Rethinking the human in human rights

In 2007, I published a paper on women's human rights in which I argued for a *critical theory* of human rights. This critical theory centred on what might be thought of in Foucauldian terms as an *analytic* of human rights that sought to interrogate the effects that human rights, and their attendant discourses, have in specific situations. Examining a series of paradoxes, which I argued beset human rights politics as they related to women, this critical account focused on exploring the dual effect of human rights in both opening up political possibilities in particular contexts as well as, sometimes simultaneously, closing them down.[1] The essence of my approach, as sketched in that piece, was that human rights are best understood as a product of and a site for critical contestation. I built this argument by concentrating, in particular, on the potential of the category of the human, rather than rights, for resignification or rearticulation.[2] Rejecting the idea that the 'human' (in human rights) is anthropologically grounded, based, that is, on a stable essence, pre-existing substance, set of properties (particular qualities, characteristics or needs), or natural foundation, I argued instead for an understanding of the normative human as constituted in, by and through human rights discourses, practices, and activism.

I want to return here to the question of the 'human' in human rights to further explore the relation between critical contestation and resignification sketched above. In doing so, I take seriously Judith Butler's suggestion, in *Undoing Gender*, that it 'is essential to the project of international human rights discourse and politics' to keep 'our notion of the human open to future articulation', so as to allow it to 'become something other than what it is traditionally assumed to be' (2004a: 36, 35). Here my aim is to consider how deployments of the name of the human by those normatively disqualified from its remit incarnate that project.

The chapter is divided into five parts. In the first section, I identify a number of occasions when subaltern groups have asserted their humanity in order to demand rights,

before briefly addressing the liberal contention that these represent moral or ethical claims, a view I seek to trouble. I then turn, in the second section, to an argument made more often by critical theorists, which is that substantive definitions of the human (in human rights) result in exclusions. What interests me here is how, precisely, exclusion is framed as a problem. I consider two possible alternatives. The first frames it as a problem of a too restrictive definition of the human; one that excludes from its purview some whom it ought rightfully to incorporate within it, a deficiency remediable by a simple politics of inclusion. The second view, and the one I advance in this chapter, construes the issue not as one of exclusion *per se* but as an issue of what people have been excluded from (Anderson 2007). Its concern is with those historically conditioned and normatively modulated assumptions about humanity that have, in different situations, operated discursively to debar certain populations from their ambit. This second position centres on the idea of a critical interrogation of the terms and limits of human belonging.

In part three, I begin to sketch the political entailments of this second position. I argue that in order to challenge the erasure of certain populations from specific normative conceptions of humanity – to oppose what Judith Butler refers to as their dehumanization – that it is necessary for the disqualified to contest and, ultimately, to reconfigure the ontological frame that renders them illegible as human (in a social and political sense). To put concrete flesh on the bones of this contention, in section four, therefore, I explore a particular aspect of the political struggle that took place in Australia over section 127 of the 1901 Constitution, which formally discounted Aboriginal persons from the census and thence from electoral representation; namely, how Aboriginal activists deployed the vernacular of the human, including the language of human rights, to counter the racialized, whitened, conception of humanity and national belonging that disavowed them.

In order to understand the actions of these activists I end the chapter by turning to Jacques Rancière's idea of the 'human' as a 'litigious' or 'political name'; that is, a name that serves both to dispute who counts politically within a specified context and to challenge what is 'given' (audible, visible, intelligible) within a particular social order (Rancière 2004a). I argue more specifically that the deployment of the vocabulary of the human in the dispute over section 127 should be understood as a litigious deployment. Not with the aim of generating a more accommodating or integrative definition of what it is, substantively, to be human but as an ungrounded political claim; part of a sensuous attempt by Aboriginal peoples to disrupt an historically contingent racialized ontology – or in Rancière's terms division of the sensible – in order to displace it.

'I would like to be only and merely human'[3]

Assertions of the type captured in the epigraph above – words written by an anonymous detainee at one of Australia's Immigration Removal and Processing Centres – are remarkably common. As part of their 'historic quest for recognition of their humanity' (Green 2004: 465-6; see also Estes 2000), African American sanitation, sweatshop, and public hospital workers, *both* male and *female*, carried placards declaring 'I *am* a man' (original emphasis). Appearing before the Platform Committee of the Democratic Party in 1980, US congressional aide and gay rights activist, Bill Kraus declared that 'the gay people of this country are *also human*' (cited in Shilts 2011: 14). During the build up to the 1967 referendum that sought to count Aboriginal peoples in the Australian census *for the first time*, activist Charles 'Chicka' Dixon stated: 'We want to be human like everyone else' (1967). More recently Humanize Palestine, Black Lives Matter, #SayHerName, like my earlier examples, have all called on the human in their respective political protests. The question is why? What does this deployment of the language of the human facilitate or attest to?

A common reaction to examples such as these, and one I have experienced on a number of occasions when I have given talks on the topic of human rights, is that these are *liberal claims*.[4] In other words, they are moral or ethical rather than political claims; individual requests to be accorded the dignity or freedom that attends being human on the grounds that all humans have equal moral status and/or an equal capacity for moral autonomy.[5] Recall that according to the so-called 'naturalistic' tradition (Beitz 2009: 49), human rights are pre-legal moral rights 'possessed by all human beings (at all times and in all places), simply in virtue of their humanity' (Simmons 2001: 185) and identifiable through the use of moral reasoning (Cruft et al., 2015: 5). But reducing all such demands to individual moral claims, treating them, in effect, as 'an end in themselves' (Bailey 2009: 121) as liberal critics are wont to do, in my view risks ignoring their political implications.

It is not uncommon to find demands, such as those noted above, also made sense of in terms of a particular liberal narrative about the advancement of human rights. One in which rights, originating as the language of the 'white male bourgeoisie', have over time 'been connected' progressively 'to daring to claim things on a basis that might previously have been disqualifying', that is, '*for* blacks, women, gays […] when the feeling before might have been that *because* one was one of these things one was disentitled to make these claims' (Kennedy 2002: 214). From its initial association with 'specific class interests', essentially constituting weapons of the bourgeoisie in their fight against despotic power, the rights of man and its successor human rights, on this interpretation, have become, as Costas Douzinas suggests, 'the rallying cry of the homeless and the dispossessed', invoked as 'the principle of liberation from oppression and domination' by subaltern groups across the globe (2000: 1).

According to this logic, claims like the following – the letter from an asylum seeker, published on the Scottish Refugee Council website in 2011, asserting 'I am a human being born in this world and I demand all of the human rights of life that I am entitled to',[6] or the

petition launched by Trans Rights Canada in 2010, in support of Bill C-389 (An Act to Amend the Canadian Human Rights Act and Criminal Code (gender identity and gender expression)), demanding that the Canadian legislature 'Recognize Trans People as "Human"'[7] – are usually interpreted as entreaties by the excluded to be incorporated into an established human rights regime on the basis that they too fit the existing liberal figuration of the human that underpins it, a proposition to which I will return shortly.

The 'problem' of exclusion

Alongside the liberal championing of the history of the discourse of human rights as the discourse of the oppressed, however, numerous writers, particularly critical theorists, have pointed to the exclusionary risks attaching to attempts to define the human. Take, for instance, Anne Phillips in her 2015 book *The Politics of the Human.* Here Phillips targets what she calls 'substantive' or 'characteristics-based' accounts of the human (2015: 132; see in particular Chapter 2). For the most part Phillips uses this label to refer to historical efforts to define the human in terms of, for example, 'rationality and the capacity for normative judgements'; 'separation from nature' (2015: 23); or the capacity for pain (2015: 24-25), definitions that variously excluded women, Aboriginal Australians, and '"lower" categories of humans' (2015: 25), respectively (see also Bourke 2011). However, Phillips also contends that even though such efforts to 'deny certain humans the name' on the basis of 'content-laden claims about the nature of human beings' (2015: 26) are rare today, it is nevertheless the case that it 'remains impossible' for certain groups, notably women, 'to function as the generic human' (2015: 27). The problem, as Phillips conceives it, is that although 'When we speak the language of the human, we engage in a politics of inclusion', by 'offering … definitions' of the category 'we endorse something that serves to exclude' (2015: 20). The flaw with substantive definitions of the human is that they, seemingly unavoidably, generate

what Michael Feola has termed an 'exclusionary optic' that divides 'the human and the non-human, the more and the less-human, the properly human … and the spectrally human' (2014: 134). And, for this reason, Phillips rejects them as an adequate basis for a *politics* of the human.

But what kind of problem, precisely, is the problem of exclusion? Is it merely that substantive categorizations are too narrow and, therefore, wrongly ignore or debar people that ought to be include within them? If so, then a simple solution would seem to present itself: that the excluded be admitted to the category and to the rights that follow from it.[8] After all, there is ample evidence that extending rights to the previously disempowered have positive political benefits: it elevates their status; allows them access to the rights that symbolize 'all the denied aspects of their humanity' (Williams 1993: 153); leads to forms of social and political change for the newly-acknowledged populations; and increases the size of the constituency of *de facto* human-rights bearers.

Following Kay Anderson, however, I want to reject the idea that exclusion '*in itself*' (2007: 199) is the main problem with substantive definitions. I do so for two main reasons. First, because a position of this kind – that group X has been wrongfully excluded from the class of the human – usually requires us to understand the types of entreaty noted earlier simply as requests to be considered the *same* as those presently recognized as fully human, on the grounds that the excluded, in fact, share identical qualities or characteristics with them. That women, Aboriginal people, Black persons, gays and lesbians, and other disqualified populations, too are (variously) rational, susceptible to pain, a language-user, or a claim-maker and, consequently, that on that basis they ought to be eligible for the same rights as those already deemed human. It thus models a politics of the human (and human rights) as a politics of *inclusion*.

Integration of the excluded within the prevailing terms of humanity means, however,

that they are subsumed within the logic of the same. Their humanization consists, to rephrase matters, in their assimilation to the governing model of the human, where they become recognizable as fully human *only* insofar as they conform to that existing classification (Lloyd 2007, 2017). What, though, if some populations or persons do not fit this classification because, for instance, their way of reasoning does not match a Western way of reasoning or their mode of embodiment does not correspond with a normative ideal of sexed morphology? What happens if the problem, as I suggest it is, concerns how the category of the human itself has been delimited and normatively conditioned?

This leads me to my second and main concern, which is that, assuming that all a politics of the human (and human rights) requires is to open up an established category of the human to those excluded from it means that '*that from which such people have been excluded*' (Anderson 2007: 199, original emphasis) is left unquestioned: namely, the specific ideal of the human at stake. A politics of inclusion centres on addressing the apparent *fact* of exclusion rather than *critically interrogating* the ways in which a particular definition of the human, one that determines in advance who counts as such, has been framed or configured socially, politically, and discursively. How it has served historically and contemporarily to deny entry into the fold of humanity to certain populations; how specific definitions have been deployed not just to keep people outside the category but have also served the interests of power in doing so.[9]

In the argument I seek to develop in the remainder of this chapter I, thus, propose to re-read assertions of humanity and the claiming of human rights by subaltern groups as engaging a very different kind of politics of the human to a politics of inclusion. One that compels us to think critically about 'the consequential ways that the human is being produced, reproduced, and deproduced' (Butler 2004b: 36). That encourages us to consider the ways in which qualifying conditions (rationality, susceptibility to pain, linguistic

competence, and so on) are themselves normatively and historically shaped. That obliges us to address the 'social and political conditions', 'mode[s] of power' (Jenkins 2015: 125), and material conditions of inequality that position subjects differentially in the first place.

What ensues from such a politics is, to follow Anderson, an 'ontological shift' in 'the meanings of humanness itself' (2007: 199). Or, as Butler observes in *Precarious Life*, what is needed to deal with the 'question of the human' is 'not a matter of a simple entry of the excluded into an established ontology' but 'an insurrection at the level of ontology' (2004b: 20). An insurrection that mandates a *critical* questioning of the terms of reality defining who is visible, intelligible, and recognizable as 'human' and, in Butlerian parlance, whose lives 'are real' (Butler 2004b: 33). I want to turn in the next section, therefore, to Butler's distinctive discussion of the human to begin to explore further this issue of ontology.

Towards a politics of 'ontological recasting':[10] thinking the human with Butler
The first thing to note about Butler's approach is that she does not conceptualize the human in terms of a list of properties or features that all those so designated share prior to their imbrication in power relations. Indeed, 'we make a mistake', she surmises, 'if we take a single definition of the human, or a single model of rationality, to be the defining feature of the human' (Butler 2004b: 90). Rather the 'human' figures in her work as a signifier for the lives that matter; for 'real' lives, in her terms. Hers is not, then, a substantive account of the human, even of a thin variety. It does not rely on attempting to define what it means *to be* human. Her critique of the 'human' centres rather on the relation between it and a process she describes as 'dehumanization'.

As Drew Walker observes, 'in the era of human rights' dehumanization has become a popular language in which to examine multiple forms of abuse and harm, 'from crimes of slavery to indefinite detention to the torture of "enemy combatants" to the indiscriminate use

of drone attacks' (2015: 141). Dehumanization is conventionally regarded as a psychological and material process that denies humanity to a particular group. Typically, it involves producing negative stereotypes of the affected population. This might mean depicting them as sub-human: *Untermenschen* as the Nazis called the Jews or *inyenzi* (or cockroaches) as the Hutus labelled Tutsis during the Rwandan genocide (Maiese 2003). It also usually entails a process of de-individualization: stripping persons of whatever makes them unique, by for example refusing to use their given names, branding them with numbers and so forth. Combined, these factors make possible violence, torture, and cruelty, facilitate human rights violations, as well as in the worst cases, authorizing genocide.

This is not how Butler understands dehumanization, however. She bids us to consider it as discursive. Not, though, primarily in the sense that a '"discourse" of dehumanization' exists, which then produces the dehumanization of specified persons as one of its effects by, for instance, labelling some as innately less- or other-than-human and then treating them accordingly, by subjecting them to the kinds of abuse and brutality already described. Dehumanization is discursive in a different way. In her allusive formulation, it is discursive in the sense that there is a 'limit to discourse that produces the limits of human intelligibility' (Butler 2004b: 35). One way to decipher this assertion is to say that dehumanization takes place where discourse ends, in what is *not said* rather than what is; through what is 'refused the possibility of cultural articulation' (Butler 1993: 8) rather than through what is granted it; through, in addition, silence, 'omission' (Butler 2004b: 34), 'radical erasures' (Butler 1993: 8), and 'a refusal of discourse' (Butler 2004b: 36). This is perhaps why Butler speculates in *Precarious Life* that 'dehumanization becomes the condition for the production of the human' (2004b: 91), because the human is defined in culturally limited ways against that-which-it-is-not-human ('the 'less "human", the inhuman, the humanly unthinkable' (Butler 1993: 8)),[11] against that which is not discursively articulated as such.

On my reading of Butler, therefore, it is because particular populations do not –
indeed *cannot* – appear as (fully) human within the realm of representation (the sphere of
appearance to borrow from an alternative philosophical vocabulary) that a critical politics of
the human, in the sense just delineated, is needed; to occasion the kind of ontological
disturbance and renovation that might make them visible.[12] To restate matters, only
challenges to the terms of prevailing reality – 'a critical opening up of the questions, What is
real? Whose lives are real? How might reality be remade?' (Butler 2004b: 33) – are likely to
be sufficient to allow the human's shadowy other(s) to appear as persons whose lives matter.
The test a critical politics of the human faces in attempting, to echo Anderson, to recast the
ontological, therefore, is how to denaturalize the natural(ized) and to contest the
incontestable. How might invoking the human enable this? How might invocations of this
kind challenge social ontology?

Here it is worth tarrying for a moment with the term 'social ontology'. In her study of
Marx, Carol Gould maps two distinct, though often enmeshed, ways to understand the
expression. The first denotes the 'study of the nature of social reality': how it is constituted.
As such, it focuses on the 'basic entities of social life' (persons, institutions), how they
interact and change. Social ontology, for Gould, apprehended in this way thus forms a
subdivision of general ontology. The second refers to 'ontology socialized' or the
examination of 'the social roots of the conceptions of […] reality' (1978: xv). Such an
approach treats ontological categories (such as the individual, for instance) as filled with
'social and historical meaning' (Gould 1978: xvi). This latter approach suggests that the
conceptions used to apprehend social reality are not simply descriptions of that reality but are
constitutive of it. It is a version of this second broad sense of social ontology that I build on in
this chapter, where ontology is social in that it is ordered by power. This means that 'what
gets produced inside of it, what gets excluded from it in order for the domain to be

constituted' is normatively regulated (Butler in Meijer and Prins 1998: 280). Exactly because they are historically delimited, culturally bounded, temporally and spatially particular, and embedded in a specific social and political contexts (Lloyd 2017), or are, in other words, *contingent*, ontologies are vulnerable to critical contestation and transformation.

My wager is that when those not recognized as fully human proclaim their humanity they are often doing more than just requesting to be treated better or more equally than they have been in the past. They are also both refusing and, indeed, refuting the ontological framework that posits them as less or other-than-human. They are, in Butler's terms, resisting their dehumanization by contesting what counts as 'real' and thus who is 'intelligible' as fully human within that 'reality'. In doing so they are seeking to articulate culturally what the current sphere of appearance renders inarticulable, to make visible what it produces as invisible. Actions like these, in other words, constitute challenges to the reigning order of things. They involve a politics that seeks to problematize the limits of human belonging. To amplify my argument I want to return to one of the examples I began this section with, that of Chicka Dixon.[13]

'Evicted from the category of humanity'[14]

When Dixon announced that Aboriginal peoples wanted to be human he did so in a very specific context: 1960s Australia, and in relation to a very specific issue: a proposed amendment to repeal two sections of the Australian Constitution of 1901, one of which, section 127, concerns me here.[15] This section declared that 'In reckoning the numbers of people in the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.[16] The term 'aboriginal native' referred to 'full-blooded Aborigines' (Smith 1980: 20; Gardiner-Graham 2007: 4; Summers 2000-2001: i, 16). By contrast, a 1901 ruling by Attorney-General Alfred Deakin determined that 'half-castes were

not "aboriginal natives" within the meaning of section 127 of the Constitution' (McGregor 2011: xxv). Why the difference?

It was widely assumed at the time the Constitution was being drafted that Aboriginal peoples were 'a "dying race" not expected to survive British settlement' (Davis and Williams 2015: 3; see also Smith 1980: 23; Williams and Hume 2010: 140; McGregor 2011: xxi). As such, there was no need to include them in the political arrangement establishing the new Commonwealth of Australia. This exclusion was 'rationalised' in terms of "race", "blood", and "caste" (Summers 2000-01: i-ii; Attwood and Markus 2007: 3). It was predicated, in other words, on racial assumptions about who was eligible for membership in the polity. To those in power, it was incontestable that 'full-blooded Aborigines' were uncountable. The situation of 'half-castes' (as they were termed), i.e. 'those of 50 per cent or less Aboriginal blood' (McGregor 1997: 135) was less clear-cut.[17]

At times during the twentieth century, as Murray Goot and Tim Rowse document, official government policy and practice was to treat this growing population as 'Aboriginal' *simpliciter*. At others, however, it was to ponder whether a 'half-caste might cease to be "Aboriginal" by ending his or her association with other "Aboriginals" and living like a "white man"' (Goot and Rowse 2007: 31-2). The worry being 'part Aboriginal' people living as *'Aboriginals'* when 'the colonies had begun to fix their gaze upon the prospect of a white Australia' (Smith 1980: 6). In the period leading up to the Second World War, the solution to 'the "half-caste" problem', as it was known, increasingly entailed efforts to 'breed out the colour' from those with 'Aboriginal ancestry' by, as Russell McGregor describes it, 'physically transform[ing]' them 'into white Australians' (2011: 2, see also McGregor 1997: 161). In essence, this meant a deliberate strategy of controlled miscegenation that encouraged 'half-castes' to mate with whites in order to gradually expunge all traces of Aboriginal 'blood' and to eradicate indigenous culture.

This was not the only way of '"turning black into white"' as Colin Tatz describes it (1967: 441). Principally as part of the policy of biological (or genetic) absorption, the predecessor to the policy of cultural assimilation that emerged after the war, 'half-caste' children, especially those who were fair-skinned – that is, those deemed to have a 'greater fraction of "white blood"' (Barta 2008: 208) – were forcibly removed from their families in what is now known as the 'stolen generations' policy, a policy that has been interpreted as an act of genocide (see Barta 2008). Additionally, there were efforts in some states to limit unions between 'full' and 'part' Aboriginal persons in order not to increase the number of 'Aboriginals' (McGregor 2002: 288; Ellinghaus 2001: 25). The antecedents for this are discernible in what is known colloquially as the 'Half-Caste Act', passed in Victoria in 1886, which legislated to remove Aboriginal people of mixed descent from government reserves, missions, and stations and to deny them the financial support.[18] The goal: to compel them to assimilate – or 'merge' – into white society.

Even as this approach of 'breeding out the colour' was, according to McGregor, conceived of as a way to breed Indigenous Australians 'into the community of the nation', to absorb or assimilate them, it could do so only, he notes, by making *whiteness* 'the essential qualification for national membership' (2011: 2); the essential qualification to be, referring back to Butler, a *real* Australian, one whose life mattered. Whiteness in this sense refers not just to 'skin colour but also to a certain set of behaviours that are historical[ly] variable, contested and often invisible to those who are marked by it, in it' (Probyn 2006). This emphasis on behaviour is evident in the assumption underpinning the 'Half-Caste Act', for instance, that 'because of their "white blood"' people of mixed descent 'were more able to look after themselves in the mainstream community than those of full descent' (Ellinghaus 2001: 23). They were regarded, that is, as more capable than their 'full-blood' counterparts, who were typically stereotyped, as Eleanor Bourke notes, as 'childlike, simple, savage and

primitive' (Bourke 1994: 5). A view confirmed by the comment from Isaac Isaacs, a future Governor-General of Australia, during a federal parliamentary debate on the Franchise Bill of 1902, just a year after the Constitution came into force, that Aboriginal people 'have not the intelligence, interest or capacity to vote' (cited in Davis and Williams 2015: 23). Returning to my earlier discussion, it seems clear that the ontology underpinning these assertions and beliefs rested on the assumption that the behaviour and capabilities of Aboriginal persons were determined by race. It was this racial determination that marked them – and this has been well documented in the literature, so I will not reprise the arguments here – as less than fully human. (For explorations of such reasoning, see e.g., Stretton and Finnimore 1993; Tripcony 2001; and McGregor 2011.)

This is the background to Chicka Dixon's exhortation that as an Aboriginal person he wants, as the title of his article in *The Sun Times* expresses it, 'to be a human being' (1967). Importantly, though, Dixon is not alone in deploying the language of either the human or human rights to draw attention to the plight of the Aboriginal peoples at this time. 'Aborigines are entitled to human rights equally with other Australians', states the Aboriginal Fellowship Petition of 1957 (reprinted in Attwood and Marcus 2007: 100). In her article, 'What a Yes vote means for Aboriginals', in *The Australian* newspaper (17 May 1967), Faith Bandler, co-founder of the Aboriginal Australian Fellowship and also New South Wales Secretary for the Advancement of Aboriginal and Torres Strait Islanders, declares that the referendum would mean 'a new life of hope' and the 'wiping out of nearly 200 years of injustice and inhumanity'. The article '"No Vote Fear on Rights Issues"', from *The Age* (11 April 1967), cites Bill Onus, of the Aborigines Advancement League, averring that the referendum 'is not a question of politics. It is a fundamental question of human rights, the case of one man being equal to the other' (in Attwood and Markus: 120). Using very similar language in the piece 'The two referendums' a few weeks later, the same newspaper quotes

'Aboriginal leaders' (perhaps Onus again?) saying the referendum concerns 'human rights and human equality' (12 May 1967).

An editorial in the 23 March edition of *The Age*, tellingly entitled 'Aborigines are human', explicitly aligns the inclusion of Aboriginal peoples in the census with 'including them in the human race', advising its readers to vote in support of 'the proposals aimed at giving equal human status to the Aboriginal people'. Another, a couple of months later (22 May 1967), describes what is at stake in the referendum as being whether 'Aborigines [should] be regarded as completely human' (cited in Davis and Williams 2015: 34). The Sydney paper, *The Bulletin*, in the comment piece 'When Aborigines become people', offers its reflections on what the Government of the day needs to do '[i]f Aborigines are to be treated as belonging to the human race' (20 May 1967). Similarly *The Canberra Times* quotes remarks from Archbishop Strong of Brisbane in support of 'giving to the remnant of Australia's aboriginal people the rights of ordinary human life' (24 May 1967).[19]

While all of these accounts talk of the human, not all do so in the same way. Some, for instance, see human rights or humanity itself as something that might be *conferred* on Aboriginal persons by others, a futural status that might be *given* to them by the state so that they might *become* recognizably human.[20] These are not my concern in this chapter. What I am interested in is what it might betoken for Aboriginal people themselves, that is those not recognized as fully human within the Australian polity, to invoke 'the human' in making their political demands. It is my assessment that this involves (borrowing from Rancière) a litigious deployment of that term.

The human as a 'litigious' or 'political name'
A popular reference for recent works on human rights has been Jacques Rancière's 2004 essay, 'Who is the Subject of the Rights of Man?', in which he sets out his somewhat opaque

and cryptic formulation that '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' (2004a: 302). The notion of litigiousness derives from the account of politics he sketches there, though it also builds on his other, wider work. Bearing in mind the constraints of space, the important thing to mention about Rancière's understanding of politics, in relation to my argument, is that it centres on the idea of articulating a 'wrong', which in his distinctive idiolect equates to a 'mode of subjectification in which the assertion of equality takes its political shape' (1999: 39). Politics, for Rancière is not, in other words, concerned with a 'conflict of interests, opinions, or values'; it is not a struggle 'over the content of specific claims' (Davis 2010: 84). It is 'a dispute about what is given' (Rancière 2004a: 304); that is, over what is visible, sayable, perceptible, intelligible, and knowable within the shared life of a particular social – or as he prefers police – order. It is a disagreement, that is, about the 'distribution of the sensible' (Rancière 1999) manifest in that order. Although Rancière does not couch his discussion of the distribution of the sensible in terms of ontology, indeed it has been suggested that Rancière does not 'do' ontology (see Chambers 2013), nevertheless there are parallels between his description of that distribution and Butler's account of 'reality' or the 'sphere of appearance'. For this reason, I propose to draw on this description in my exploration of social ontology in Butler's sense.

What is particularly noteworthy, for my purposes, about Rancière's wider account is that politics entails what has variously been translated in English as 'subjectification' and 'subjectivization' (from the French *subjectivation*; see Chambers 2013: 98-101): the coming into existence of *political* subjects. Rancière describes subjectivation, as I will render it here, as the 'production through a series of actions of a body and a capacity for enunciation *not previously identifiable within a given field of experience*, whose identification is thus part of the reconfiguration of the field of experience' (1999: 36, emphasis in original). A political

subject is not, in other words, a pre-existing subject; it is one that emerges *through* an act of politics, *through* the transformation of identities defined in a given police order 'into instances of experiences of a dispute' (Rancière, 1999: 36). This is where litigiousness fits. For Rancière politics works by inscribing a 'subject name' that is different from any 'identified' part of the community (1999: 37).[21] In 'Who is the Subject of the Rights of Man?' he explicitly equates these 'political names' with 'litigious names', names that allow for the reconfiguration of the community as they 'set out a question or a dispute (*litige*) about who is included in their count' (Rancière 2004a: 303). To illustrate what he means by this claim, I want briefly to consider his treatment of one such name: 'woman'

Woman, he suggests, is an identity that 'hold no mystery. Anyone can tell *who is* meant' by the term. But, he goes on, political subjectivation 'forces' woman 'out of such obviousness by questioning the relationship between a *who* and a *what*' (Rancière 1999: 36, emphases in original). In politics, as he conceives of it, 'woman' designates a 'subject of experience' that 'measures the gap' between a part acknowledged within the current police organization of the community, namely woman as the sexual complement of man, and what he refers to as 'a having no part' (Rancière 1999: 236): the fact that, in this masculinist social order, women cannot appear as politically competent beings. It is in this gap that political subjectivation occurs. First, through the rejection of – or 'disidentification' from – the role, identity, and 'natural' capacities allotted to women within this police order, where they are, to re-characterize matters, designated the second sex; and, second, via the generation of a new subject, 'militant feminist', 'a multiple' not already counted within that order (Rancière 1999: 36) and one that remakes its sensate basis, recalibrating what is perceptible within it.[22]

More to the point for this chapter, another of the names that Rancière identifies as a political or litigious name is 'human being' (1992: 60). Apprehended thus, 'human' does not connote a specific subject or identity. Nor does it define a set of properties shared by all

persons, as in a universal essence such as speech, language, rationality, or even biological existence (*zoë*). And it does not signify a collective body – humanity or the human species, say – of which individuals are members. As I read Rancière, claims made in the name of the human are ungrounded political claims that arise out of a 'quarrel over the perceptible givens of common life' (Rancière 2004b: 7).[23] I now want to tie this exploration of litigiousness back to my earlier discussion, of the fact that a critical politics of the human requires a disruptive ontological intervention, by returning to the words of Chicka Dixon.

In his 1967 article, Dixon makes a number of claims. 'Dogs, horses, cattle and sheep get counted in the census. So do TV sets and motor cars', he censures, 'But not Aborigines. We don't even rate as high as a goggle box'. 'We are invisible citizens', he accuses, 'We don't exist officially – yet we pay taxes. We don't exist – yet we are subject to a net of restrictive laws. We don't exist – yet we have to serve in the army […]'.[24] He speaks of the significance of the referendum as 'most importantly a matter of seeing white Australians finally, after 179 years, affirming at last that they believe we are human beings'. In addition, he proclaims his desire 'to be a Human Being', noting that Aboriginal people, as indicated earlier, 'want to be human like everyone else'.

The litigious use by Dixon (and others) of the language – or, to echo Rancière, the 'name' – of the human, I submit, needs to be understood in two inter-related ways. First, as an indictment of that 'name', because although it purports to apply universally the human, as it presently operates, excludes Dixon and those like him from its ambit. Secondly, as a way to disrupt and rearticulate who counts within the Australian nation as a citizen, whose political claims are intelligible as political claims, whose words are audible as words; in short who appears, and thus visibly exists, as a valued subject therein. Understood thus, the effect of interventions like these is *not* to produce a more capacious or expansive category of the human; recall that for Rancière political or litigious names do not have substantive content. It

is rather that they are the occasion for a political disruption, or (to recall Butler) an insurrection, of the prevailing distribution of the sensible, or what I am interpreting, in this instance, as the racialized ontology that excludes Aboriginal people from the count of the Australian polity, including from the literal 'reckoning' of the census. When successful, it is an intercession with the capacity to make possible the fabrication of a 'novel perceptual universe' (Rancière 2004b: 5). Invoking the human, in this context, I am suggesting, should be interpreted as part of a sensate struggle by Aboriginal peoples to 'make' themselves 'of some account' (1999: 27): a 'demand by them not only to exist' but, more importantly, 'to be perceived' (Panagia 2010: 96). An effort, moreover, both to undo the prevailing racially configured inegalitarian social order that dehumanizes them, as well as a demand, to borrow the evocative words of Gordon Bryant, a former Australian Labour Party MP, 'not only to be counted [in the census] but also to *count'* (cited in Gardiner-Graham 2007: 9, my emphasis).

Conclusion

The starting point for this chapter was my contention that human rights are best understood as a site for and outcome of critical contestation, with the human in this context, unlike in more traditional accounts, conceived, following Butler, not as a presupposition for or 'foundation' (2004a: 36, 37) of human rights but as one of its contingent and resignifiable effects. Consequently, human rights are not grounded in a fixed definition of what it is or means to be human. Instead, the very impossibility of securing the meaning of the human is precisely what opens it up to 'redefinition and renegotiation' (Butler 2004a: 33). We can see evidence of this potentiality for reinscription in cases like that discussed in this chapter, where those who do not qualify, normatively, as fully human nevertheless articulate their demands in its terms. With Rancière, I have proposed that on such occasions the human functions as a litigious or political name. Its deployment a means to stage a dispute over the sensate

ordering of the social. As a political (rather than moral or ethical) claim, subaltern appeals to the human not only performatively oppose the production of particular populations in specific settings as unintelligible, invisible, and unrecognizable as meaningful humans, without the rights and benefits such a status conveys. They also serve, more importantly, to advance a critical politics, centred not on incorporating the excluded into the existing count of humanity, but on unsettling and transforming the ontological limits of human belonging. Human rights is *one* of the instruments through which this critical politics is enacted.

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[1] My argument, drawing from feminist literature, was that such rights are beset by a series of paradoxes such that while positing formal equality, abstract rights fail to address material or structural inequalities; that despite their deficit in actually effecting significant social and political transformation, they nevertheless serve a purpose for 'the historically disempowered', as Patricia Williams calls them (1993: 153); that even as it provides a politically useful vocabulary in which to frame social and political wrongs and to articulate claims, human rights can also generate disciplinary and regulatory effects that re-naturalize particular subordinating features of a subaltern group's identity; and finally, that the very institutions that have been instruments of oppression (e.g. the state) become legitimized as potential agents of change.

[2] I am not arguing against the performativity of rights here, just for a performative politics of the human. On rights as performative see Zivi (2012) and Golder (2015).

[3] Anonymous in Amor and Austin 2003: 16.

[4] It might, of course, be objected that this is a reductive reading of liberalism, which masks both its diversity and more subtle modes of argumentation. As liberalism is not my focus here, these criticisms notwithstanding, I intend to let this characterization stand.

[5] According to John Tasioulas philosophers have variously grounded these moral rights in human dignity, personhood, basic human needs, or universal interests (2015: 45).

[6] 'Are we not human beings, we asylum seekers?', http://www.scottishrefugeecouncil.org.uk/news_and_events/latest_blogs/1361_are_we_not_human_beings_we_asylum_seekers, last accessed 20 November 2016.

[7] 'Recognize Trans Gender Identity' at: https://queerchatter.wordpress.com, last accessed 20 November 2016. As noted on the blog from which this quotation was taken: 'Right now, "Canadian Trans People are not explicitly recognized as humans. They are NOT in the Human Rights Code… Trans People are NOT protected by Hate Crime legislation. Bill C-389, would ensure basic human rights protections for trans people.' The Act was passed in the House of Commons at the Third Reading by a vote of 143 for to 135 against in 2011; however, it did not pass into law because an election was called before it could be debated in Senate or receive Royal Assent.

[8] This, of course, is not Phillips' solution. Rejecting both substantive and 'contentless' or 'abstract' accounts, those that divest the human of all particularities, she advances a 'claim-based' alternative, where to claim humanity is to claim equality and *vice versa*.

[9] Exclusionary measures, Feola notes, have served, variously, 'projects of state violence' and to produce, *inter alia*, 'the slave, construed as an instrument of the master's will; the racialized colonial subject, driven by the sub-rational rhythms of nature; [and] the sexual deviant, who violates both medicalized and moralized conventions of normality' (2014: 134).

[10] Anderson 2007: 201.

[11] Butler often uses inverted commas around the term, the human, to signal its contestability.

[12] The point I want to make here is that they do not appear as *fully human*; not that they do not appear at all.

[13] At the time of the referendum campaign Dixon, an Australian Aboriginal activist and leader, was the manager of the Foundation for Aboriginal Affairs. In 1970 he helped found Australia's first Aboriginal Legal Service and in 1972 was one of the co-founders of the Aboriginal Tent Embassy in Canberra.

[14] Razack 2014: 3. In what follows, I use the terminology (in respect of Aboriginal peoples) employed in the literature to which I am referring.

[15] The second, focused on a specific clause (xxvi) of section 51, concerning the power granted to the Commonwealth to enact laws with regard to special minorities.

[16] The effect of section 127, the census clause, was to limit both the size of electorates for the Federal Parliament and the distribution of funds (Williams and Hume 2010: 141; Attwood and Markus 2007: 3). I do not have the scope in this chapter to set out the full history or significance of the referendum campaign or, indeed, to address any political shortcomings it may have had as a campaign; so for more on the referendum see e.g. Tripcony (2001); Taffe (2005); Attwood and Markus (2007); and Gardiner-Graham (2007).

[17] As Tatz observes, because of the federal structure, one of the problems was the existence, at the same time, of six 'varying legal definition' determining 'who is an Aborigine' (1967: 440), one for each state.

[18] In contrast, those of full descent were allowed to remain on the reserves, missions and stations, and receive Government assistance. For a discussion of the nuances attached to how 'half-caste' was defined and who could qualify as 'Aboriginal' under such Protection Acts see Ganter (2008).

[19] The language of the 'human' is not the only one in circulation at this time. There are also references during the campaign to Aboriginal populations as 'people' (see e.g. the Petition Leaflet by the Federal Council for Aboriginal Advancement reproduced in Attwood and Markus 2007: 105, 106) and to them becoming Australian (Archbishop Strong cited in Attwood and Markus 2007: 122).

[20] One of the features of the campaign was the belief, advocated by white politicians amongst others, that the Commonwealth, rather than the individual states, should be responsible for Aboriginal affairs (see, for instance, Bryant cited in Gardiner-Graham 2007: 15; Attwood and Markus 2007: 7; Davis and Williams 2015: 27-28). With responsibility would, of course, come regulation, control and policing of Aboriginal communities; see, for instance, Tatz's discussion of the requirement, for social and economic planning purposes, of statistical information about Australia's indigenous peoples (1967: 439).

[21] For Rancière every police order has a particular mode of counting those within it. It divides the social world up, that is, in such a way that everyone has a place within it though not all places are equal politically. Politics, for him, entails a different way of counting, in which 'those who have no right to be counted…make themselves of some account' (Rancière 1999: 27). It thus involves a 'miscount', his allusive term for when those not deemed capable of political speech speak and in so-doing challenge the distribution of parts underpinning the existing police order. My point in this chapter is not to claim the example I am discussing would qualify as a political event as Rancière understands such matters; it would not. But, in my view, that does not invalidate my interpretation that during the campaign the vernacular of the human was used litigiously in his sense of that term.

[22] This is why Rancière notes that 'militant feminists are strangers to their sex' (1999: 36). Another way to frame the process of disidentification, employing the theoretical lexicon of Foucault and Butler, is to view it as an example of 'denaturalization'.

[23] On human rights as ungrounded claims see also Golder 2015. In Rancièrean terms, they are expressions of equality in action. Here equality is understood not as a goal of politics or the effect of a fairer parceling out of rights or resources but what is assumed in specific political actions.

[24] A refrain incidentally echoed by Bandler when she notes that 'At the moment for census purposes' Aboriginal persons are 'not even counted as existing' (in Attwood and Markus 2007: 123).