The right to protest

The Right to Protest

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In 'What's Left After Rights?' Eric Santner asks 'what points of orientation for political and ethical thinking *remain* on the far side of human rights discourse'?[1] While Santner's article ultimately explores what happens to leftist thought after rights-thinking is dispensed with, I think the formulation of Santner's question is helpful. This special issue asks 'Can we, and should we, imagine an 'after rights'?' I take that to mean, because rights have a persistent hold on the political imagination,[2] it is a serious question to wonder whether we *could* dispense with them. Much as a critic may identify the dangers of rights discourse, social movements and those wronged by states and corporations will continue to deploy human rights to challenge their situation.[3] So while it may be easy to imagine movements that push beyond rights, their hold on the political imagination means that we always risk falling back into a rights framework. Santner's question is useful precisely because it sets up a sort of spatial imagination. It suggests that we might think of 'the far side' of rights. But to get to the far side, it is necessary to traverse rights, to move through them critically, and to take people with you as you traverse. This article is about the right to protest, which I suggest helps us in this traversal of rights. It helps us to grasp the way rights frameworks operate to pre-structure protest, particularly in the way they naturalise the most spectacular but ineffective of protest formations. This traversal is important precisely because the right to protest is also a threshold concept. The threshold marks an edge. It is both within the discourse, but at the same time, on the cusp of being 'beyond' or 'after'. The right to protest can do more than help us critique the way rights work. I will argue that it can also orient us towards an 'after' rights, that is, it can re-orient political imaginaries of protest beyond the grip of rights. To do this, the article will explore the way in which protest is understood in human rights, primarily through the framework of speech, and the deleterious effects that this has on how we conceptualise protest. The article then focuses on the question of violence, or rather the determination of what counts as 'violence',

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[1] Eric Santner, 'What's Left After Rights?' 26 *Law & Critique* (2015) 105

[2] Cf. Upendra Baxi, *The Future of Human Rights* ((New Delhi: Oxford University Press, 2002)*;* Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000); Ratna Kapur, *Gender, Alterity and Human Rights* (Cheltenham: Edward Elgar Press, 2018); Sumi Madhok, *Vernacular Rights Cultures* (Cambridge: Cambridge University Press, 2021); see also Laurel Fletcher, 'Power and the International Human Rights Imaginary', *Journal of Human Rights Practice* (2022); and Josê Julián López *Human Rights as Political Imaginary* (London: Palgrave Macmillan, 2018)

[3] Ben Golder, *Foucault and the Politics of Rights* (California: Stanford University Press, 2015); Bal Sokhi-Bulley, *Governing (Through) Rights* (Oxford: Bloomsbury Press, 2016), Lara Montesinos Coleman, *Struggles for the Human* (Durham: Duke University Press, 2023); Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (Oxford: Oxford University Press, 2012)

showing the way in which the communicative idea of rights leaves (the other more effective) forms of protest unprotected.

The right to protest does not fit neatly into either international human rights law or into domestic traditions of civil rights, needing to be fashioned from speech and assembly rights, and demarcated from the extensive public order powers that states assert.[4] Drawing from recent experience of protests in Hong Kong, Chile, Colombia and the USA we might also want to add aspects of the rights to strike and to self-determination (whether that is political or economic). In short, because the right to protest does not exist in a specifically enumerated manner, it is quite messy at the level of norms. This lack of clarity pales into insignificance when we think about how it is understood at a popular level. The slogan 'defend the right to protest' has proved powerful in recent years, connecting a wide variety of organisations, activists and writers. But beneath this apparent agreement of left, centre-left and at times even certain conservative groups, we find quite a significant difference of views over the meaning of the 'right to protest', and what activities it might protect. Is it only 'peaceful' protest which calmly makes a point and then disperses; Does it cover events where there is some minor 'disorder'; What of strikes, mass pickets and general strikes; What about damage to municipal statues, to private businesses or public buildings; Or can the right to protest extend to fighting with the police or tussles between protestors and counter-protestors? In the popular usage, the right to protest is used to defend all sorts of activities that human rights institutions might be quite uncomfortable with. While there is important work to be done on this plurality, this article will focus on how human rights institutions limit and constrain protest activities.

On the surface, then, we might bemoan the fact that the right to protest does not exist as such, perhaps even attributing this confusion to the lack of an enumerated 'right to protest'. But the issue here is actually much more thorny. The problem is that by and large, protest is not a right that can be claimed from the state, but a right to be taken despite the state. Quite obviously, states do not organise protests. And while most states are willing to tolerate some dissent, their tolerance of large scale protest is often inversely tied to its likelihood of success: The more likely a protest is to be successful, the more likely a state is to want to co-opt and neuter or supress it. States are keen on the right to protest when the protests are unlikely to change anything in their country, or where they are directed at major change in another country. This means that states have an interest

[4] To see this clearly, we could explore the recent Inter-American Commission on Human Rights standards, written by the Special Rapporteur Edison Lanza, ('Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State' (Washington: OAS, 2019)). There a right to protest is fashioned from the various different norms around speech and assembly. The Commission must do some quite intense work of stitching these together.

in protecting only certain protests. Even the most 'tolerant' governments, will send in the riot police when a protest grows too big, becomes too popular, or stays too long. What is more, most states have learned from the anti-protest laws of the old colonial systems. Post-colonial states have almost universally maintained draconian colonial rules, and the former metropoles have borrowed widely from them with wave after wave of fresh anti-protest legislation.[5] States have the legislative and police powers to supress and criminalise almost any protest.[6] When people take to the streets to change something, they very often have to face off against this overwhelming public order apparatus. That is to say that they have to *take* their right to protest despite the state, not because of it. What we will see is that in the confrontation with the state that occurs under the banner of 'the right to protest', we find a way to traverse towards this 'other side of rights'.

The Primacy of Communication

The hegemonic conceptualisation of the right to protest in international human rights law is as a mode of communication. As Liberty explain: 'We have the right to come together with others and peacefully express our views'.[7] A group of people gather together in a crowd to demonstrate their demands. This demonstration is powerful precisely because a large number of people gather to express it. Where individuals expressing that opinion amongst friends and acquaintances might generate a slow capillary change, the idea of protest as a communicative action is that the 'force of numbers' will give a certain visibility and power to the demand. The UN Human Rights Committee is very clear on this in General Comment 37 where they explain that the 'right of peaceful assembly protects the non-violent gathering by persons for specific purposes, principally expressive ones. It constitutes an individual right that is exercised collectively.'[8] A protest involves a gathering *principally* for expressive purposes. Likewise the Inter-American *Standards on Social Protest* explain in their very first paragraph that: 'Protest is a form of individual or collective action aimed at expressing ideas, views, or values of dissent, opposition, denunciation, or vindication.'[9] Again, protest is action aimed at expression. Thus, we might say that primarily, human rights institutions understand protest as a communicative issue. As a shorthand, I will call this the 'primacy of communication'.

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[5] Stuart Schraeder, *Badges without Borders* (California: University of California Press, 2018), Illan rua Wall, *Law and Disorder* (Abingdon: Routledge, 2021).

[6] Paul Passavant, *Policing Protest* (Durham: Duke University Press, 2021)

[7] Liberty, 'The Right to Protest', (https://www.libertyhumanrights.org.uk/right/right-to-protest/). We see it reflected in Chatham House's 'What Makes a Successful Protest?' article by the Common Futures Community. (https://www.chathamhouse.org/2020/12/what-makes-successful-protest)

[8] UNHRC 'General Comment 37 on the right to peaceful assembly', (CCPR/C/GC/37, 17 Sept 2020) para 4

[9] Lanza, *Protest and Human Rights,* Para 1

Perhaps the most sophisticated versions of this 'primacy of communication' has been developed by the European Court of Human Rights in their deployment of the *lex specialis* principle.[10] The ECHR have deployed the principle of '*lex specialis derogat legi generali'* ('a specialist/specific law derogates from the general rule') to understand the relation between speech and assembly.[11] As Anja Lindroos explains, the *lex specialis* rule originates in a consensual model of treaty conflicts. The idea is simply that it 'would seem pointless to apply a more general rule to circumstances already regulated in a more specific manner. In such a situation, therefore, it appears preferable to respect the wishes of the parties (or the law-maker) and solve the conflict as they have already agreed.'[12] This 'common sense' principle operates by identifying a common object between the general and specific law. So for instance we might imagine a general rule about liability for environmental damage by reckless corporations, and then specific rules for enhanced damages against nuclear power plant operators because of the intensity of the damage they might cause. In an instance where there is a reckless discharge nuclear waste, we can see that while both the general and specific rule might apply, it should be the specific rule is deployed to assess damages. This works because both specific and general rules concern the same phenomenon – the release of nuclear waste.

As applied to the relation between speech and assembly rights, the *lex specialis* principle makes free speech the general rule, and the right to assembly a specific sub-set where slightly different norms might apply. It means that speech protections apply to assemblies, but assembly rules are particular and don't necessarily affect other (non-crowded) speech-acts. In this way communication is accorded a general value, and assembly is understood as a particular form of that communicative power. The effect of this principle is that crowded speech presents very particular problems which may mean speech acts need to be restrained. The crowd can be an amplifier of speech, assemblies can be important in iterating the democratic mode of contestation,

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[10] While *Ezelin v France* (Application no. 11800/85, 1991) is taken as the origin of the application of the *lex specialis* principle to Article 10 and 11, in fact it receives little consideration from the Court (para 35). Indeed, the majority specifically seem to limit the application of the principle, commenting that it applies in the specific 'circumstances of the case', although it does not enumerate the conditions under which it might or might not apply. Nevertheless, *Ezelin* is now reffered to in the jurisprudence, as though it settled this question once and for all (e.g. Frumkin v Russia, (Application no. 74568/12) 2016, para 107).

[11] The *lex specialis* argument was made by the Finnish government at the UN Human Rights Committee in *Kivenmaa v. Finland* (Communication No. 412/1990). While the Council ultimately rejected Finland's argument, it did so (in a remarkably short comment) on the facts and made no pronouncement on the *lex specialis* argument. This may be a sign that the Committee is unwilling to employ the technical logic of the *lex specialis.* In his individual opinion, Mr Kurt Herndl comments that: 'It is regrettable that the Committee, in its Views, did not address this legal problem but contented itself with the somewhat oversimplified statement that just by removing the displayed banner, the Government violated the author's right to freedom of expression. Would the Committee still have found a violation of article 19 if it had found no violation of article 21? Hardly.' (para 3.5).

[12] Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis,*' 74 *Nordic Journal of International Law* (2005), 36

but they deserve protection because of their relationship to communication. As I will show in the next section, this reduction of assembly to speech is problematic in the manner in which it misses key aspects of assembly, rendering crowds as a threat, rather than as an additional reason for protection. If assembly was as valued as speech, we would see a jurisprudence of the mass, where the larger protests would accrue greater protection. But in fact the jurisprudence goes the other way: The greater the crowd that takes to the streets, the more the court perceives danger, the greater this anxiety, the more willing the court is to allow resort to the state's violent public order powers. Thus, at times we find a paradoxical relation where an individual speech act would be protected, but by gathering together and performing that speech-act together, the communication becomes more risky according to the analysis. In this way, the right to assembly can operate to reduce protections extended by speech rights.

The right to petition is a good way to conceptualise this aspect of the contemporary right to protest. In the 19th century the right to petition rendered popular desires intelligible to the powerful, it allowed the crowd to address parliament or the government. It also served an important reflexive function. The petition provided a concrete focus around which to organise mass meetings, pamphleteering and other forms of agitation. While historic petitions like the Chartists tended to adopt comparatively supplicant tones, they 'could be pregnant with threat'.[13] Understanding the right to protest as a form of petition, it emerges as an intra-systemic political communication that takes its place alongside electoral politics and juridical evaluation. The aim is for large groups of people to address the state (or one of its functionaries) and seek a shift in policy, a recognition of wrong or some form of redress. The right to protest (qua petition) can be conceived as the right to gather together in large numbers and calmly walk around a major city for the afternoon. It is a channel of communication to the powerful.[14] In this form, the demand is visibly performed by large numbers of people, it is performed publicly and in broad daylight, and it is performed with a self-policed polite calm. If a protest *qua* the right to petition is successful, then the social or legal change comes from the sovereign order. The sovereign order 'hears' the demand, it considers and relents. This makes the protest merely a communicative vehicle. The dynamics of the actual change come from within the machinations of government. Clearly contemporary human rights jurisprudence includes a more sophisticated idea of the public sphere, wherein discussion and debate occur as a way of working through disagreements in a democratic

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[13] Huzzey and Miller, 'Petitions, Parliament and Political Culture: Petitioning the House of Commons, 1780-1918' 248 *Past and Present* (2020) 131. They continue: 'It is not difficult to comprehend why many British elites feared that the presentation of the Chartist petition in April 1848 heralded an uprising: they had read, in recent weeks, of petitions interwoven with demands for revolutionary change in the German states, Austria and France.'

[14] For instance, see Ruud Wouters, and Stefaan Walgrave, Stefaan 'Demonstrating Power: How Protest Persuades Political Representatives,' 82.2 *American Sociological Review* (2017), 361

way. In this sense, the right to petition's orientation towards the sovereign order is a little misleading, but nonetheless, it is a helpful comparison at the outset to clarify some of the elements of the hegemonic human rights conceptualisation of this right. At the core of petition as a model for the right to protest is its communicative configuration.

The Materiality of Protest

The tendency to reduce protest to communicative power has the ring of common sense. After all, inevitably protests communicate something! But like all common sense positions more is hidden than revealed. To grasp the occlusions that this position produces, it is useful to begin to work through the different forms of power that can take shape in the right to protest. To do this, I propose that we suspend the different definitional determinations of what counts as protest; that it cannot infringe the right of others, that it must be non-violent, that it must take place in public space, or that it has to have narrowly political (rather than particular economic) ends. These categories are key to the reproduction of rights thinking, and ensure the return to the same rights thinking of protest. If we are to begin to move towards the 'far side of rights' then it is important to suspend these determinations. Rather than starting from a normative determination of the correct form of protest and then working backwards, the aim is to begin with the phenomenon of protest.[15]

So let us imagine three scenarios: Let's say, a large group of protestors have gathered outside the London headquarters of an energy company. The company have reopened an old coal seam, and have begun to build a major new coal fired power station. In the first scenario, the large crowd of several thousand people surround the building, chanting and singing. They have banners and flyers. As night falls tents emerge and the main body of the crowd promises to remain in the public space until the company ceases its climate changing activities. In the second scenario, the protestors enter through the front doors. They rapidly spread out around the building and sit down in every available space, still chanting and singing. Out of their bags they take sleeping bags, food and water for weeks. They make it clear that they are here to stay. In the final scenario, the crowds enter the building and begin to methodically destroy computers, furniture, servers, equipment and documentation. With such large numbers, the work of destruction is quickly completed. The crowd stream from the exits and evaporate into the city.

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[15] See also James Greenwood-Reeves, *Justifying Violent Protest* (Abingdon: Routledge, 2023); Christian Volk, 'On a Radical Democratic Theory of Political Protest: Potentials and Shortcomings' 4 *Review of International Social and Political Philosophy* (2021), 437.

Let us approach these scenarios philosophically, ignoring the likely policing and criminal justice responses, just as we have ignored the normative determination of what properly counts as protest. In scenario one, we might identify the exercise of a communicative power. The protestors are exercising their power to assemble and communicate both with the employees of the company, and also with the broader public. Their aim is to shine the light of public spectacle on this company, and through public opinion or shame or some other affective response, draw a reaction. Their occupation of the square outside the company is a material manifestation of this communicative tactic, and it inconveniences the company without overly disrupting their activities. The occupation, in time, becomes a sore on the public face of this corporation, a perpetual symbolic reminder of their climate damage. In scenario two, we see a disruptive power. The protestors interrupt the smooth functioning of the headquarters, they stop the activities of the workers in a material way. But of course, this is also a communicative action, their material disruption is staged also for a broader audience who they hope will sympathise or join them. In the first scenario the protestors sought to communicate the necessity of action (of stopping the activities of the company), in the second the protestors actively cause that action *and* also communicate their case for stopping that activity. In this sense, it is important that we are not comparing different forms of power, but accumulating different elements. The third scenario is characterised by what we might call a destructive power. The equipment and space used by the company is wrecked, the work of the company is stopped (for a time at least). But it also combines both disruptive and communicative action. The act of destruction includes a communication between the protestors, the energy company and the public. And it actively disrupts the workers from undertaking their activities. The destructive effects operates to continue the interruption even after the protestors have left.

It is important to see that each of these acts are communicative, but it is also important that we do not simply reduce them only to their communicative element. The *material* disruption and destruction are essential components of those protests. Most mass protests contain a significant material component, and they do this precisely *because* they are assemblies. The gathering of large crowds together in one place, inevitably displaces the activities that would have taken place there. So for instance it might lead to traffic build-up elsewhere as roads are closed; shoppers and sight-seers might be put off from traveling to the space of the protest; public transport might be closed or diverted; etc. Material disruption is often a key aim of particular protests. So for instance the occupation around the Legislative Council buildings in Hong Kong in 2014 and of the entrance to the Mugamma building which housed the Interior Ministry during the 2011 revolt in Tahrir

Square are both good examples of bureaucratic and legislative functions being disrupted.[16] In a different way, the civic strike in Buenaventura (Colombia) in 2017 saw the disruption of a massive hub for global supply chains.[17] These instances of disruptive power of protest are important *not* because they communicate (although they do that too), but because they generate material changes in the functioning of the protested space. These radiate outwards from that space, reverberating around the city and the territory of the state.[18]

We might complicate the relation between disruptive power and communication a little further, by insisting upon a strain of protest where the communicative content almost approaches zero. That is not to say that it reaches zero, but that it contain only a minimal level of communication. These are protest events which are almost entirely oriented around disruptive power, sometimes referred to as 'destituent power' or a 'pure rejection'.[19] So for instance, in 2008 there had been a major series of strikes in the Gafsa region of Tunisia. President Ben Ali had managed these by carrot and stick, dividing the strikers and giving in on a number of key demands. In this way, his policies changed, but the regime itself remained. When protests broke out following the protestors in 2010-11 learned the lesson of Gafsa, and demanded simply that Ben Ali should 'get out' (*degage!*). Across every level, the protesters refused to enter into the communicative games of the regime. Their symbolism pointed to the failure of the state, the failure of the 'pact of obedience'.[20] However, instead of making particular demands, the communication to the regime was *almost* at a zero level. This point-blank refusal to accept even the conditions of communication renders the protest unintelligible to the regime it contests. While we cannot say the protests were 'pure disruption', they were marked far more by the refusal to engage discursively. It is important to say that this communicative element only approaches zero, because as our editors have pointed out, the refusal to communicate does communicate a key demand.

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[16] While some would deny its status as protest, I suggest a strike is a classic expression of disruptive power. At the core of the strike is the manifestation of the withdrawal of labor. But this is has two aspects, firstly, the laborer withdraws the productive labor they give to their employer. And secondly, they manifest this withdrawal at the picket. The picket operates as an affective blockage, where workers are pressed not to cross. At stake is the power to interrupt the labor of the space of employment.

[17] Johanna Cortes-Nieto, 'Securing the Port Against the Black Poor in Buenaventura, Colombia, 26.5-6 *City* (2022). 1045; Alke Jenss, 'Disrupting the Rhythms of Violence: Anti-port Protests in the City of Buenaventura' 12.2 *Global Policy* (2021) 67

[18] Daniel Matthews, Narrative, Space and Atmosphere: A Nomospheric Inquiry into Hong Kong's Pro-democracy 'Umbrella Movement', 26.1 *Social and Legal Studies* (2017) 25.

[19] Kolija Möller, 'From Constituent to Destituent Power Beyond the State' 9.1 *Transnational Legal Theory* (2018); Saul Newman, 'What is an insurrection? Destituent Power and Ontological Anarchy in Agamben and Stirner' 65.2 Political Studies (2016); Jessica Whyte, 'I would prefer not to': Giorgio Agamben, Bartelby and the Potentiality of the Law' 20 *Law & Critique* (2009), 309;

[20] Beatrice Hibou, *The Force of Obedience* (Polity Press, 2011), Illan rua Wall, 'Tunisia and the Critical Legal Theory of Dissensus' 23.3 *Law and Critique* (2012); Illan rua Wall, 'A Different Constituent Power : Agamben & Tunisia' in Illan Rua Wall, Costas Douzinas and Matthew Stone (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press, 2012)

A different example comes from protests that are oriented around a destructive power. These are often understood as excluding themselves from the realms of communication. So for instance, general analysis will differentiate between the riot and protest stages of the 'London Riots' during the summer of 2011. Where the initial 'protest' outside Tottenham police station was against the death of Mark Duggan at the hands of the police,[21] the subsequent 'riot' was characterised by liberal and conservative voices as senseless violence and pure criminality. These accounts insist that the latter phase communicated nothing in political terms, and instead was constituted by a base desire for appropriation of things and a general sense of immiseration. Against this, Vicky Osterweil argues that looting and rioting can be made legible by grasping their history as a 'racialized relationship to property'.[22] Osterweil argues that '*Looting* is a word taken from a colonized people and used to denigrate and racialize riotous subalterns resisting English empire. It would from the very beginning refer to a non-white and lawless relationship to property.'[23] She traces different ways in which looting works as a mode of everyday protest and revolt: Looting is a mode of redistribution; When it is the looting of necessities, it feeds the everyday needs of the crowd. When it is luxuries that are taken, it is the appropriation of joyous commodities that are only available to the poor through relations of debt and subjection; Looting, Osterweil argues, destroys the commodity as commodity. By removing it from the cycle of exchange and profit, the object becomes gift.[24] There are other arguments too, but at the core of the book is the insistence that looting is directly legible. Legibility, in this context, is not simple communication. It requires that you move beyond attention to a specific demand. This line of critical theory insists that riot and looting communicate in a way that is specifically excluded from the conditions of political discourse.[25] Thus, between the 'legibility' of riots and the almost zero-level communication of the refusal, we have modes of protests that challenge the very conditions under which communicative power operates.

If we return specifically to the human rights paradigm, we can see that both disruptive and destructive powers of protest are acknowledged. UN Human Rights Committee general comment 37 explains that 'peaceful assemblies can sometimes be used to pursue contentious ideas or goals.

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[21] cf. Lucy Finchett-Maddock, 'Seeing Red: Entropy, Property and Resistance in the Summer Riots 2011' 23 *Law and Critique* (2012), 199

[22] Vicki Osterweil, *In Defense of Looting* (New York: Bold Type Books, 2019) 226. See also Greenwood-Reeves, *Justifying Violent Protest*, Chapter 4.

[23] Osterweil *In Defense of Looting,* 3

[24] See also Angus MacDonald's exploration of this situationist analysis of looting in 'Nocturnal Games in the Streets' 23 *Law and Critique,* (2012) 185, where he comes to a very different conclusion.

[25] See also Evan Calder-Williams, 'An Open Letter to those who Condemn Looting' (Viewed on 01/12/2022, available at: https://azinelibrary.org/approved/open-letter-those-who-condemn-looting-evan-calder-williams-1.pdf); and in a very different way, E.P. Thompson 'The Moral Economy of the English Crowd in the Eighteenth Century' 50 *Past & Present* (1971), 76

Their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity. These consequences, whether intended or unintended, do not call into question the protection such assemblies enjoy.'[26] Thus a certain amount of disruption is imagined by human rights paradigms, however, disruptive protest is more contentious. In terms of destructive power, the general comment also appears *relatively* permissive. Relying on Inter-American and European jurisprudence, it explains that 'isolated acts of violence by some participants should not be attributed… to the assembly as such'.[27] So sporadic and contained violent acts should not be used to disperse the entire protest. However, those who undertake the destructive power are unprotected by the right to protest. And an entire protest may be dispersed where violence becomes more than merely 'isolated' in the eyes of the state.

We should take three points from this discussion. Firstly, protest should not be reduced only to communicative power. There are lots of other ways in which it works. Secondly, it is clear that the gilded value in human rights law is communicative power, and material disruption and destruction are tolerated only because of the communicative element. The addition of material power of protest is a risk, it is a dangerous supplement. It is tolerated precisely because communication has been deemed to be important in a democratic society. And thirdly, we have begun to glimpse the ways in which the determination of 'violence' is important to the treatment of the material power of protest. Thus, let us turn now to the work that violence might do in human rights law.

The Monopoly on the Determination of Violence

In the human rights jurisprudence on the right to protest there is a clear demarcation that *only* 'peaceful' protest is protected. The Human Rights Committee's general comment 37 goes some way to explaining this:

> A 'peaceful' assembly stands in contradistinction to one characterized by widespread and serious violence…. The right of peaceful assembly may, by definition, not be exercised using violence. 'Violence'… typically entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property.[28]

There is broad support for this position in the regional jurisprudence. Again, it seems to have a certain common sense value. *Of course* only peaceful protest is protected by rights. But again, the

[26] UNHRC 'General Comment 37', para 7
[27] UNHRC 'General Comment 37', para 17
[28] UNHRC 'General Comment 37', para 15

trick is in the determination of 'violence'. To show the way this can work, let us focus in on the European jurisprudence and, in particular on the recent case of *Razzvozzhayev and Udaltsov v Russia* (2020).

The case is complicated and concerns a number of potential violations which I will not explore, but the facts which are important for the Article 11 (assembly) decision concern protests in Moscow in 2012. Dissident groups sought to protest the inauguration of President Putin, following what they saw as illegitimate elections. A protest route and rallying point was agreed with the police in advance to Bolotnaya Square in central Moscow on the 6th of May. However, when the march arrived, they found that police had cordoned off the Square and sought to keep them on Bolotnaya Embankment. The leaders encouraged a sit-down protest at the cordon, which the police saw as incitement to disorder. As tensions rose, the leaders withdrew their sit-down protest and made their way to the stage on the Embankment. 'At the same time a commotion arose near the police cordon at the place vacated by the sit-down protest, and the heavily armoured police cordon was broken in several places. A crowd of about 100 people spilled over to the empty space beyond the cordon.'[29] The police – who were on the scene in force – closed the breach very quickly and no more people got through. Following this, the police instructed the organisers that the stage was closed and that the protest was over. Within fifteen minutes they began to break up the crowd by force,

> they pushed the crowd apart, arrested some people, confronted others and formed new cordons to isolate sections of the crowd. Some protesters held up metal barriers and aligned them so as to resist the police, threw various objects at the police, shouted and chanted 'Shame!' and other slogans, and whenever the police apprehended anyone from among the protesters they attempted to pull them back. The police applied combat techniques and used truncheons.[30]

The first applicant was arrested for breaking through the police cordon, and the second for speaking from the stage, explaining that they should occupy the park/embankment until Putin's inauguration was cancelled.

The first applicant's article 11 case was dismissed by the ECHR as incompatible with the provisions of the convention because it was not 'peaceful'. The Court concluded that by breaking the cordon at that moment, his acts 'led to the escalation of violence at a crucial moment and triggered the onset of clashes'.[31] In other words, for the Court, the police's subsequent forceful dispersal of the protest can be traced back to the 'violence' of breaking the cordon. It is worth

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[29] *Razzvozzhayev v Russia and Ukraine* (Application no. 75734/12*), and Udaltsov v Russia* (Application no. 55325/15) (2020) para 25

[30] *Razzvozzhayev v Russia,* para 28

[31] *Razzvozzhayev v Russia,* para 284

emphasising just how quickly they come to this conclusion. In a decision of 87 pages, the Court dismisses the claim in 96 words. There is absolutely no discussion of the nature of the 'violence' that led to the cordon breach, no need to define violence or to monitor the state's determination of violence. Instead the Court grants a wide margin of appreciation for this determination, and I want to suggest this is rooted in the old Weberian argument about the nature of the state.

In his 1919 lecture 'Politics as a Vocation', Weber had famously suggested that the state claims for itself the monopoly on the use of legitimate force. It identifies certain acts as legitimate, and in the process of doing so gives itself form as a structure of legitimation. This act of legitimation, also establishes a realm of violent acts that are illegitimate and private. Unlike the public force of the state, violent acts belong to the populace and are outside or against the state's monopoly on legitimated force. In their recent book *The Force of Non-Violence,* Judith Butler glosses this point about the state's monopoly on the use of force. They show that it relies upon a prior determination of what is force and what is violence. The force/violence distinction could never simply be a matter of the riot police officer working to protect this limit, it must first be discursively produced.

> States and institutions sometimes call 'violent' any number of expressions of political dissent, or of opposition to the state or the authority of the institution in question. Demonstrations, encampment, assemblies, boycotts, and strikes are all subject to being called 'violent' even when they do not seek recourse to physical fighting, or to the forms of systemic or structural violence…. When states or institutions do this, they seek to rename nonviolent practices as violent, conducting a political war, as it were, at the level of public semantics.[32]

Butler then sharpens this observation, cutting through the politics of particular situations to identify the key discursive practice: 'That monopoly [on the use of force] depends upon a naming practice, one that often dissimulates violence as legal coercion or externalizes its own violence onto its target rediscovering it as the violence of the other.'[33] Thus in Butler's hands the force/violence distinction opens onto a series of naming practices that form a key part of the broader apparatus that gathers around protest. The determination of 'violence' does more than simply delineating the realm of acceptable and unacceptable speech and action. It refashions the scene of protest, so that any actual violence is immediately blameable on protestors. The presence of the 'black bloc', for instance, is often synonymous with violence. When a state points to the presence of the black bloc, they signal that violence is in the air. When that violence is manifested, the black bloc are identified with it. It rarely matters whether the police were the ones beating

[32] Judith Butler, *The Force of Non-Violence,* (London: Verso, 2021) 2-3
[33] Butler, *The Force of Non-Violence,* 6

people, destroying encampments or detaining innocent protestors. Violence is that which is done by the protestors.

Returning to *Razzvozzhayev and Udaltsov v Russia* we might follow the ECHR's own determination of the facts on this apparent violence. There are three distinct sources referred to regarding the cordon breach. Firstly, there was a reliable witness who explained that while negotiations were going on 'the crowd built up [and] suddenly the police began moving forward, the protestors resisted and the cordon broke'.[34] Secondly, there is the decision of the Moscow City Court, itself. This explained that:

> the court [rejects] the testimonies to the effect that it was the police who had begun moving towards the protesters who were peacefully sitting on the ground and thus provoked the breaking of the cordon… [and finds] that it was the protesters, and not the police… who began pushing against the cordon, causing the crowd to panic, which eventually led to the breaking of the cordon and the ensuing mass disorder.[35]

And finally, the international expert commission, set up by eight prominent international NGO's. They reported on the cordon breach that:

> as people tried to move through the narrow gap between the police cordon and the waterfront to reach Bolotnaya Square, the police line moved two steps forward, further pressing the crowd. This in turn generated a counter response from the crowd, and protesters began pushing back. In several places, the police cordon broke, and a few dozen people found themselves in the empty space behind the first police line. It is impossible to determine whether the [breaking of the cordon] was the result of conscious action by sections of the crowd or if the police cordon simply broke due to the pressure from such a large number of people.
>
> Some of those who made it past the police lines were young men, but there were also many elderly citizens and others who did not resemble street fighters. Those who found themselves behind the police cordon did not act in an aggressive manner but appeared to move towards the entrance to the Bolotnaya [park], the supposed rally point.[36]

From these we get a spectrum of actions – from people pushing a heavily armed police cordon to the police failing to hold back a particularly dense part of the crowd. The facts around the cordon-breech are never established by the ECHR, instead the domestic court's determination in this is accepted. Before I comment on this, let me observe the contrast with the treatment of the second applicant.

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[34] *Razzvozzhayev v Russia,* para 137
[35] *Razzvozzhayev v Russia,* para 137
[36] *Razzvozzhayev v Russia,* para 51

Where the Court rapidly deems the first applicant's acts to have precipitated the violence of the day, we find a slower, more patient discussion in the second applicant's case. It begins with a disavowal of any form of violence.

> In relation to the second applicant, on the other hand, the Court considers that the acts imputed to him – that is, taking part in the sit-in and encouraging others to join it, and his calls to the protesters to begin an 'indefinite protest action' on the site of the cancelled meeting and to set up an illegal campsite there – did not demonstrate violent intentions on his part. No witnesses at the trial stated that he had taken part in any violent acts or encouraged them; on the contrary, he insisted on a 'strictly peaceful' form of conduct.[37]

Unlike the first applicant's treatment, the Court looks back over its findings of fact, adopting a nuanced and critical reading of the state's account. It finds that the tensions arose 'because of the authorities' unannounced change of the venue layout in order to prevent illegal campsites from being set up in the park at Bolotnaya Square.' And the failure of the police to communicate with the protestors intensified this tension and lead to the violence of the dispersal.[38] With the first applicant there is just this one moment which apparently precipitates the violence of the afternoon, but the second applicant's illegal call to occupy the space and confront the police is treated very differently.

In the simplest of senses, I want to suggest that the difference lies in the communicative value of one and the material power of the other. There is little communicative value in the first applicant's breach of the police lines. It is primarily a disruptive mode. Police use cordons to limit protest zones. The danger to any cordon comes from behind, so if protestors can break through the police may be forced to defend themselves from in front and behind, and this will often lead to the order to release the cordon and regroup elsewhere. The 'zone sanitaire' behind the cordon is therefore essential to the efficacy of the tactic. The second applicant's cordon breach was therefore important because, in a very material way, it challenged the efficacy of the police's decision to refuse access to Bolotnaya Square. If the protestors had managed to get to the Square in numbers, and forced the police to cede the space, the protestors might have been able to undertake the encampment encouraged by the second applicant. This was the 'Occupy' moment specifically imagined by both the applicants and the State. The first applicant undertook a disruptive action against the police management, a material power that had the same end as the second applicant. But the second applicant's action was solely communicative. And for that reason, it was given significantly more consideration.

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[37] *Razzvozzhayev v Russia,* para 285

[38] *Razzvozzhayev v Russia,* para 291

In a simple sense then communicative power is given primacy, because it is given more care and attention. But there is also a more sophisticated way in which this primacy of communicative power works. We might understand the primacy of communication as a framing device. A framing device is a way of making something appear as a matter of concern. The trick, however, is that you see only the matter of concern and not the way it was made to appear. In other words, the frame itself escapes our attention. By granting communicative power a normative primacy, it becomes the frame through which protest rights are judged. If communication has primacy in the right to protest, then all acts of assembly (including those that are destructive or disruptive) must pass through the communicative frame in order to establish their legitimacy. In this case, the first applicant's action needed no consideration at all, because it seemed contentless when passed through the communicative frame.

There is one final observation that is connected to this, that helps us grasp the way this primacy of the communicative helps us *through* rights and potentially out the other side. It requires that we zoom out from this case, and think more broadly about protest cases. Orsolya Salát points out that the ECHR seems to provide significantly fewer protections to protests that actually occur than to those that the state seeks to prevent in advance.[39] There are many successful cases about the prospective prohibition of assemblies at the ECHR, but at the same time, as Salát identifies, there a curiously fewer cases about police tactics when a protest is allowed to happen but then deemed 'violent'. In the early days of the ECHR system, the Commission was often comical in its willingness to accept the state's determination of the likelihood of violence: 'the Commission regularly rubber-stamped government allegations on public disorder without requiring any standard of probability.'[40] Salát adds: 'Unhindered flow of traffic (in a pedestrian area!), or avoiding excessive noise, exemplify the breadth of the traditional interpretation of prevention of disorder.'[41] Since the mid-2000s however, the Court has been keen to critically explore the (often) paranoiac fantasies of the police. It implicitly accepts that the state is likely to harbour a basic prejudice against protest movements that challenge their policies. And it insists that states should presume that protests will be peaceful, unless they have specific information to the contrary.[42] In other words, the Court insists that the state should protect the pristine idea of protests. This is the case, as we have seen, even if there is likely to be a little disorder that is typical of crowded situations but which presents no overall threat to the public order. As against this situation, where a protest

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[39] Orsolya Salát, *The Right to Freedom of Assembly: A Comparative Study* (Oxford: Hart, 2015), 132

[40] Salat, *The Right to Freedom of Assembly,* 129

[41] Salat, *The Right to Freedom of Assembly,*129

[42] *Oya Ataman v Turkey* (2006) and *Aldemir (No. 2) v Turkey* (2007) both demonstrated that the Court would be willing to explore the fear of disorder more critically.

actually occurs, the fantasy of the pristine speech-act situation is measured against the accounts of the event. Here we find a tendency for the fantasy of the ideal speech-act to be shattered by even minimal levels of disorder. When that occurs, like a jilted lover, the Court is willing to sanction high levels of force. Here the fantasy has shifted, from the ideal speech-act, to the terror of the crowd. As I have shown elsewhere, the crowd is the feared object-target of public order interventions.[43]

In *Razzvozzhayev and Udaltsov v Russia,* the second applicant fits neatly within this fantasy of protest. He called for an occupation of the square, but no occupation actually took place to ruin the fantasy. The first applicant committed the mistake of a material action to reach those ends. The second applicant was entitled to call for an illegal occupation to prevent Putin's 2012 inauguration. But the moment anyone did anything about this, like pushing or being pushed through a police cordon, then the rights protection disappears. 'Violence' is used as a meta-signifier in the right to protest literature. It is used by states, as Butler showed, to attribute police actions to the protestors. In fact, the vast majority of the actual violence on that day was either undertaken *by* the riot police, or precipitated by their specific intervention. While sometimes the ECtHR has been willing to explore the paranoic fantasies of states about what protests might do *in the future*, they are singularly unwilling to explore the ways that states have actually policed protest that has taken place. Those few cases where they do explore this in any detail show an *overwhelming* willingness to defer to the state's determination of that meta-signifier 'violence'.[44]

This is not a critique of the margin of appreciation, rather I am arguing that it points us to a much deeper insight into the way human rights and states work. As Étienne Balibar insists, when the state claims the monopoly on the use of force, and the attendant monopoly on the determination of what is force or violence, then it elevates itself to a site of transcendent rationality.[45] When the state identifies an act as violent, it inscribes the act as existing in a realm beyond civility. As we see in *Razzvozzhayev,* human rights are intimately involved in the determination of this limit. The state claims for itself a realm of civility. However, while it seeks to outlaw violence, it can only secure this sphere of civility by periodically employing a 'counterviolence of overpowering repression' to keep the populace in order.[46] The violence which is apparently beyond the state, creeps back in under the title of 'security'. The riot officer is faced with crowds who refuse to concede, who refuse to stand down when their protest is rejected by

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[43] ****Author****

[44] For instance Austin and Others v the United Kingdom, (15 Mar 2012), 55 EHRR 14

[45] Étienne Balibar, *Violence and Civility: On the Limits of Political Philosophy*, (New York: Columbia University Press, 2016) 5

[46] Balibar, *Violence and Civility*, 5

the state. In this moment they become a limit-worker. Their labour manifests the delineation between the force of the state and the violence of the private citizens in protest. But to protect this limit, at times they must manifest an extreme counterviolence. Their job is to stand with one foot in force and one in counterviolence: On one side the image of a constrained and responsible state worker; On the other the terrible, monstrous power of a state to supress its populace. Balibar explains that 'the established order [holds itself up]… as the very reality of non-violence… [but] it is quite often only the common framework for a host of general or particular, open or veiled forms of violence.'[47] This limit is precisely the point that the right to protest focuses us upon.

Conclusion: The Far Side of Rights

At the outset I explained that the right to protest was thorny because it presented a particular challenge to state power. The more likely a protest was to be successful, the more likely a state is to want to supress it. With Balibar's analysis of protest as a limit-point, we get to the heart of this. Through the monopoly on (the determination of) force/violence, the state claims for itself a pure rationality and universality. The state is not just any form of social, economic and political organisation, it is *the form* of organisation that guarantees civility in Western modernity, that suspends civil war. But in the moment of protest, where the state releases its counterviolence against the populace, the state suddenly comes to appear as a *particular* form. It is not *the state* which guarantees non-violence and civility, through reason and universality. Instead at the moment of protest, where the state appears in its savage brutality, it is just *a state*. It is particular and irrational. And in this moment, the entire state edifice gives way. The necessity of its form collapses and the state form is shown to be contingent. It could be otherwise. The right to protest is essential because it focuses us on this moment.[48] It is the moment that the crowd forces the state to show the incivility that it holds in reserve. This is why it is essential that the state do everything it can to externalise this violence onto the protestors. But for the protestors, when the right to protest is adjudged to end at the point where state violence is externalised onto the protestors, we find an opening beyond rights. Beyond a right to protest which favours empty communicative gesture, are forms of protest which open other virtues, from political participation to the fashioning of solidaristic bonds, and from the challenge to injustice to the potentiality of self-help.

This article suggests that it is absolutely essential that we begin to think through a process of traversing rights, that we grasp the thresholds presented by the current rights systems in order

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[47] Balibar, *Violence and Civility*.
[48] This is what I have called elsewhere the 'state of unrest' (Wall, *Law and Disorder*.)

to explore what Santner called the 'far side of rights'. However, rights cannot simply be done away with, because as our editors diagnose they still hold a tight grip on the political imagination. It is essential that we find paths through rights. Some paths will get us lost, others will deposit us on the far side, where rights are overtaken and overcome. Crucially the paths that we choose cannot simply be sites of rational critique. They must also work on the hold that rights have on the political imaginary. We must be transformed as we traverse rights. This article has taken the form of a critique, it has shown the effects of institutional rights formations on the right to protest. It has shown the danger of giving communicative power a primacy. But it also begins to chart that path through the right to protest, whereby the very structure of rights as a legitimatory apparatus, that can rubber stamp extreme public order counterviolence, appears *to the protestors*. And this, perhaps is the most important thing. Because within this question of 'beyond rights' is a secondary question of 'for whom?' When the right to protest is deployed to insist only upon ineffective protest, we find it a deeply conservative jurisprudence. It is conservative in the sense that it seeks to conserve particular state formations, to seal in a particular state form. The right to protest therefore does not simply give us a position of critique, rather it makes rights appear in ways that radically affect the political imaginary. The right to protest is a right that opens onto the 'far side of rights'.