself by demanding changes in the law and by claiming new forms of rights that were not recognised in current human rights charters and treaties. While the struggle for migrant rights in France and across the globe is an ongoing one, citizenship as method starts to build a non-prescriptive framework for navigating the present, in light of the past and with a view to the future.

*Proposition Three: Citizenship as Method Negotiates with the State.* Citizenship as method *deepens* the field of citizenship studies through a negotiation with citizenship in its institutional form. This process of negotiation is structured by a double bind, caught between 'affirmation' (the unconditional call for rights) and 'position' (the institutionalisation of conditional rights). For Derrida, negotiation necessarily 'takes place between affirmation and position, because the position threatens the affirmation. That is to say that in itself institutionalization in its very success threatens the movement of unconditional affirmation. And yet this needs to happen' (2002: 25). In a sense what Derrida is describing here is the very logic of the right to have rights,

where there is no possibility of turning away from citizenship in the name of the universal. For anyone interested in rights and justice (affirmation), inscribed in the structure of their promise is a demand to be fulfilled, which entails a negotiation with the institutions of citizenship (position).

The inclusion of the state as a key area of analysis marks a central point of divergence between this thesis and the field of critical citizenship studies. In shifting the object of study from legal status to acts, theorists of acts of citizenship move away from state-sanctioned forms of citizenship to an investigation of 'acts' that are not only not founded in law but might even entail breaking the law. While the state and its institutions are not formally excluded from their analysis, this remains a blind spot in the literature. As discussed in chapter three, this omission reflects a tendency in performative approaches to politics to view the state as a hindrance to radical politics (Lloyd 2009: 44). Implicit in a performative account of citizenship is the assumption that, while individuals and groups can break with pre-existing scripts of citizenship through their deeds and resignify its meaning, citizenship at the level of state speech is not so amenable to resignification. Yet, in *Signature Event Context* (1988) Derrida makes it clear that iterability is a general characteristic of all forms of identity and language, so state speech must also be open to resignification. The analysis undertaken across chapters six and seven of this thesis, as well as the eventalisation of Rosa Parks' act, have sought to prove this point. In regard to citizenship, my aim was to investigate both the opportunities and threats legal and democratic institutions pose to the resignification of state speech and how that might create new opportunities for action across civil society. As the Civil Rights movement demonstrates, while both litigation and voting were incapable of delivering racial justice alone, they were an integral part of how the movement's counter-hegemonic politics - consider the importance of *Morgan v. Commonwealth of Virginia* or the 1964 voter registration drive in Mississippi. Similarly, while Herrou's civil disobedience broke particular statutes, his ability to challenge and rearticulate how the constitutional principle of fraternity is to be read opened up a new space for humanitarian action in civil society. Consequently, any approach to citizenship must view the state as a necessary site of intervention and acknowledge the important role that the state and state

speech play in shaping citizenship practices in ways that are both disabling and enabling.

*Proposition Four:* Citizenship as Method mobilises aporias as generative sites of critique. Building on the previous proposition, I argue that the state is not simply a necessary site of radical politics but that it is also a generative site of critique. Because institutions represent the (only ever partial) fulfilment of rights, justice and democracy, then they (institutions) are also generative of new meanings. In chapters six and seven I sought to demonstrate how law and democracy might each authorise new acts, actions and actors. Consider how Cedric Herrou defended his acts of civil disobedience by mobilising the distinction between law and justice; or how Let Us Learn strategically deployed their educational records to appear as idealised democratic citizens. In both cases, law and democracy are structured by an aporia between their unconditional promise (justice and democracy-to-come) and their conditional formations. Through practices of rights-claiming, Herrou and LUL mobilised these aporias, turning them into generative sites, bringing into being new political subjects and authorising new forms of rights. This is the *generative potential of citizenship*: a 'potential' that is made possible precisely because at a prior moment in history universal rights were given particular form by the state. Formulated differently, because rights-claiming is best understood as a performative practice and the force of the performative is necessarily derived from a constative, then the force of the rights claims made by Herrou or LUL is derived from the fact that previous iterations of rights were given a codified form by the state.

Citizenship in its institutional form should be seen as both disabling and enabling: disabling because without a doubt state power has a tendency towards exclusion and oppression, as the primary problem around which this project is organised; however, because contemporary citizenship enshrines universal rights and is organised around the institutional features of law and democracy then it is also a generative site of critique, remaining nominally open to the rights claims of others. For this reason, to direct the struggle for migrant rights through the prism of citizenship is not to reduce the radicality of their claims to old forms and models whose authority is necessarily given and unshakeable – as is the case with Benhabib's concept of democratic

iterations, for example. Instead, it is to open up the question of political belonging to a wider array of rights that do not just transform citizenship in its current form but also point to an open future, a horizon not yet in view, of new rights-claims and forms of justice not yet imaginable. Citizenship as method does not approach aporias (non-passages) as insurmountable hurdles but as sites at which new paths must be forged from impure resources.

*Proposition Five:* Citizenship as Method is a liminal condition. The sites of transformational citizenship come into being through a negotiation between state and civil society. What I mean by 'sites' is not immediately apparent and, thus, requires some clarification. Isin addresses this question himself, offering an understanding of sites that, while spatial, are not merely about specific locations. Instead, sites have symbolic and material value, due to the 'contestation or struggle around which certain issues, interests, stakes as well as themes, concepts and objects assemble' (2012a: 133). In this sense, a site is 'not only a physical place but also an imaginary space that evokes resonant images' (Ibid: 133). While not inherently problematic taken on its own, the sites at which citizenship Isin's account of sites represents a general privileging of civil society as the domain of radical politics. For example, of the 20 different examples of acts that Isin gives in *Citizens Without Frontiers*, all of them take place in civil society. In contrast, my aim here is not simply to demonstrate that the state can also be a site of transformational politics. I propose that the sites of transformational citizenship are always arise out of a negotiation between the state and civil society. Consequently, it is necessary to understand the state and civil society as *interdependent* and *relational*.

A good example of this process is how the activists in the civil rights movement linked together litigation with direct action to dismantle the Jim Crow laws. Irene Morgan's arrest in 1944 presented the NAACP with an opportunity to challenge the Jim Crow laws in the courtroom, the verdict then provided the foundation for a series of direct actions, most notably the Freedom Riders, who challenged the failure to enforce the Morgan decision. The culmination was the 1964 Civil Rights Act, some 20 years after Morgan's arrest, that finally marked the end of the Jim Crow system. As this example shows, while both the state and civil society were key arenas of struggle, neither were sufficient alone. Not only were both sites necessary, they were

interdependent: The Freedom Riders' action was a direct result of the NAACP's court case, which in turn was only possible because of Irene Morgan's civil disobedience with the ultimate legislative success of the political process coming in the form of the 1964 Civil Rights Act. In the case of the immigrant rights movement, there is a similar trajectory. An example would be Let Us Learn. The group challenged their exclusion from higher education in the courtroom and won. However, as a group they continue to campaign through both governmental and nongovernmental channels, building networks amongst young migrants, undertaking new campaigns and running workshops to develop new young migrant leaders. Taken together with its generative capacity, what this consideration of the site(s) of citizenship reveals is that citizenship is necessarily a *liminal condition*. Citizenship is neither defined by its institutional and legal existence, nor forms of action that take place in the public sphere. For its universal promise to be realised, citizenship requires forms of mobilisation that exceed its institutions. This is not a moment of pure excess but a form of liminality that arises out of the negotiation between affirmation and position, universal and particular, and civil society and the state.

*Proposition Six:* Citizenship as Method is a theory of citizenship that starts from the limit. Having said in the introduction to this chapter that citizenship as method is not a theory, at least in the conventional sense, I am going to clarify what I mean. Citizenship as method is not a normative theory but a theoretical intervention into the practices that constitute citizenship; or perhaps a theory of citizenship that operates in recognition of the limits of what is theorisable. It is a dynamic account of citizenship that arises out of the interplay of subject and object, and theory and practice. So how then does it constitute a theory of citizenship in any meaningful way?

*First,* citizenship as method is a theory of citizenship practices: because a post-foundational theorisation of citizenship is structured by an ethico-political aporia, citizenship is not just practiced by *exercising* rights and duties but also by *claiming* rights. Or to put it differently, because citizenship is constitutive of rights and these rights call its borders into question, then rights-claiming practices are the substantive content of citizenship. Therefore, in delineating a rights-claiming framework across chapters four and five, this

thesis proposes a substantive, although not prescriptive, theory of citizenship practices. *Second*, citizenship as method is a theory of the constitution of citizenship. In his chapter 'Performative Citizenship', Isin states that he wants to 'focus our attention on the actions of actors, on how people creatively perform citizenship rather than following a script. This allows us to appreciate that how people perform citizenship plays an important role in contesting and constructing citizenship' (2017: 501). This is why acts of citizenship is not just an analytic method but a theory of citizenship, because citizenship as an object is constituted through the multiple struggles over its contents and meaning. For Isin and other theorists of acts, this means the act becomes the object of analysis because it is through 'acts' that citizenship comes into being. In contrast, my analysis proposes to expand the object(s) of analysis, through a broadening and a deepening, in order to better grasp the political practices that constitute citizenship. By rethinking the relationship between state and civil society and breaking with the singularity of the act, citizenship as method offers a refined and more accurate framework for theorising the constitution of citizenship through the struggles that shape its meaning.

*Proposition Seven:* Citizenship as Method theorises an unstable object because it links the 'what' and the 'how' of political practices. What makes citizenship so epistemically unstable as an object is that these same processes that constitute it also open it up to new formulations. Arising out of her analysis of some of the limitations of Butler's theory of performativity, Lloyd makes the analytically useful suggestion to differentiate the 'what' from the 'how' of radical political demands. There is a difference 'between the recitation of demands and the recitation of the mechanisms through which those demands are articulated' (2007: 138). For example, persistent feature of the immigrant rights movement, taking place across multiple sites, is the recycling of historical mechanisms through which they make their demand, with a 'full awareness of the expressive value of their legacy' (Abrams 2014: 7). This is a practice which has been present in almost all of the illustrative examples used in this project. For example, how refugees in Calais used hunger strikes as a form of protest or the *Sans-papiers*' mobilised the language of the French Revolution to frame their demands. Citizenship is an unstable object of analysis because it conjoins the 'what' and the 'how' of radical political

practice: the struggles that define the meaning of citizenship also open it up to new rights-claims and processes of resignification. It is in trying to capture this dimension of citizenship that my own approach runs up against the limits of theory. As stated above, citizenship as method does not reject theory but is 'a *call to practice* that exceeds any theorization [emphasis original]' (Cornell 2017: 202). I propose that this is why the term method is more suitable than theory alone: it is not a rejection of theory but a linking together of knowledge of its object (citizenship) with an account the practices of contestation through which the object is potentially transformed. To approach citizenship as method is not just to acknowledge 'that method[...] is as much about acting on the world as it is about knowing it' (Mezzadra & Neilson, 2013: 17) but also an attempt to think through the back and forth movement, or perhaps 'negotiation', between theory and practice.

The propositions above are not prescriptions for practicing or knowing citizenship but a framework for analysis that refuses to reduce it to a simple object or singular moment. To finish, I want to turn to an example to highlight how citizenship as method, as adumbrated above, helps to navigate a particular political scenario. In so doing, I also respond to the concern voiced by Anne McNevin in chapter two, where she suggests that that framing political demands in terms of citizenship might ultimately foreclose the possibility of new forms of political belonging (2011).

## **8.2 Political Belonging After Citizenship**

The New York Times runs a podcast called *The Daily*. On July 1<sup>st</sup> 2019 it turned its attention to the Clint Immigration Centre in Texas. Clint has become something of a touchstone in the struggle for migrant rights in the United States under President Donald Trump. What makes the Clint facility so controversial is its treatment of migrant children. Clint was designed as a 'forward operating base', where it was only ever meant to hold up to 100 hundred adult men for a few hours while they were processed, before being transferred elsewhere. However, as increased immigration flows ran up against Trump's Zero Tolerance Immigration policy along the United States'

southern border, Clint was transformed into a detainment centre for children. At its height, it housed over 700 migrant children, some of them as young as five years old (Romero et al. 2019). The centre was so overcrowded that one border guard recounted being ordered to take away beds in order to make space in the holding cells and the New York Times reported that '[o]utbreaks of scabies, shingles and chickenpox were spreading among the hundreds of children and adults who were being held in cramped cells' (Ibid). Michael Barbaro, the host of *The Daily*, invited Caitlin Dickerson, the New York Times' national immigration reporter, on to the show to discuss the problems in Clint. Their discussion was oriented around the court case *Flores v. Barr*, which found that in response to the conditions in Flint, young migrant children must be housed in 'safe and sanitary' conditions. Framed around the rights of migrant children, a large part of their conversation and the court case, concerned whether 'safe and sanitary' implied that they should provide soap, toothpaste and toothbrushes for the children. Judge William Fletcher argued that it did (Ibid). Having established the severity of the problem, the conversation turned to how it could be that conditions came to be so bad. Dickerson asks: 'why are children still going into the exact same facilities that they were almost a year ago now? I mean, why hasn't the infrastructure changed?'. (Barbaro and Dickerson n.d.). She complains that, due to limited resources, 'we haven't seen a whole lot of effort put toward expanding facilities' and suggests that the government are wrong not to build more centres out of a worry it will 'encourage more people to come' (Ibid).

Dickerson expresses an understandable concern with the wellbeing of migrant children and her arguments are all framed in the language of rights. Yet somehow she ends up arguing for the expansion of the migrant detention facilities that are the root cause of the violation of so many migrants' rights in the first place. How is it that a concern for rights might inadvertently lead to their violation and how might we avoid such a scenario? Citizenship as method helps us navigate this problem but I want to go further: the example of the Clint immigration facility and the different responses to it also help to think through a problem that has haunted this thesis since it was first raised in chapter two. It is, perhaps, best summed up by Audre Lorde's famous claim that 'the master's tools will never dismantle the master's house' (2018). Theoretically, it finds expression in McNevin's concern not to reduce all rights

claims to citizenship, in order to 'remain open to the possibility of more than what our current conceptual limits allow' (McNevin, 2011: 101). The desire for an open futurity that is not (over)determined by existing models of politics and political belonging is a concern I also share in this thesis. However, my argument has been that citizenship is transformational precisely because it is displaced by the rights-claims it makes possible. So surely McNevin would find that my approach, citizenship as method, is vulnerable to the same criticism. She might well but I suggest that this would be wrong. In fact, I propose that citizenship as method provides a better framework for navigating irregular migrants' struggles over citizenship without closing down the prospect of a more radical future. I will explain how now.

### **The Master's Tools Will Never Dismantle the Master's House?**

McNevin does not reject the framework of acts but tries to develop it further. Arising out of her concern not to close down a more radical future, one of McNevin's main contributions to the literature is to refine the concept of acts by adding a further analytic category (2009; 2011). She identifies three different forms of contestation. The first type are contestations over legal citizenship. While important, they do not fundamentally challenge citizenship as such. The second type concern contestations occurring at the representational level. These are the types of acts theorised by Isin that do not just claim inclusion but challenge the very common sense of who counts as a citizen. While radical, McNevin worries that they might have the tendency to foreclose the possibility of alternate forms of political belonging by re-enforcing the dominant discourse of citizenship. Finally, McNevin proposes her own category of contestation that ruptures the terms of reference upon which our understandings of political belong rest. She suggests that such 'contestations generate new interpretations and articulations of power, agency, community... [and] justice' (McNevin 2009: 166). Consequently, McNevin believes that forms of contestation carried out by irregular migrants should work to open up 'new frontier[s] of the political' (Ibid: 32) precisely because they challenge the spatial frames (the nation-state) through which citizenship is traditionally understood. McNevin's third category of acts suggests the possibility of imagining forms of political belonging that break with citizenship and its historical linkage to the nation-state.

Yet there is also a difficulty here that McNevin is alive to elsewhere. On the one hand, she wants to imagine forms of contestation that go ‘beyond the language of rights and citizenship itself’, where ‘what makes the prospect of such acts so radical’ is their inability to be captured by the existing vocabulary of political belonging. On the other hand, McNevin is also critical of the autonomy of migration approach that rejects the language of citizenship. She states that ‘what remains inarticulable may also remain politically impotent precisely because being political remains being recognizable in social terms’ (2011: 97). McNevin is caught in the horns of a dilemma: she wants to move beyond the language of citizenship but criticises others when they try to do the same. She never offers a satisfactory way out of this dilemma. McNevin highlights the limitations of the *Sans-papiers* movement because it utilises the traditions of French citizenship yet also suggests that how they frame their acts ‘enlivens the potential for new forms of political belonging’ (Ibid: 153). This poses an ethical problem: surely, in contesting rightlessness, irregular migrants should adopt a strategy that will be effective for them in the immediate moment; yet it also appears as though, in doing so through practices that mobilise citizenship as a resource, their actions might not be sufficiently radical in McNevin’s terms. While she never offers an adequate route out this dilemma, I propose that citizenship as method helps navigate the immediate terrain of citizenship without foreclosing the possibility of a more radical future. So how does this work?

The first proposition of citizenship as method is that there is no moment of pure transcendence. Which can be phrased as Laclau puts it, where we always-already ‘live in a world of sedimented social practices that limit the range of what is thinkable and decidable’ (2014: 134). How we navigate this terrain is a question of tactics and strategy. The distinction between tactics and strategy adds a degree of analytic refinement missing from the acts of citizenship literature. As discussed in chapter three, citizenship does not exhaust the possibilities of political belonging but, in the present moment, it is the hegemonic form.<sup>88</sup> By approaching citizenship as a discursive

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<sup>88</sup> This is an observation McNevin agrees with when she states that the ‘key point for present purposes is to conceptualise citizenship as one mode of political belonging amongst many—albeit one that is currently hegemonic’ (2009: 164). What is important, and supports my argument, is the fact that McNevin also makes use of Laclau and Mouffe’s understanding of

articulation and investigating how the key nodal points around which it is articulated (rights, law and democracy) can be rearticulated it is possible to think through genuinely transformational politics. Because citizenship as method separates out tactics (particular modes of immanent rights-claiming) from strategy (longer term contestations of power) I propose that it is possible to contest citizenship according to its own logic without further sedimenting hegemonic power relations. Returning to the example of the immigration facility in Clint Texas, I will demonstrate how this works.

### **Abolish ICE to Transform Citizenship**

The different responses to the rights violations along the Southern border of the United States reveal a lot. By all accounts The New York Times' correspondent, Caitlin Dickerson, was acting from a position of concern for the rights of the migrant children in the facility. While the demand that they be treated humanely and be granted soap, toothpaste and toothbrushes might seem a futile gesture in the face of the United States' violent border regime, it does at least respond to an immediate problem. However, when she goes on to suggest that there is a need to invest in new infrastructure, particularly by building more detention centres, she legitimates the very violence she highlights as a problem. In claiming the right for migrant children to be housed in 'safe and sanitary' conditions, she inadvertently re-enforces a hegemonic discourse that posits migration as a problem and defines citizenship in increasingly nativist and exclusionary terms. The question is, what might be a better response? It is here that citizenship as method might help guide our actions.

A different response to the violence at the Southern border of the United States can be found in the increasingly popular call to 'abolish ICE'. 'ICE' refers to the Immigration and Customs Enforcement agency in the United States. My aim here is not to give a nuanced account of abolish ICE as a political programme. Rather, I want to contrast it to Dickerson's response to human rights abuses along the United States border as a way of illustrating how citizenship as method might provide a useful analytic framework for

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both hegemony and discourse. Therefore, my argument should be acceptable within even the terms that McNevin is working.

navigating the problem. The demand to abolish ICE started out life primarily as a political slogan and grassroots movement, rather than a concrete proposal or political programme. Sean McElwee was the first to make the demand in an article in *The Nation* (McElwee 2018) but it has subsequently gained a great deal of traction, to the extent that it has also been picked up by a number of politicians in the Democratic Party, most notably Presidential hopefuls Elizabeth Warren and Kirsten Gillibrand (Hinkle and Levinson-Waldman 2018). It found its most concrete expression when it was introduced as a bill by Democratic Congressman Mark Pocan (Pocan 2018). The bill specifically proposes to defund ICE as it currently exists and to shift any of its key constitutional functions out of the remit of the Department of Homeland Security (DHS) and to other government agencies.

So here are two different responses to border violence: on the one hand there is Dickerson, who wants to expand the infrastructure to make it more hospitable; then there is the abolish ICE movement that denies the legitimacy of the very institutions Dickerson wants to expand. What unites them is a concern with human rights, where McElwee writes that ICE as '*[a] mass-deportation strike force is incompatible with democracy and human rights[emphasis original]*' (McElwee 2018). If both want to protect human rights, how did they get so far apart and how might we address the gap? Citizenship as method helps guide our actions. The difference is that, while the abolish ICE movement uses rights as a 'tactic' it does not end up legitimating a problematic discourse because it is part of a broader 'strategy' to contest the power relations that caused the violations in the first place. As McElwee observes, a major part of the problem is that by 'putting ICE under the scope of DHS [Department for Homeland Security], the government framed immigration as a national security issue rather than an issue of community development, diversity or human rights' (Ibid). As a rights-claiming strategy, abolishing ICE does not just address the immediate violation, such as the lack of toothbrushes at the Clint facility, but is an attempt to shift the entire discourse on migration in the United States.

As discussed in chapter one, the framing of migration as a security issue and the subsequent illegalisation of irregular migrants are central elements of the problem this thesis addresses. They both undermine the legal and political standing (personhood) of irregular migrants and define

contemporary citizenship regimes in particularly exclusionary terms. Scholars in the field of critical security scholars, such as Didier Bigo (2002), Jef Huysmans (Huysmans 2000) and Vicki Squire (2009) have observed the negative effects of the securitisation of migration. The problem is not simply that it results in a violent border regime – although that is bad enough – but that governmental agencies, such as ICE, define the discursive environment in which they operate. For these thinkers, routine and normalised governmental practices, such as the creation of risk analyses and practices of surveillance discursively construct the migrant as the threat to homeland security.

By approaching migration as a security threat, ICE does not just inflict immediate violence but is also the source of its own legitimation. As Squire writes, a critique of the securitisation of migration ‘enables us to conceive how state governance and national belonging are reaffirmed[...] in the identification of the asylum seeker [and irregular migrant] as a ‘threatening’ or ‘culpable’ subject’ (Ibid: 42). Furthermore, because practices of bordering work to articulate the political community, the securitisation of migration results in particularly exclusionary forms of citizenship. The challenging and potentially dismantling of governmental agencies, such as ICE, also entails a ‘rethinking of citizenship in terms that open up a political space that is not skewed against asylum seekers’ (Ibid: 42) and irregular migrants. This is not just an abstract theoretical point but an observable logic in the movement to abolish ICE. One of its most vocal proponents, Congresswoman Alexandria Ocasio-Cortez argues that ‘[i]t’s time to abolish ICE, clear the path to citizenship, and protect the rights of families to remain together’ (quoted in Godfrey 2018). Because immigration controls define the boundaries of the political, challenging them starts to open citizenship up to new and, potentially less exclusionary modes of being.<sup>89</sup>

In the case of abolish ICE the tactic of rights-claiming forms part of a broader strategy aimed at the contestation of power. In the most immediate sense, this helps with political judgements, making it possible to engage in practices of rights-claiming without legitimating dominant and oppressive

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<sup>89</sup> Recall that in chapter six, on the question of law, I argued that immigration controls are an important way in which citizenship is constituted (Squire 2009) and that citizenship and alienage need to be viewed along a spectrum rather than as a binary.

discourses, as the New York Times journalist, Caitlin Dickerson, does in her discussion of the Clint immigration facility. However, it also takes us further, offering a different solution to the dilemma that McNevin never adequately resolves. To recall, she worries that claims made outside the language of citizenship are not legible, thus ineffective; yet she also criticises Isin's approach to acts, which necessarily proceeds through the framework of citizenship. Her concern is that they close down the possibility of new and more radical forms of political belonging. I suggest that McNevin presents us with a false choice. Rather than thinking in either/or terms, where the aim is to rupture the very terms within which our concepts operate, it makes more sense to think in terms of a transformational politics that shifts the limits of the possible. In the 'event' – I use this word deliberately - that ICE were to be abolished, the potential lies not simply in the fact that an oppressive border apparatus is dismantled. As Squire observes, such a move disrupts the 'self-fulfilling cycle of securitisation and criminalisation, which further sediments and embeds an exclusionary politics as part of a precarious territorial order' (Squire 2009: 169). Shifting the management of migration away from the state's security apparatus also break with the forms of knowledge production that discursively construct migration as a security threat and begins the process of re-articulating citizenship in less problematic terms.

Contra, McNevin, I propose that citizenship as method offers a better analytic framework for thinking through the transformation of and potentially even beyond citizenship. The task is to tread the narrow path between practices of contestation that are at once legible without re-enforcing dominant power relations. I suggest that this is as much an ethical question as it is a political one. The first step is to ask what it is that practices of rights-claiming can, or even should, do? The approach to rights proposed and deployed across this thesis describes a tension between two different and competing demands. Madeleine Fagan identifies this when she writes that the

future can be closed down both by its erasure and by its determination which leaves us with the difficult task of trying to ensure that we have a future at all (hence, the need to be cautious in the use of our immense power) and that we let that future

open as a future (hence, the rather minimal guidelines regarding what such caution might involve) (Fagan 2017: 239).

It is equally important that in contesting citizenship theorists, such as McNevin do not overdetermine the future with alternative models of political belonging. The need to challenge oppressive power relations in the here and now should not foreclose the possibility of the future by providing prescriptive ethical and normative codes. It is not that McNevin is not aware of this dilemma, it is just that she does not provide the resources with which to navigate it. In contrast, by linking rights with questions of tactics and strategy, citizenship as method provides a better framework. As the case of abolish ICE demonstrates, it is possible to address the immediate material concerns of migrants while still contesting and potentially rearticulating hegemonic power.

Contesting dominant power relations, through movements such as abolish ICE, is not a reformist political practice but a transformational one. The radical potential of such discursive shifts does not just articulate citizenship in more inclusive terms but also redefines the limits of the possible. One can see the potential of this by thinking about how past struggles are often the grounds for new claims. A historical perspective reveals that the history of citizenship is one of struggles by non-citizens over rights and inclusion. In each case, they redefine what is possible.<sup>90</sup> Which is not to impose a telic process of universalisation on citizenship but to observe that every event has consequences that echo outwards, transforming the discursive terrain upon which they occur. The transformational potential of citizenship resides in the fact that, as stated above, it links the 'what' and the 'how' of political struggle. For example, the migrant rights movement might not exist today, or take a totally different form, without the civil rights movement, which itself cited prior conventions, such as Gandhian non-violent civil disobedience. As prior struggles are incorporated into the history of existing citizenship regimes, they transform its meaning, opening up new worlds and authorising possible new rights-claims that are yet to be made. The transformation of citizenship does not exclude new political forms but might act as the precursor to alternate

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<sup>90</sup> This is the point that Isin makes in his genealogical reading of citizenship in *Being Political* and again in the chapter 'Performative Citizenship' (2017; 2002)

modes of political belonging because citizenship does now and has always exceeded itself in the directions of both the past and the future. The event(s) that might mark the culmination of one struggle, such as the 1964 Civil Rights act or 1965 Voting Rights Act are not really an endpoint but a beginning, contributing to opening up the horizon of political belonging.

## Conclusion

In the current chapter I attempted to weave the analysis undertaken across this thesis back together. I did this by setting out the central propositions for understanding citizenship as method in terms of a deconstructive negotiation. Having done that, I then turned to discussion of violations of migrant rights in the United States and, in particular, the move to 'abolish ICE'. I argued that the transformational potential of citizenship as method resides not just in the immediate contestation of power but also in discursive shifts that reframe the limits of possible action. Starting in chapter three, much of my argument across this thesis has turned on how we understand the 'event'. If acts of citizenship reduced the event to a singular 'rupture', then citizenship as method is indebted to a more Heideggerian approach. In Heidegger's writing, the event (*Ereignis*) was always deployed as a verbalised noun because it does not point to 'a substantive and stable essence, but rather to a never-ending process' (Marchart 2007: 20). Citizenship as method marks its fidelity to the event by refusing to stop, by resisting the reification of the unfolding process of citizenship into a simple object. It does so by intervening in the practices through which citizenship is constituted. In this way, as MacKenzie observes, political theory 'can become an event itself, political theory can engage in the world that it inhabits, when it creatively experiments with conceptions of the political' (2008: 14). That is not to arrogantly proclaim that this thesis is itself an event because it is not something that could be controlled in such a way. Nor am I saying that this is a 'true' account of citizenship, because, '[t]ruth is an event which may visit us like a thief in the night' (Caputo 2014: 23). Instead, the 'truth' encounter of citizenship as method is that it can offer no universal rules: it is a close engagement with a context that is already given and a ceaseless negotiation between a politics of constitution and insurrection.



# Conclusion

*At the conclusion of the First World War it was borders that were invented and adjusted, while people were on the whole left in place. After 1945 what happened was rather the opposite: with one major exception boundaries stayed broadly intact and people were moved instead.*

(Judt 2010: 27)

It used to be that shifting borders defined the shape of citizenship; in a contemporary context, it is the movement of people. As mass migration increases – whether that is due to failed development policies in the global south (Sassen 2014), domestic and international conflicts or climate change – the political impacts of migration are only likely to increase. That poses a question: to whom are we responsible as citizens? As we saw in the introduction to this thesis, Theresa May gave one answer to that question in her infamous ‘citizens of nowhere’ speech. The ‘spirit of citizenship’, she suggests, ‘means a commitment to the men and women who live around you’ (May 2016). It would seem, according to May at least, that our responsibilities as citizens do not extend very far – certainly not beyond the borders of the nation-state. While she might have been attempting to tap into the contemporary populist zeitgeist, her understanding of ‘the spirit of citizenship’ is not without precedent. Historically, modern liberal democracies have displayed a preference for human rights in a domestic, rather than a global, context; yet today, as migration increases, that distinction is falling apart at the border and borders are extending deeper into domestic political space, eroding rights as they go.

There is another story. It is perhaps best encapsulated in the case of the French farmer Cedric Herrou, discussed in chapter six, who in extending hospitality to migrants demonstrated another meaning of ‘the spirit of citizenship’. While his actions were illegal, France’s highest constitutional court exonerated him because the ‘freedom to help another, for humanitarian reasons, follows from the principle of *fraternity*, without consideration of the legality of their presence on the national territory [emphasis added]’ (Boudou 2018). The constitutional principle that institutes the common bonds of

citizenship entails obligations that might exceed its statutes. When it comes to citizenship, as Derrida observes, 'spirit always comes with its double? Spirit is its double' (Derrida 1989: 41) because true responsibility exceeds the law. Once again, we arrive back at the two, seemingly opposing yet indissociable, stories of citizenship: citizenship institutes rights that then overflow its borders. The question I posed in the introduction is how do we negotiate this paradox? My answer is: through the conceptual framework of citizenship as method.

Citizenship as method is this thesis' primary innovation and main contribution to the field of citizenship studies. At the most fundamental level, citizenship as method is a response to rightlessness, which is a concrete problem that poses conceptual difficulties: it is a concrete problem for the millions of irregular migrants globally who are vulnerable to abuse and exploitation and it is a conceptual difficulty because it reveals the aporetic relationship between universal rights and citizenship – best summed up by Arendt's formulation of the right to have rights. A central proposition of this thesis is that because rightlessness arises through an encounter with citizenship, then it is necessary to rethink citizenship. As I argued in chapter two, a new approach was needed because existing ones were either overdetermined by an excessive legalism (Benhabib) or failed to account for citizenship in its legal and institutional form (Isin). Citizenship as method fills this gap.

In concrete terms, citizenship as method provides a post-foundational theorisation of citizenship from which follows a political practice. Citizenship is founded upon the aporia of its own impossibility precisely because it institutes a set of rights that necessarily overflow its borders; in turn, that introduces the possibility of a political practice of rights-claiming, through which the aporias of citizenship can be mobilised to make forceful ethical claims. This practice is best understood as a deconstructive negotiation of citizenship. What makes a Derridean understanding of negotiation applicable is that it approaches politics as an ongoing process that necessarily engages with institutions. It is worth re-iterating, however, that while this project is deconstructive, it is not about deconstruction, nor is it a simple application of Derrida's thought; instead, citizenship as method makes a series of 'deconstructive moves' (Thomassen 2010). The most obvious example being

chapter four, where I rethought the right to have rights in non-oppositional terms. In this respect, the theoretical framework is post-foundational, calling on Laclau and Mouffe's theory of hegemony (Laclau and Mouffe 2001) and Fagan's account of the ethico-political (Fagan 2013).

Citizenship as method also contributes a set of resources for the negotiation of citizenship: a politics of rights must be thought in terms of both *tactics* and *strategy*. Rights-claiming works by tactically mobilising a dimension of the citizenship regime one is contesting to call it to come good on its universal promise. The most explicit example in this study being the *sans-papiers* movement, who continually deployed aspects of France's revolutionary history to support their claims. A rights-claiming strategy arises out of an analytic of particular power relations and investigates how they can be contested and transformed. Here one can think of the case of Let Us Learn in chapter seven. Let Us Learn situated their own particular struggle within the broader context of the hostile environment and, even after their own court success, continued to organise against its laws and policies.

There were two pivotal moments in developing my approach to citizenship: the first was largely analytic and methodological, taking place in chapter three; the second was conceptual – although it necessitates practice – occurring in chapter four. In chapter three I demonstrated that acts of citizenship fail in their own terms when analysed in relation to the category of the event – the very condition of them being considered 'acts' in the first place. Following an argument made by Moya Lloyd (2007) in her critique of performative theory, I suggested that the act needed to be eventalised in order to understand the conditions of its success. What this move did, through an analysis of the resistance to the Jim Crow laws, was to change this doctoral project from a sympathetic reading of the acts of citizenship literature to something altogether more critical. The problem with a theory of acts is that, in shifting the object of analysis to the act, it obscures the political practices that make transformational politics possible. I argued that any radical theory of citizenship must be able to account for both the longer-term processes of counter-hegemonic politics and include the state as a necessary site of contestation. Consequently, citizenship as method broadened and deepened the range of analysis.

The second pivotal moment came in chapter four, where I utilised Fagan's concept of the ethico-political to rethink the paradoxes of the right to have rights. If the right to have rights displays an aporia between universal rights (ethical principles) and citizenship (politics) then the infrastructure of the ethico-political makes it possible to account for the aporias of rights in non-oppositional terms. This was the key 'deconstructive move'. It does not resolve the aporias of rights but reverses and displaces the terms of the problem, shifting it out of the realm of pure theory and towards a consideration of practical politics. I argued that the aporias of rights can be mobilised through practices of rights-claiming. Utilising contemporary literature on performative approaches to rights (Golder 2015; Zivi 2012), chapter five outlined a new political practice of rights-claiming as the substantive content of a radical practice of citizenship, forming a significant contribution to the field.

In keeping with the research gap the thesis has addressed, chapters six and seven used the framework of citizenship as method to analyse how practices of rights-claiming negotiate citizenship in its institutional form. What I found was that institutions are both disabling and enabling. For example, as was the case of *BA Nigeria* showed in chapter six, litigation is a particular kind of political practice that can shape the meaning of the law. In contrast, in chapter seven I demonstrated that, despite its promise, a structural limitation of representative democracy tends to discriminate against migrants. A counter-hegemonic practice of rights-claiming cannot 'wash its hands of the institution' (Derrida and Rottenberg 2002: 25) and must negotiate these threats and opportunities. My main proposition was to argue, through the analyses in chapters six and seven, that citizenship has a generative capacity. Because principles of freedom and equality are instituted through law and democracy, practices of rights-claiming by irregular migrants can generate new meanings. It is here that the framework of citizenship as method explicitly fills a gap in the literature: by focussing on the generative potential of citizenship I have built an account of the state and civil society as *interdependent* and *relational*.

One consequence of citizenship's generative potential concerns the figure of the irregular migrant. Because citizenship is constitutive of rights and enshrines universal principles, rights-claiming irregular migrants generate new meanings by revealing the constitutive failure of citizenship's universal

foundations (Lowe 1996). Somewhat paradoxically, the irregular migrant is not a threat to citizenship but the very condition of its possibility, by demanding that it fulfils its promise. However, at this point it is important to proceed with caution. It is only a small step to move from the assertion above to the fetishisation of the migrant as a privileged political actor. This is not the intention of this project. Rather, my claim is more modest, although no less important: I am suggesting that the migrant does not hold a privileged position but is important because they expose the contradictions of the state in relation to its proclaimed universality. This opens up new sites for radical and transformational politics. My point is both theoretical and historical. Radical political projects, such as the Suffragettes or Civil Rights movement, strategically positioned themselves on this terrain and, in so doing, redefined the contents and meaning of citizenship. In this respect Isin is correct when he states that 'those engaged in the constitution of citizenship are not always citizens in the conventional sense of members of a nation-state' (2017: 2). Due to contemporary global trends, such as increased conflict and climate change, the numbers of displaced people is only likely to grow and the struggle for migrant rights is likely to have a defining role in the future meaning of citizenship. Writing as I am during a populist moment, the form that might take remains undecided, which is why this research project was so necessary. By exposing the contradictions of liberal states, the thesis contributes to the necessary project of unpicking the hard border between the discursive categories of citizens and migrants.

The analysis across this study has further discursive significance to the contemporary political climate. In the introduction to the thesis I suggested that we were experiencing a 'crisis of citizenship': a growing contradiction between the mass displacement of people and a growing anti-migrant sentiment that has been mobilised with great electoral success by right-wing populist politicians. The result is that national borders are hardening and citizenship is being articulated in increasingly nativist and exclusionary forms. While it is beyond the scope of this study to address the causes of mass global migration, I have analysed and demonstrated the growing anti-migrant discourse and the increasingly problematic ways that citizenship is being constructed, both in terms of a growing securitisation and illegalisation of migration (Squire 2009; Huysmans 2000; Bigo 2002) and the contemporary

dominance of populist politics (Laclau 2005; Mouffe 2018; Gerbaudo 2017; Müller 2017). As I argued in chapter one, the securitisation and illegalisation of migration is an important contributing factor to the rightlessness irregular migrants experience. Consequently, contesting and dismantling the hostile environment, discussed in chapters six and seven, is one way we can start to shift the discourse on migration. Similarly, in chapter seven I proposed a new framework for radical democratic activity as an alternative to left-populism. In so doing, my aim was to contribute to a politics that might break with a contemporary populist moment and its nationalist orientation. Contesting the securitisation of migration and offering alternatives to populism are both topics of important contemporary significance. I anticipate that they are areas where the conceptual framework of citizenship as method can be utilised and tested in future, not only in academia but also by those engaged in struggles for rights more generally – including but not limited to irregular migrants.

At this point, it might be helpful to address some questions over the scope of this thesis, by highlighting some limitations and areas for further study. Struggles to contest the hostile environment, or abolish ICE, highlight a methodological limitation of this thesis. Focussing on a set of intensive illustrative examples made it possible for me to produce a more generalisable approach to citizenship but in order to address longer term projects, such as dismantling the hostile environment, I would anticipate a singular and more focussed method would be required, including first-hand empirical fieldwork.

A second limitation concerns the distinction between acts of citizenship and citizenship as method. While an analytic concern with the state is a strength of this thesis, when it comes to the literature on acts of citizenship, something is gained and something is lost. Citizenship as method provides a more comprehensive conceptual framework and wider range of analysis, making it better able to understand the different sites and scales at which citizenship is constituted, contested and re-articulated. What is lost, however, is a more flexible approach that is able to account for a wider range of citizenship practices, particularly in non-Western contexts. In order to better understand how practices of contestation might re-articulate citizenship and attenuate the problem of rightlessness this study has focussed on contesting citizenship in its currently hegemonic form – or modern mode, to use Tully's

terminology (2014). A narrow analytic focus has certainly been a strength in investigating insurgent citizenship practices in more depth, particularly when it comes to theorising their relationship with the state. However, what it means is that there is a limit to the generalisability of some of the findings. For example, how, if at all, might practices of rights-claiming that work by mobilising the constitutive aporias also work in states that are not liberal democracies, such as China? Without doubt, focussing on modern citizenship has led to a Western bias and I would anticipate that applying the framework of citizenship as method in non-Western contexts is an essential area of future research.

Another area in which the conceptual framework of citizenship as method might be extended and tested is in relation to feminist theory. The very idea of the citizen as a universal and self-evident subject has long been contested by feminist theorists (for example Young 1989). In her discussion of acts of citizenship, Rutvica Andrijasevic (2015) suggests that there is a need for a research agenda that links contemporary literature in critical citizenship studies and the work of stand point feminist theorists, such as Sandra Harding (1991). There is a compatibility because both disciplines 'stress the transformative dimension of collective political struggle either in terms of transition from objects to subjects of knowledge or from subjects to citizens' (Andrijasevic 2015: 58). A feminist standpoint perspective would also entail a necessary level of critique by bringing to light the tensions and contradictions that permeate the formation of collective political subjects. This represents an urgent area of future research.

Finally, from a more theoretical perspective, there is potential for a further research agenda that might analyse the relationship between Fagan's post-foundational account of the ethico-political (2013) and Laclau and Mouffe's understanding of hegemony and the political (2001). While I have argued for the compatibility of these two strands of post-foundational theory, I would envision a future research project that more explicitly and systematically investigated their relationship, particularly in light of Laclau and Mouffe's well known resistance to ethicism.

To finish the long journey that we have been on, I want briefly to return to the question of what it is that we think political theory can and should do. In *On Revolution* (1963) Hannah Arendt distinguished between 'liberation' and

'freedom'. Framed within the struggle for migrant rights, one might think of liberation as particular victories, such as contesting one's deportation or being freed from detention. While acknowledging the importance of liberation for individuals in the struggle for rights, contesting particular instances of rightlessness without transforming political belonging is like fighting the Hydra: you can chop off a head but they will keep growing back until you address the root of the problem. In contrast, 'freedom' is about something more; freedom is a creative and enduring exercise that involves the building of new and durable worlds, and the institutions and practices that go along with it. This task is an ongoing one and it has been the focus of this thesis.

Somewhat contradictorily, I have also been at pains to point out that this is not a work of normative political theory. The citizenship studies literature abounds with normative proposals, such as denizen enfranchisement (Pedroza 2019), post-territorial citizenship (Squire 2009) or even cosmopolitan citizenship (Held 2013) amongst many others. Some solutions might be better than others and most are valuable contributions to knowledge. However, it is both politically and ethically beyond the scope of this project to provide a blueprint for how citizenship might be in the future. As Fagan puts it, this is a 'defence of knowing when to stop' (2013: 11). Which is not to say I am not interested in such questions, or citizenship as method might not have something to say about normative solutions in particular contexts. Instead, I have attempted to theorise citizenship as an unfolding process rather than an outcome because at its best, citizenship can be a vehicle for empowerment. Citizenship as method operates at the limit of theory and practice, the particular and the universal, and politics and ethics – this is not to found the political on an ethical principle, nor is it to posit ethics as a guide, rather it is a means of negotiating the present in light of the past and with a view to the future.

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