Rights and Queues:

On Distributive Contests in the Modern State

KATHARINE G. YOUNG*

Two legal concepts have become fundamental to questions of resource allocation in the modern state: rights and queues. As rights are increasingly recognized in areas such as housing, health care, or immigration law, so too are queues used to administer access to the goods, services, or opportunities that realize such rights, especially in conditions of scarcity. This Article is the first to analyze the concept of queues (or temporal waiting lines or lists) and their ambivalent, interdependent relation with rights. After showing the conceptual tension between rights and queues, the Article argues that queues and "queue talk" present a unique challenge to rights and "rights talk." In exploring the currency of rights and queues in both political and legal terms, the Article illustrates how participants discuss and contest the right to housing in South Africa, the right to health care in Canada, and the right to asylum in Australia. It argues that, despite its appearance in very different ideological and institutional settings, the political discourse of

* Associate Professor, Boston College Law School. I am grateful for the comments of Bruce Ackerman, Bill Alford, Paulo Barrozo, David Beatty, Gabriella Blum, Amy Cohen, Colleen Flood, Richard Ford, Helen Hershkoff, Jayne Huckerby, Martha Jackman, Dan Kanstroom, Mattias Kumm, Bernadette Meyler, Frank Michelman, Gerald Neuman, Vlad Perju, Marie-Eve Sylvestre, Susan Rose-Ackerman, Kristen Rundle, and Lucie White, and participants at the workshop on Narrative and Metaphor in the Law at Stanford Law School, the Colloquium on Comparative and Public Law at New York University School of Law, the International Law Workshop at Harvard Law School, the Women in International Law Workshop at Duke Law School, the Boston College Law School Faculty Workshop, and invited speaker series at the University of Ottawa, Canada, the Universidad de Los Andes, Colombia, and Åbo Akademi University, Finland. This paper was selected for the 2016 Harvard/Stanford/Yale Junior Faculty Forum. My thanks also go to Erica Coray for excellent research assistance. Contact: youngkv@bc.edu.

"queues" and especially "queue jumping" commonly invokes misleading distinctions between corruption and order, markets and bureaucracies, and governments and courts. Moreover, queue talk obscures the first-order questions on which resource allocations in housing, health care, or immigration contexts must rely. By bringing much-needed complexity to the concept of "queues," the Article explores ways in which general principles of allocative fairness may be both open to contestation and yet supportive of basic claims of rights.

INTRODUCTION

In South Africa, persons living in intolerable conditions who seek housing have been derided as "queue jumpers," despite their claims of basic constitutional and human rights.[1] In Canada, those who seek to access medical care outside of the State's provided services have been labeled "queue jumpers," again in the face of claims of basic constitutional and human rights.[2] In Australia, persons attempting to enter the continent by sea who seek asylum are dismissed as "queue jumpers," notwithstanding their claims of basic human rights.[3] Deeply divisive, these distributive contests pit queues against rights, propelling the importance of the queue and objections to its evasion into the same moral, political, and legal universe as rights. As a political and legal concept, rights represent the fundamental importance of the dignity of the human person, or of their liberty, or their equality with others. But so too, as a political and legal concept, do queues represent the fundamental importance of fairness and order. The interrelation between the two has not been theorized.

This Article explores how these two legal concepts—so fundamental to questions of dignity, equality, ordering, and distribution––interact. I argue that only the first legal concept (the concept of rights) has attracted the normative and conceptual attention that is due, and that the second legal concept (the concept of the queue) has been strikingly under-theorized, despite its prevalence in legal systems, especially in deciding questions of resource allocation under conditions of scarcity. The two concepts together forge an ambivalent, interdependent relation: to be realized, rights appear sometimes to prohibit, sometimes to permit, and sometimes to require queues; queues, in their turn, appear to create, institute, or displace rights. I aim to show that the lack of attention paid to the legal concept of the queue is a result not only of its uncertain relation to other distributional norms in law, but of the contradictions and the obfuscations that the concept produces in political discourse. I emphasize throughout, however, that the role of the queue has become so basic to our understanding of law that no effort to disaggregate and therefore to understand the legal concept can shift, on its own, the ideological role that it plays. Examining the interrelation of rights and queues is therefore a first step in attending to perceived tensions in the norms of liberty, equality, and justice in modern settings of con-

1. *See infra* Part II.A.

2. *See infra* Part II.B.

3. *See infra* Part II.C.

stitutional government and liberal market-based democracies.

This Article is organized in three parts. Part I draws from comparative constitutional and international human rights law to define rights, and from queueing theory and law to define queues. This part also sets out an initial map of the relations between the two concepts. Part II moves to an analysis of discourse, examining three encounters between "rights talk" and "queue talk" in highly charged distributive disputes in South Africa, Canada, and Australia. I examine the "queue" as a wait list for access to housing, health care, or asylum processing. This queue configures the space in which housing rights, patient rights, and refugee rights are contested. In each context, rights claimants, perceived as "queue jumpers," are the focus of heated objection by government officials, politicians, and members of the public. This part shows the highly distinct ideological and distributional roles in which the concept of the queue is asserted and defended, and in which perceived "evaders" of the queue—in each instance, asserting claims of right—are treated. Part III seeks to disaggregate the legal concept of the queue by noting the unresolved questions that accompany the political use of the concept and the obfuscations that "queue talk" produces. It argues that the political discourse of queues and "queue jumping" invokes misleading distinctions between corruption and order, markets and government, and governments and courts. And even more significantly, "queue talk" obscures the first-order questions on which the resource decisions impacting housing, health care, or asylum rights must rest. After describing the high stakes of the contests between rights and queues, the Article concludes.

I. RIGHTS AND QUEUES

A number of different allocation methods are available to distribute scarce goods: markets, merit, voting, need, lotteries, arbitrary power, queues, and rights.[4] In many cases, different methods of allocation work together. For example, a market-based system of health care can be designed according to certain principles of justice, in or-

4. For classic treatment, see, for example, GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES (1978) (noting methods of allotment based on markets, political allocations, lotteries, and mixed forms); DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE (1999). For direct comparisons with rights, see Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286 (2012); Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, *in* LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 87 (Austin Sarat & Thomas R. Kearns eds., 1996).

der to allow for exemptions for those in need of urgent medical assistance, but who are unable to pay. Indeed, that is a basic template for ordering in modern liberal capitalist democracies. In the definition provided in this Article, queues implement a principle of "first come, first served," and allocate first to those who have waited longest,[5] while at the same time often controlling for other modes of ordering preferences by allowing for exemptions (on grounds of need or other criteria) or by setting categories of recipients in line with each other, using "first come, first served" within each category. In turn, rights operate as political "trumps" when certain important values, such as liberty or dignity, are infringed,[6] or at least require an appropriate reason, over majoritarian or utilitarian objections, before such infringement is justified.[7] The mechanisms of rights and queues sometimes compete and sometimes work together in settling distributive questions. Because so much of this relation rests on definitions, this Part first describes the contemporary role and function of rights in comparative constitutional and human rights law and the operation of queues in varied legal and extra-legal settings before moving to address the relation between the two.

A. Rights in Law

One might describe ours as the age of rights. In contemporary political discourse, few concepts now rival the discursive moral power of the idea that every person has inherent dignity and basic

5. "First come, first served" reflects the most common discipline of queues in everyday life and is the one under study in this Article; other queue disciplines may follow a principle of "last come, first served" (inventory systems), "last in, first out" (employment law), or random order selection, where queues operate much like lotteries. *See, e.g.*, DONALD GROSS ET AL., FUNDAMENTALS OF QUEUEING THEORY 3 (4th ed. 2008).

6. For seminal analysis of this conception, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). For alternative philosophical conceptions that are distanced from the "trumps" formulation, see, for example, ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002) (presenting constitutional rights as principles that demand optimization); THE HUMAN RIGHTS READER: MAJOR POLITICAL ESSAYS, SPEECHES, AND DOCUMENTS FROM ANCIENT TIMES TO THE PRESENT (Micheline R. Ishay ed., 2d ed. 2007) (presenting codified human rights in different historical phases).

7. ALEXY, *supra* note 6; STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008); Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574 (2004) (reviewing ALEXY, *supra* note 6).

rights, which others ought to respect.[8] Since at least the end of the Second World War, the development of a comprehensive international law of human rights[9] and the corresponding growth in constitutional bills of rights around the world[10] have buttressed this idea and expanded it. Laid within its Westphalian architecture, the age of rights corresponds with the duty of modern states to respect them as matters of law.[11] And laid within a more expansive conception of human freedom than the eighteenth century declarations of the "rights of man," such rights now commonly include economic and social rights and require the modern state to respect, protect, and fulfill them.[12] Claims of "rights" have now entered into contested areas of social policy, such as housing, health care, education, and immigration.[13] These claims include new articulations of the material di-

8. *E.g.*, Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004); *see also* John Tasioulas, *The Moral Reality of Human Rights*, *in* FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 75, 75 (Thomas Pogge ed., 2007) (noting the "discourse of human rights [has acquired] in recent times . . . the status of an ethical lingua franca").

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force in 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (entered into force in 1976); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

10. For recourse to the primary text of all of the world's constitutions, see, for example, CONSTITUTE, http://www.constituteproject.org (last visited Dec. 2, 2016) (collecting texts and highlighting their parallels with each other and with international law). For analysis, see, for example, Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practic*e, 54 HARV. INT'L L.J. 61 (2013). Convergence between constitutional rights and human rights follows many paths. *See, e.g.*, CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990); Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304 (Michel Rosenfeld & András Sajó eds., 2012).

11. *E.g.*, ICCPR, *supra* note 9; ICESCR, *supra* note 9; UDHR, *supra* note 9; Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 10 (1989) (presenting this early architecture); *cf.* HUMAN RIGHTS: THE HARD QUESTIONS (Cindy Holder & David Reidy eds., 2013) (collecting viewpoints on the problems with this general architecture).

12. *E.g.*, ICESCR, *supra* note 9; Francesca Bignami & Carla Spivack, *Social and Economic Rights as Fundamental Rights*, 62 AM. J. COMP. L. 561 (2014); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

13. This Article does not discuss the right to education, arguably the most universally recognized (in law) of the (as-categorized) economic and social rights. Much of the discussion could certainly be tested in this policy domain. See, for example, the rigorous examination of justice principles behind the distribution of educational opportunities in

mensions of liberty and the government's positive role in responding to shortcomings in the enjoyment of that liberty.[14] Such "positive," "second-generation," or "welfare" rights immediately call forth the question of priority, although such questions arise with civil and political rights as well, as will be shown below. It is at the point of positive provision, however, that the relation between rights and queues is most in need of analysis. For this reason, this Article selects, in illustrating the tensions between rights and queues, examples of prominent contestations around rights to housing, health care, and asylum.

The language of rights expresses "individualistic considerations,"[15] which may be characterized in terms of their special importance to securing fundamental values such as freedom, dignity, or equality,[16] and in terms of their systematization within broader conceptions of justice or political morality.[17] Rights, conceptualized as human rights or constitutional rights, have been legally instituted in the texts of international declarations on how states must treat individuals, constitutional texts, and statutes, and in the interpretive stances that judges apply to common or civil law.[18] But rights also

---

MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1997). Similarly, affirmative action policies, in areas of education and employment, raise tensions and interrelations between rights and queues that are worthy of mapping against the analysis of Part III. For example, in a prominent case in U.S. constitutional law, Abigail Fisher's claim of having her own place denied due to the admissions slots reserved for other applicants in the University of Texas's admission policy relies on a queueing narrative which reduces much of the complexity of the admissions process. *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016). Other waiting lists, administered by first-come-first-served and other principles, have distinct legal roles in the United States in the health care, housing, and immigration policy domains examined in this Article. Queues are also at work in the discrete systems of allocation in the United States's extensive prison system, for example, and in welfare administration, water rights allocations, and child adoption laws. While analysis of the role of waiting lists in the United States is beyond the scope of the present Article, the political resonance of the metaphor bears compelling affinities with the present discussion, especially when it is used to express an anterior sense of privilege against perceived newcomers. *See infra* note 337.

14. *See, e.g.*, CÉCILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE 47–49 (2000); HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (2d ed. 1996); KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012); Sen, *supra* note 8.

15. For a useful presentation of the diversity of conceptions of rights, see Jeremy Waldron, *Introduction*, *in* THEORIES OF RIGHTS 1 (Jeremy Waldron ed., 1984).

16. DWORKIN, *supra* note 6; Sen, *supra* note 8.

17. JOHN RAWLS, A THEORY OF JUSTICE (REV. ED. 1999); *see also* Waldron, *supra* note 4.

18. ICCPR *supra* note 9; ICESCR *supra* note 9; UDHR *supra* note 9; *see also* YOUNG,

exist in the "slogans and polemics of political debate."[19] In answer to a number of unsettled questions about constitutional and human rights, this Article assumes that they should be understood as both moral and legal entitlements; that they are validated by processes of deliberation as well as reason; that an alleged infringement demands, at the very least, a heightened level of justification; and that they include material interests, such as food, health care, housing, and education that are necessary for the protection of particular values.[20]

Already, the inclusivity of such assumptions suggests the permissibility of some sort of co-existence between rights and queues. But this choice reflects modern trends in comparative and international law, if not in U.S. constitutional law itself.[21] Many national constitutions now recognize economic and social rights within their bills of rights. The latest textual survey recorded the inclusion of such guarantees as the rule, rather than the exception, with the greatest number of such rights entrenched in Latin America and the post-communist states.[22] In ever more countries, the infringement of economic and social rights now gives rise to justiciable complaints, either expressly or via the interpretive practice of courts.[23] In inter-

---

supra note 14; *infra* text accompanying notes 110–113 (describing basic legal design of rights-implementation and enforcement in South Africa, Canada, and Australia).

19. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 489 (2013).

20. These assumptions, while supported in constitutional theory, *see, e.g.*, YOUNG, *supra* note 14; Waldron, *supra* note 15, are also applicable to the positive law undergirding the three rights in the three jurisdictions dealt with in Part II below. Any departures from these assumptions are noted in more detail in that Part.

21. *Compare*, DWORKIN, *supra* note 6, *with* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015) (noting the posture of balancing can apply to rights); *see also* Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008) (proposing an approach that would resituate welfare rights in U.S. constitutional law); Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663 (2008).

22. Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1047 (2014).

23. *Id*. at 1046 (suggesting that one-third of all constitutions identify all of their economic and social rights as justiciable, with another third reserving justiciability for some rights only, and others containing only aspirational rights, or containing less than two). This categorization is useful, with the obvious caveat that constitutional text does not always reflect constitutional practice. *See, e.g.*, Atudiwe P. Atupare, *Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria*, 27 HARV. HUM. RTS. J. 71 (2014); Katharine G. Young, *On What Matters in Comparative Constitutional Law: A Comment on Hirschl*, 96 B.U. L. REV. 1375 (2016); Madhav Khosla, *Making Social Rights Conditional: Lessons from India,* 8 INT'L J. CONST. L. 739 (2010).

national human rights law, the International Covenant on Economic, Social and Cultural Rights, ratified by 164 states, now has its own quasi-adjudicatory mechanism.[24] The treaty's committee has issued its first response to an individual complaint.[25] A widely accessible and growing jurisprudence on economic and social rights[26] informs the arguments and decisions of NGOs, lawyers, governments, and judges in networks that are often indistinguishable from the civil and political concerns of more traditional constitutional and human rights advocacy.[27] Such jurisprudence centers on the questions of legitimate priority setting in the "progressive realization"[28] of economic and social rights through three main routes: setting the content of a

24. G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Dec. 10, 2008) (twenty-one Parties, forty-five Signatories as of December 1, 2016).

25. U.N. Comm. on Econ., Soc. and Cultural Rights, Communication No. 2/2014: Views Adopted by the Committee at Its Fifty-Fifth Session, U.N. Doc. E/C.12/55/D/2/2014 (Oct. 13, 2015) [hereinafter *I.D.G. v. Spain*].

26. *E.g.*, ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS (Aoife Nolan ed., 2014); EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE (Daphne Barak-Erez & Aeyal M. Gross eds., 2007); SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2008).

27. The metaphor of migrations has been popular for comparative constitutional ideas. Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1 (Sujit Choudhry ed., 2006). For an analysis of human rights ideas outside of courts, see BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009). For analysis of earlier trends in human rights advocacy, especially in the United States, omitting economic and social rights, see SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010). For documentation of such networks, particularly in relation to economic and social rights, see generally SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES (Helena Alviar García et al. eds., 2015); STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie E. White & Jeremy Perelman, eds., 2011).

28. *See* ICESCR, *supra* note 9, art. 2(1) (requiring States Parties to "progressively" realize economic, social, and cultural rights). This is in contrast with obligations to "respect" (immediately) civil and political rights under the ICCPR. *See* ICCPR, *supra* note 9, art. 2(1). Progressive realization requires the state to "take steps" according to "available resources." BEN SAUL ET AL., THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 137–57 (2014). While later human rights treaties, which combine civil, political, economic, social, and cultural rights together, eschewed the progressive realization formulation, the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, reverted to this formula for economic and social rights. *Id.* art. 4(2). But for the suggestion that the "minimum essential level of enjoyment" requires immediate respect under that Convention, see U.N. Office of the High Comm'r for Human Rights, Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors 28 (2010), http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf.

non-derogable, or otherwise prioritized, "minimum core";[29] setting out standards of "reasonableness" or "proportionality" in state responses;[30] or prioritizing "negative" over "positive" obligations.[31] Each of these debates assumes, without analysis, that certain rights-holders are to be given priority and that others must wait before their rights claims are addressed.

Despite this growing practice around economic and social rights, on which the assumptions of this Article rest, fundamental questions remain about the legitimacy of rights claims in the distributional sphere, foremost of all being the pervasive perception that such rights are "positive rights" that require state action, rather than "negative rights" that require state restraint. This central positive/negative binary is noteworthy, not only for its longevity, in the face of extensive and convincing analysis of its shortcomings,[32] but also for the ease with which it accommodates the concept of queues. The more accurate demarcation of positive and negative duties, associated with all rights, rather than the so-called positive and negative rights, is described in more detail below.[33] In short, queues appear to be an appropriate method for fulfilling "positive" duties; yet at the same time, many who seek to evade the queue are seeking to assert claims of "negative" duties (to be allowed to buy health care, for instance, or to be protected from eviction). These interests are pitted against those

29. *Cf., e.g.*, U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant), U.N. Doc. E/1991/23 (1990); David Landau, *The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures*, *in* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS, *supra* note 26, at 267; Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

30. SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION (2010); Katharine G. Young, *Proportionality, Reasonableness, and Economic and Social Rights*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (Vicki C. Jackson & Mark Tushnet eds., forthcoming).

31. On the more idiosyncratic approaches between constitutional systems with respect to economic and social rights, as opposed to the apparently converging approaches to civil and political rights, see Daniel M. Brinks et al., *Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular*, 11 ANN. REV. L. & SOC. SCI. 289, 297–300 (2015); Colm O'Cinneide, *The Problematic of Social Rights—Uniformity and Diversity in the Development of Social Rights Review*, *in* REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 299 (Liora Lazarus et al. eds., 2014).

32. *E.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002); *see also* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008).

33. *See infra* Part I.C.

who remain in their "correct" place in the queue, who can be characterized as enjoying rights with "negative" duties (to be left alone), or "positive" duties (to having the interest in the queue fulfilled). Thus, as will be seen below, this binary is misleading in relation to queues, as it is for rights.

B. Queues in Law

The concept of queues has a less developed analytical pedigree in law.[34] Nonetheless, the concept is a familiar one in both formal and informal systems of ordering and harbors its own normative commitments—to equality, for example, or transparency—that appear to compete with the value claims of rights. This Article defines the queue as a resource allocation method that ranks those who seek access to goods, services, or opportunities, and gives priority in order of entry. This definition is closely tied to current law. Queues can operate as a legal rule, procedure, or practice. In property law, for example, competing claims to property in wild animals are decided according to first occupancy.[35] In compensation mechanisms for mass torts, claims are processed according to "first in, first out," with only claimants confronting financial need allowed to skip to the front of the line.[36] In commercial dealings, conflicts between security interests on debtor's property are resolved in accordance with the time of filing or perfection.[37] As commentators contend, a general rule of

34. This is not to say that analytical energy has not been applied elsewhere. *See*, *e.g.*, GROSS ET AL., *supra* note 5 (detailing applications in engineering, mathematics, marketing, customer service, and other fields). For two notable exceptions in law, see Kevin Gray, *Property in a Queue*, *in* PROPERTY AND COMMUNITY 165 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010); Ronen Perry & Tal Z. Zarsky, *Queues in Law*, 99 IOWA L. REV. 1595 (2014).

35. Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805); Alfred L. Brophy, *Introduction: A Famous Fox, a Surfacing Whale, and the Forgotten Slave*, 27 L. & HIST. REV. 145, 146 (2009); *cf*. Symposium, *Time, Property Rights, and the Common Law*, 64 WASH. U. L.Q. 661 (1986) (comparing notions of first possession and conquest). Gray suggests that analogues of queueing and property acquisition are entrenched in the structure of property law. Gray, *supra* note 34, at 172–76.

36. *See*, *e.g.*, Ronen Perry, *The* Deepwater Horizon *Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1 (2011); *see also* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992).

37. *See, e.g.*, U.C.C. § 9-322(a)(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014). An earlier rule for distribution during bankruptcy was based on first in first out queues; this was later revised to distribution *pari passu* (a principle of equal footing) among all creditors, subject to level of security. *See* DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY (6th ed. 2014); Rizwaan Jameel Mokal, *Priority as Pathology: The* Pari Passu *Myth*, 60 CAMBRIDGE L.J. 581, 592 (2001). The strict priorities imposed upon interests can be reordered by the

"first in time, first in right . . . runs like a golden thread through all priority schemes."[38]

Such a thread appears to run through many informal settings of ordering as well. In this respect, queues appear an almost universal, if culturally variable, system of ordering in conditions of scarcity, or in conditions where simultaneous provision is not possible. In examining a system of informal norms of queueing, Neil MacCormick emphasized not only the informal prompt of groups to self-organize in rank, but also the expectation that others observe the priority-norm and "respond critically or even obstructively towards people who flout" it.[39] MacCormick's insight here highlights not only the informal self-organization toward queueing, but the way in which people feel justified in giving social sanctions to those who jump the queue, or cut in line, in the absence of any law. Often, this is a question of the trust and cooperation that is available to self- and extra-legally-enforce this system.[40] Law also steps in to endorse and enforce these informal ordering systems, particularly in times when trust and cooperation are low.[41]

That the queue is readily understood and socially enforced[42] is more pronounced in some cultures than others. Queues represent "an overlapping, largely shared, common understanding of the right way to behave,"[43] but this is culturally, just as it is historically and jurisdictionally, contingent.[44] For example, queues are sometimes

---

doctrine of equitable subordination, codified at 11 U.S.C. § 510(c), which allows a bankruptcy court to relegate even a secured claim to a lower tier in order to restore a just hierarchy.

38. 4 JAMES J. WHITE ET AL., UNIFORM COMMERCIAL CODE 428 (6th ed. 2010); *see also* Perry & Zarsky, *supra* note 34, at 1596.

39. Neil MacCormick, *Norms, Institutions, and Institutional Facts*, 17 L. & PHIL. 301, 305 (1998).

40. Leon Mann, *Queue Culture: The Waiting Line as a Social System*, 75 AM. J. SOC. 340 (1969). Differences in trust may be one reason why queueing for a recreational good or service inculcates a different sense of camaraderie from queueing for a necessary good or service like transport or the postal system. JOE MORAN, QUEUEING FOR BEGINNERS: THE STORY OF DAILY LIFE FROM BREAKFAST TO BEDTIME 70–71 (2008).

41. For example, after Hurricane Sandy, queues in gas stations were enforced by police. Elizabeth A. Harris, *A Slow Return to Normal Skips the Gas Station*, N.Y. TIMES (Nov. 3, 2012), http://www.nytimes.com/2012/11/04/nyregion/gas-rationing-is-new-burden-after-hurricane-sandy.html.

42. Mann, *supra* note 40.

43. MacCormick, *supra* note 39, at 308–09.

44. I make no naturalist argument here, but it bears mentioning that simple hierarchical orderings have been tracked in a variety of non-human animals, undergirding a field in biology known as social queue analysis. *See, e.g.*, Hiroshi Toyoizumi & Jeremy Field,

thought of as a quintessentially Western consumer practice.[45] The British have been described as having mastered the art of the queue;[46] Americans, too, avidly follow the practice, although it is usually described as "waiting in lines," not "queues."[47] Slightly different norms of queueing exist in Nordic countries: for example, time-outs are often socially acceptable.[48] Yet culture is a malleable concept, and cultural practices respond to institutional conditions. In Eastern Europe during communism, queueing was an unavoidable part of everyday life.[49] In contemporary China, the rise of urbanization has brought with it lengthy queues.[50] The end of apartheid in South Afri-

---

Dynamics of Social Queues, 346 J. THEORETICAL BIOLOGY 16 (2014) (documenting, in the case of wasps, age-based queues that predictably determine the inheritance of resources or social status for individuals).

45. *E.g.*, Henry J. Ssali, *Jumping the Queue*, AFR. NEWS SERV., May 28, 2007 (comparing the need to "hustle" in Uganda with the respect for queues in the U.K., Germany, and South Africa).

46. *See, e.g.*, MORAN, *supra* note 40, at 60–71 (describing a social history of queueing in Britain, and detailing practices in the early nineteenth century, the Second World War and post-Thatcher Britain). *See also* Gray, *supra* note 34, at 178 (noting the "Anglo-Saxon" histories of queueing).

47. Apparently the terminology of the "queue" is rapidly gaining acceptance in the United States. GROSS ET AL., *supra* note 5, at 1–2. For a broader analysis of the arguably more time-conscious culture of the United States, including how family time is prioritized alongside work, see TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 6–7, 139 (2002); *see also* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 157 (Talcott Parsons trans., Dover 2003) (1905) (noting the rise of an ethic of work that saw wastefulness of time as "the first and in principle the deadliest of sins").

48. MacCormick, *supra* note 39, at 311 (noting that a line-stander could depart, with the help of a numbered ticket, and not lose her place); *see also* David Fagundes, *The Social Norms of Waiting in Line*, L. & SOC. INQUIRY (forthcoming) (describing lines for sports tickets at Duke University, with scheduled check-in to ensure queuers' continued wait); Mann, supra note 40 (describing lines for Australian Rules Football, with some permissible absences).

49. A famous Russian novel records the phenomenology of the queue during communism. VLADIMIR SOROKIN, THE QUEUE 256–57 (Sally Laird trans., 2008) (1985) (describing the "interminable lines . . . for everything—for bread, sugar, nails, news of an arrested husband, tickets to *Swan Lake*, furniture, Komsomol vacation tours[,] . . . [and] the toilet. . . . Soviet citizens spent a third of each day standing in lines"). Indeed in Bolshevik Russia, in 1917, the commercial newspaper *Kommersant* had announced that queues were the "law of our time." JULIE HESSLER, A SOCIAL HISTORY OF SOVIET TRADE: TRADE POLICY, RETAIL PRACTICES, AND CONSUMPTION, 1917–1953, at 22 (2004). In describing queues in the former GDR, social historian Joe Moran notes the principle of "deferred gratification" that was used to justify their ubiquity. MORAN, *supra* note 40, at 64.

50. Ian Johnson, *As Beijing Becomes a Supercity, the Rapid Growth Brings Pains*, N.Y. TIMES (July 19, 2015), http://www.nytimes.com/2015/07/20/world/asia/in-china-a-supercity-rises-around-beijing.html. While Johnson's report tracks the rise of more

ca allowed for new, desegregated queues.[51] In journalist accounts, queueing prowess has been described as the "cornerstone of civilisation",[52] a failure to respect queues has been linked to political instability in government,[53] and entrepreneurial instability in business.[54]

Notwithstanding these different cultural affinities with queues, there is universality in the normative values they purport to uphold. They appear to promote the values of both fairness and order. In terms of the former, queues lay claim to rival notions of fairness that are purportedly settled by rights. In this sense, the queue represents two important distributive values: equality and desert. First, queues are blind to the interpersonal differences that should be irrelevant to questions of distribution, such as eye color in a queue for food.[55] Queues ensure that services or opportunities are distributed on a "ground that is universalistic rather than personally discriminatory,"[56] and thus not on the basis of gender, sexual orientation,

---

disciplined norms of queueing for transportation services, this is not to say that China has adopted, wholesale, the distinctively orderly waiting systems that can be more commonly observed in other Asian settings (such as Japan), especially for high speed options. *See, e.g.*, Lance Heiko, *Some Relationships Between Japanese Culture and Just-in-Time*, 3 ACAD. MGMT. EXECUTIVE 319, 320 (1989) (noting the marked areas on station platforms that delineate queueing space). One example, from queueing theory, compares the strict first in first out queueing discipline for urban railway services in Japan with the random-access queueing in the United States. *See* Yuichiro Yoshida, *Commuter Arrivals and Optimal Service in Mass Transit: Does Queuing Behavior at Transit Stops Matter?*, 38 REGIONAL SCI. & URB. ECON. 228 (2008).

51. Nadine Gordimer, *Standing in the Queue*, 41 INDEX CENSORSHIP, July/Aug. 1994, at 148 (describing the new experience of waiting to vote in post-apartheid South Africa). Two decades later, record queues were again observed for those paying their final respects to Nelson Mandela. David Smith, *Nelson Mandela's Lying in State Draws Queue of Thousands to Say Goodbye*, GUARDIAN (London) (Dec. 11, 2013) https://www.theguardian.com/world/2013/dec/11/nelson-mandela-lying-in-state-thousands-say-goodbye.

52. Damian Barr, *The Waiting Game*, TIMES (London), Nov. 28, 2009, at 28. As a human geographer has put it, norms of civility may be enhanced in highly visible queueing spaces. *See* Stuart Corbridge, *Waiting in Line, or the Moral and Material Geographies of Queue-Jumping*, *in* GEOGRAPHIES AND MORALITIES: INTERNATIONAL PERSPECTIVES ON DEVELOPMENT, JUSTICE AND PLACE 183, 185 (Roger Lee & David M. Smith eds., 2004).

53. Ssali, *supra* note 45.

54. Vartuhí Tonoyan et al., *Corruption and Entrepreneurship: How Formal and Informal Institutions Shape Small Firm Behavior in Transition and Mature Market Economies*, 34 ENTREPRENEURSHIP THEORY & PRAC. 803 (2010). For development of these associations, see *infra* Part III.A.I.

55. BILLY EHN & ORVAR LÖFGREN, THE SECRET WORLD OF DOING NOTHING 42 (2010) (noting that "being beautiful, wealthy, or well-connected should mean nothing once you are standing in line").

56. MacCormick, *supra* note 39, at 307.

race, ethnicity, religion, age, disability, socioeconomic status, or other grounds. Such discrimination is also impermissible, of course, in theories of rights, unless required affirmatively on grounds of substantive equality. Moreover, the relevant criteria of distribution or provision—the time of entry—appears to vindicate equality by treating equally every person's time.[57] As well as equality, queues espouse the value of desert, since they allocate on the basis of a person's own conduct (arriving/filing/registering early, and waiting in line). This justification is evident in the "first in time, first in right" principle, espoused above.[58] This value is a greater rival to the fundamental values upheld in modern theories of rights, which may depart from desert-based justifications entirely.[59] Yet, while these system features purport to uphold equality and desert, this may be more apparent than real, because more affluent participants often have the resources necessary to strategically adapt to early entry or waiting substitutes.[60] Certainly, gender, sexual orientation, race, ethnicity, religion, age, disability, and socioeconomic status are grounds that may determine not only time and ability to wait in line, but also entry into the queue at all.[61] And more significantly, the lack of proportionality between effort (time invested) and result in different queueing systems means that they may flout a desert-based justification anyway.[62]

---

57. Perry & Zarsky, *supra* note 34, at 1611. For a fuller discussion of the value of time, see *infra* notes 70–71 and accompanying text.

58. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805); *see also* Gray, *supra* note 34, at 173–76.

59. Desert may fail to pass the required normative justification, as well as being an unreliable principle for identifying valued activities. *See, e.g.*, MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY (2d ed. 2013); MILLER, *supra* note 4; Richard J. Arneson, *Egalitarianism and the Undeserving Poor*, 5 J. POL. PHIL. 327, 331 (1997).

60. *See* Mokal, *supra* note 37, 609–16 (noting problems with equality justifications for ranking creditors in bankruptcy); *infra* Part III.A.2 (discussing use of markets).

61. *See infra* Part III.B.3 (discussing, for example, the advantages that young men have compared to women, children, and the elderly when seeking asylum or escaping persecution in the first place); *infra* note 197 and accompanying text; *see also infra* Part III.A.2 (discussing the ability of the wealthy to opt out of queues). Thus, even if the queue itself treats everyone equally, it may often have biases structured within its terms of entry.

62. *See, e.g.*, Perry & Zarsky, *supra* note 34, at 1618. The investment of time may appear a poor basis for desert when government distribution should be guided by broader properties of virtue or effort. Desert theorists have identified properties such "as being a citizen; having been unjustifiably harmed by a government agency; having earned a lot of money; being keen on getting into business; being vulnerable to robbers and muggers who might attack." Fred Feldman & Brad Skow, *Desert*, STAN. ENCYC. PHIL. (Oct. 9, 2015), http://plato.stanford.edu/archives/win2015/entries/desert; *cf.* RAWLS, *supra* note 17, 88–89

As well as certain values of fairness, queues are said to reflect and promote the values of order and civility, but this too is unreliable.[63] In conditions of scarcity, queues prevent chaos and disorder. Compared with other allocation methods, administrative costs are low because of the ease of explaining the method of allocation, monitoring compliance, and resolving disputes.[64] This brings obvious gains in efficiency. Nonetheless, because queues are insensitive to the question of who will use the resources most efficiently, such gains are, beyond the superficial level, uncertain.[65] Queues are a recognizable medium for social integration,[66] and an incubator for developing important virtues such as patience, rule-compliance, and trust.[67] And if civility means regarding others, "including one's adversaries, as members of the same inclusive collectivity,"[68] queues

(suggesting how this reward would resemble not desert but entitlement: that "those who, with the prospect of improving their condition, have done what the system announces it will reward are entitled to have their expectations met. In this sense the more fortunate have title to their better situation").

63. MORAN, *supra* note 40, at 70–71 (describing the decline in civility in queueing, and attributing this to an increasingly "accelerated, time poor society" and to the difference between queueing for recreational and non-recreational goods and services); *see also* Ryan Powell & John Flint, *(In)formalization and the Civilizing Process: Applying the Work of Norbert Elias to Housing-Based Anti-Social Behaviour Interventions in the UK*, 26 HOUSING, THEORY & SOC. 159, 171, 173 (2009) (suggesting that the state-run Respect Action Plan in the U.K., which seeks to tackle queue jumping and other "incivilities," also creates a concomitant "decivilizing of previous standards of social regulation").

64. Perry & Zarsky, *supra* note 34, at 1630 (discussing Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 670 (1986)); *see also* Yoram Barzel, *A Theory of Rationing by Waiting*, 17 J.L. & ECON. 73 (1074). For the important role played by administrative costs in questions of enforcement, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (failing to mention queues in this classic study of boundary settings and informal norms); compare with the recent analysis in Fagundes, *supra* note 48 (seeking to re-center queues in law and social norms analysis).

65. Perry & Zarsky, *supra* note 34, at 1636 (noting complications); *see also infra* Part III.A.1.

66. Again, much depends on the purpose of the queue. *E.g.*, SOROKIN, *supra* note 49; Nadine Beckmann & Janet Bujra, *The 'Politics of the Queue': The Politicization of People Living with HIV/AIDS in Tanzania*, 41 DEV. & CHANGE 1041 (2010); Gordimer, *supra* note 51.

67. See, for example, the values imputed to queues in Barr, *supra* note 52; Ssali, *supra* note 45. For a useful presentation of Wittgenstein's challenge to the certainty of rule-following or rule-breaking, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 64–68 (1991).

68. Edward Shils, *The Virtue of Civil Society*, *in* THE CIVIL SOCIETY READER 291, 298 (Virginia A. Hodgkinson & Michael W. Foley eds., 2003).

can, in principle, provide a useful forum for learning and practicing it, and building norms of courtesy, cooperation, and institutional effectiveness.[69]

Much of these justifications for queues are dependent on the type of queue. These include tangible physical queues (for instance, in supermarkets, airports, passport controls, and sports and entertainment ticket booths) and legally enforced but virtual queues (mass tort compensation funds, public housing applications, or surgery wait lists). The first type usually involves the suspension of other activities for minutes or hours; while the second involves days, weeks, or years in waiting and the continuation of other activities despite significant queueing costs.[70] The queue, therefore, stands in as a system of physical or virtual ordering which gives priority to the timing of the claim, despite critical differences in the experiences of time in each case. Moreover, while developments in information technology increasingly limit the need for physical queues, such that grocery shopping and parking permit applications can now take place online, new versions of priority setting in virtual environments themselves rely on design principles with certain controlled, if more fleeting, queues.[71] At the same time, other countervailing modern trends, such as urbanization or mobility, have made physical queues ever more ubiquitous.[72]

---

69. For an analysis of the "episodic, single stranded, and anonymous" networks that may form from queues, and the very different social capital built into the "repeated, intensive, multistranded networks" of associations, see ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22 (2000).

70. In a study of prolonged waiting, one geographer distinguished between the different states of "surplus time," "heightened suspense," "lost time," and "panic and inertia." Craig Jeffrey, Guest Editorial, *Waiting*, 26 ENV'T & PLAN. D: SOC'Y & SPACE 954, 955 (2008). I discuss further the stakes of rights and queues in Part III.C.

71. *See, e.g.*, Perry & Zarsky, *supra* note 34, at 1637–40 (framing aspects of the internet's network neutrality debate as involving queues); *see also* TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 285–86 (2010) (describing the risk of cable companies providing "fast lane" information pathways for some, and slow lanes for others, and suggesting that network neutrality principle can avert this risk). For an example of the high stakes involved, even by a millisecond, in virtual queues, see MICHAEL LEWIS, FLASH BOYS: A WALL STREET REVOLT (2015) (describing the efforts by some high-speed traders to move ahead of others, resulting in massive financial gains). While participants are not visible to one another in such virtual environments, the changes to queueing order can often be detected, at least in the aggregate if not in individual cases.

72. *E.g.*, Johnson, *supra* note 50. For an assessment of the contradictions that flow from "time and space compression" in modern times, see William E. Scheuerman, *Liberal Democracy and the Empire of Speed*, 34 POLITY 41 (2001). For attention to what is now analyzed as a "politics of waiting," particularly as experienced in the Global South, see Jeffrey, *supra* note 70, at 957. *See generally* JAVIER AUYERO, PATIENTS OF THE STATE: THE

If time is the most vital criteria for allocations in queues, it has an uncertain value. Time is a scarce good, and the reward for the investment of time and the recognition of the cost of time would appear to be the key feature of queues as opposed to other ordering mechanisms. However, in the virtual and physical instantiations of queues described above,[73] the expenditure of time operates differently. Moreover, the recognition of the importance of time does not, in itself, consider that the benefits of time expenditure can be radically different. In simple distribution queues, people may be queueing to receive the same good before others.[74] But queues may also determine the quality of the good, service, or opportunity, its price at point of provision, or indeed whether it is received at all. In the latter sense, scholars Ronen Perry and Tal Zarsky have described certain queues as "entitlement determining,"[75] where those first in line will acquire a scarce resource and others will not receive any share. The expenditure of time is therefore unequally rewarded in such queueing systems, with very different implications for rights.

In their relative simplicity, queues thus embody complex systems of norms and values, and their violation usually gives rise to intense objection. Especially when combined with other distributive criteria, such as desert or need, the queue may represent a fair system of allocation whose breach suggests not only a discrete unit of unfairness in allocation, but the jeopardy of the more collective values described above. What participants and outsiders consider an impermissible breach of the queue is often labeled "queue jumping." Before analyzing the political use of the metaphor of "queue jumping," the next section introduces the relation between the two concepts.

C. The Relation Between Rights and Queues

Once we have posited the existence of the queue as a legal category, we can map the relations between rights and queues. The

---

POLITICS OF WAITING IN ARGENTINA (2012); CRAIG JEFFREY, TIMEPASS: YOUTH, CLASS, AND THE POLITICS OF WAITING IN INDIA (2010).

73. *See supra* notes 70–72 and accompanying text.

74. For example, the Pacific Telegraph Act of 1860 facilitated communication by transmitting in order of reception, "excepting that the dispatches of the government shall have priority." Pacific Telegraph Act, ch. 137, § 3, 12 Stat. 41, 42 (1860) Thus the queue determined the order in which one's claim was processed, rather than the quality of service or whether one got it at all.

75. Perry & Zarsky, *supra* note 34, at 1601 (referring to first in time, first in right rules in property law as "winner takes all," entitlement-determining queues).

two concepts forge an ambivalent, interdependent relation. In order to be realized, rights may in some cases prohibit queues, but in other cases permit, or even require, them. Queues, in turn, create, institute, and even displace rights. It is in the distributive context that the relationship between queues and rights is at its most complex. The image of the queue seems an intuitive response to the "line-item" mode of rights argument that is created by the discrete claims of economic and social rights, rather than broader justice-based claims.[76] But the relation can be both rivalrous and symbiotic: rights are invoked as a means to challenge queues, but rights also rely on queues to be realized. This contradictory relationship—which raises the inevitable tensions between substance and process, informality and formality, and negative and positive duties—conceals important questions of justice and reason in modern rights claims.

From the perspective of rights, the use of queues points immediately to the distinction between so-called positive and negative rights described above: negative rights are subject to a duty of immediate respect; positive rights, in their turn, are subject to a duty to realize rights progressively, over time.[77] Thus, so-called positive rights seem not only to permit, but also to require, a waiting priority system. Yet commentators have long noted the "positive" obligations underlying the so-called "negative" civil and political (and property) rights, in the sense that they all require an extensive state apparatus to enforce.[78] This insight is an important one, although it is clear that the act/omission distinction, usually conjured by the positive/negative distinction, is nevertheless worth retaining in understanding the duty of the state to respect fundamental rights.[79] The analytical sorting of state duties—to respect, protect, and fulfill—has helped to clarify this dichotomy.[80] Yet again, as we will see, the

76. Jeremy Waldron has urged a "bigger picture" approach, rather than what he calls a "line-item" approach. *See* Jeremy Waldron, *Socioeconomic Rights and Theories of Justice*, 48 SAN DIEGO L. REV. 773, 778 (2011).

77. ICESCR, *supra* note 9, art. 2(1); *cf*. ICCPR, *supra* note 9, art. 2(1).

78. HOLMES & SUNSTEIN, *supra* note 32, ch. 1 ("All Rights Are Positive."); SHUE, *supra* note 14, at 53 ("The very most 'negative'-seeming right to liberty, for example, requires positive action by society to protect it and positive action by society to restore it when avoidance and protection both fail.").

79. FABRE, *supra* note 14, at 47–49. The action/omission distinction can also be supplemented with distinctions between doing and allowing. Adam Omar Hosein, *Doing, Allowing, and the State*, 33 L. & PHIL. 235 (2014).

80. *E.g*., SHUE, *supra* note 14, at 52. The U.N. Committee on Economic, Social and Cultural Rights ("CESCR") adopted this formula, although the obligation to fulfill is further delineated to include obligations to facilitate and provide (the right to food), U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 12: The Right to Adequate Food

concept of the queue confounds the clarity of this typology as well.

Taking first the duty to respect rights, this obligation is perceived as negative, since it requires the state to refrain from a particular action that will deprive persons of their rights, and is usually termed an immediate one,[81] such that any queueing system would be prohibited. A framework of queues for determining freedom from torture, or the exercise of free speech, would seem absurd. To allow any reason (administrative or otherwise) to justify delay in respecting rights goes against the fundamental structure of the rights argument: to "trump" arguments that rely on the common good, or, at the very least, heighten the justification required for rights infringements.[82] One can imagine, however, secondary queues in such contexts, such as a requirement of reasonable waiting time to secure a prosecution for torture, behind other claims; or a reasonable waiting procedure for accessing particular city permissions for staging a political demonstration.[83] As soon as scarce resources are implicated, some kind of subordinate priority-setting is required. Queues may therefore be present in our understanding of the duty to respect rights, for civil and political rights, no less for economic and social rights. Take one example in support of a duty to respect economic and social rights: a State must refrain from "denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative

(Art. 11), U.N. Doc. E/C.12/1999/5, ¶ 15 (May 12, 1999), and the obligation to promote (the right to health), U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C. 12/2000/4, ¶¶ 33, 62 (Aug. 11, 2000) [hereinafter General Comment No. 14]. See further the inclusion of this typology in obligations to respect, protect, and fulfill the constitutional rights of the South African Constitution. S. AFR. CONST., 1996 §§ 7–8. Shue had suggested the duties to (1) avoid depriving, (2) protect from deprivation, and (3) aid the deprived. SHUE, *supra* note 14, at 52; *see also* Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 9, 23–24 (Asbjørn Eide et al. eds., 2d rev. ed. 2001) (presenting typology of duties to respect, protect, and fulfill). More specific, institutionally-oriented duties, such as the duty to "[c]reate [i]nstitutional [m]achinery [e]ssential to [the] [r]ealization of [r]ights" and the duty to "provide goods and services to satisfy rights," have also been suggested. ALSTON & GOODMAN, *supra* note 19, at 183–85.

81. ICCPR, *supra* note 9, art. 2(1).

82. *Compare* DWORKIN, *supra* note 6, *with* Kumm, *supra* note 7.

83. The design and enforcement of such queues could also be understood as an instantiation of the duty to "protect" rather than "respect" rights, demonstrating how this distinction, like the distinction between duties to avoid and duties to protect, although "relatively clear in the abstract, blurs considerably in concrete reality." SHUE, *supra* note 14, at 59.

health services" if it is to respect the right to health.[84] This prohibition relies on the fundamental norm of non-discrimination, as well as the fundamental importance of the particular right.[85] Yet the institution of some sort of queue for such systems would appear unremarkable, as long as it did not operate in conjunction with impermissible classifications.[86]

Secondly, the duty to protect rights is often understood as an obligation concerning third parties.[87] In this sense, it requires the state to ensure that third parties do not deprive people of the guaranteed right, through enforcing rights-protective private laws, for example,[88] or agency decision-making.[89] The duty is critical for rights in market-based societies.[90] Again, a relatively uncontroversial example would be a duty on the state to regulate hazardous chemicals that are a risk to public health: the duty would require the government to pass and enforce laws that prohibit private companies from releasing such chemicals.[91] Yet again, queues may be permissible to

84. *See* General Comment No. 14, *supra* note 80, ¶ 34; *see also* JOHN TOBIN, THE RIGHT TO HEALTH IN INTERNATIONAL LAW 167–68 (2012).

85. General Comment No. 14, *supra* note 80, ¶ 34; *see also id*. ¶ 50; U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 20: Non-discrimination in Economic, Social & Cultural Rights, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

86. For further discussion, see *infra* text accompanying notes 282–83.

87. SHUE, *supra* note 14, at 55–56. Shue draws his typology from basic moral rights, including those that "ought to, but do not yet, have legal protection." *Id*. at 15, 28 (citing JAMES C. SCOTT, THE MORAL ECONOMY OF THE PEASANT: REBELLION AND SUBSISTENCE IN SOUTHEAST ASIA 40–41 (1976)). For a presentation of the early conceptual work outlining the government's power to regulate the market, and hence discharge a duty to protect—albeit through the prism of maximizing collective welfare rather than individual rights as understood at that time—see BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998).

88. This duty is described in comparative constitutional settings as one of "horizontal effect," or Drittwirkung. *See, e.g*., Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003); Oliver Gerstenberg, *What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law*, 17 CANADIAN J.L. & JURIS. 61 (2004).

89. Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

90. See, for example, the human rights framework of John Ruggie, Special Representative of the Sec'y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Right*s: *Implementing the United Nations "Protect, Respect and Remedy" Framework,* U.N. Doc. A/HRC/17/31 (June 16, 2011) (emphasizing, as the first of three pillars in the framework, "the State duty to protect").

91. *See, e.g*., General Comment No. 14, *supra* note 80, ¶ 51 (noting the example of a violation of the State's obligation to protect the right to health, by, inter alia, "the failure to

establish agency priorities within certain timelines,[92] or to sort out compensation claims, in the event that third parties infringe such laws in the face of illegality.[93] They are therefore present in the duty to protect rights.

Finally, the duty to fulfill is understood as a positive obligation. It requires the state to establish political, economic, and social systems that provide access to the good, service, or opportunity at issue in the guaranteed right for all members of society.[94] For example, a government must provide essential health services such as accessible primary care and clean water.[95] Again, queues may be permitted and also required in such arrangements, especially if the government is to establish such systems without using market mechanisms.[96] Queues provide such rights a tangible presence in the world: the right to food, for example, may require a delivery system of queueing in order to be realized, particularly in conditions of extreme scarcity (of course, the more usual mechanism of the market is far more relevant to the long-term realization of the right to food, as will be seen below).[97] While an inordinately long queue for essential services would suggest an infringement of the duty to fulfill such rights,[98] there is nothing in the structure of the queue itself that is ob-

---

enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries"). For broader connections between public health programs and the international right to health, see TOBIN, *supra* note 84, at 34–41.

92. Sunstein & Vermeule, *supra* note 89, at 162 (suggesting constraints on agencies' deferral of decisions, including the proviso that "resource allocation is an entirely legitimate grounds for moving particular agency action to the end of the queue, but . . . may not be invoked repeatedly to keep a particular action at the back of the queue forever").

93. Schuck, *supra* note 36.

94. ALSTON & GOODMAN, *supra* note 19, at 184–85 (suggesting, in respect of a duty to provide goods and services, that the state's resources "may go directly from it to the individual rights-bearer, as by providing food stamps or subsidized public housing, *or* it may go indirectly to the ultimate beneficiary through, say, subsidies to construction firms that will then offer low-rent housing"). *See also* SHUE, *supra* note 14, at 56–57 (noting various duties that would fall under a duty to aid).

95. General Comment No. 14, *supra* note 80, ¶ 36; EIDE, *supra* note 80; *see also* Patrick Bond & Jackie Dugard, *The Case of Johannesburg Water: What Really Happened at the Pre-Paid 'Parish Pump'*, L. DEMOCRACY & DEV., Jan. 2008, at 1.

96. *E.g.*, Aoife Nolan, *Budget Analysis and Economic and Social Rights*, *in* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES 369, 369–90 (Eibe Riedel et al. eds., 2014).

97. *See generally infra* Part III.B. Market design has many features, but it is worth noting that queue management has become an integral part of customer service in market-governed systems, with mathematical, engineering, and architectural literature on queue management blossoming since the 1950s. GROSS ET AL., *supra* note 5, at 2–3.

98. A timely example is represented by the ubiquity of queues in Venezuela's current

jectionable.

Thus it would appear, in the face of an incongruity between rights and queues, that the two do share an interdependent relation, and that even the duty to immediately respect rights carries with it an understanding that enforcement might have to depend on particular priority setting. Much here depends on baselines. It is therefore necessary to examine whether there is anything in the design of queues that invokes a particular relation with rights. For as well as instituting the realization of rights, queues themselves may also be observed to both create and displace rights. To understand how this is so, one must observe the ancillary rights that queues appear to create.

While a full analysis of such ancillary rights is beyond the scope of the present Article, I present a basic sketch here in order to lay the framework for understanding the rhetorical use of queues in arguing for and against the rights claimed in the illustrations in Part II. The ancillary rights are property-like, although the analogy is a loose one. In broad terms, we can point to the earlier analysis by Charles Reich, who pointed to a form of "new property,"[99] at work in the modern administrative state. With this analytical tool, Reich showed how government largess could be understood to create new forms of wealth, upon which, he argued, beneficiaries should be able to form some sort of reliance. In this vein, we might say that the modern human rights-respecting State creates queues, setting out expectations of benefit even before distribution. Reich's analysis was directed to the rights or statuses that the government had already provided, which, he argued, should be subject to procedural safeguards before removal.[100] We might say that queues—or a person's place in

---

energy, food, and medicine crisis. *Venezuela's Crisis: Implications for the Region: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. On Foreign Affairs*, 114th Cong. 2 (2016) (statement of Rep. Jeff Duncan, Chairman, Subcomm. on the W. Hemisphere) ("Food shortages affect 80 percent of the population, which wait an average of 4 hours in line to obtain basic foodstuffs. Nine out of ten homes do not eat three meals a day. This situation has led to more than 50 food riots and deaths of at least five people.").

99. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Reich preferred the term "public interest state" but predicted a welfare state was emerging in the United States. *Id*. at 756–71.

100. This re-framing of a "new property" led to *Goldberg v. Kelly*, 397 U.S. 254 (1970), and the procedural protections for welfare recipients, including entitlement to a hearing. Major retrenchments since then have occurred, both through statute and caselaw. For statutory changes, see Personal Responsibility Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.), and others discussed in JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 192–96, 235–37 (2007); FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 176 (2007). For judicial revisions, see Vicki Lens, *Confronting Government After Welfare*

them—are rights-realization-in-waiting, where the allocative priority that a person is given within a waiting system gives rise to a legitimate expectation that she or he can rely on this method of allocation.

Yet this creation of an ancillary right—to promote the realization of the primary right (such as in housing, health care, or the security of the person from persecution, each detailed in Part II below)—cuts both ways. Indeed, it may create a conflict between rights and queues. Queuers and others police the distributive channel and deride "queue jumpers" if they access such goods or services before them. Due, in no small part, to such well-observed phenomena as the "endowment effect,"—whereby "the sheer fact of possession" confers a sense of entitlement—and related theories of loss aversion,[101] those waiting in line react strongly against those who apparently evade it. Of course, queues can be designed to operate with certain other distributive criteria, which exempt certain interests from the temporal discipline, or even absorb evaders to preserve the order of the line.[102] Yet it is the pernicious relation between ancillary rights-realization-in-waiting and rights that sets out the condition in which the former displaces the latter, or, at least, in which such displacement is claimed to be justified. This is the basic structure of what I identify as "queue talk."

II. RIGHTS TALK VERSUS QUEUE TALK? THREE EXAMPLES

A conceptual and functional analysis of rights and queues is properly informed by evidence of each concept's rhetorical use. Ordinary language use of such concepts, and accompanying prevalent behavior, are relevant to their conceptual classifications and legal functions: people's beliefs about justice, and people's behavior when asked to allocate some valuable resource, inform politics and law. In this way, "rights talk" and "queue talk" are constitutive of principles

---

Reform: Moralists, Reformers, and Narratives of (Ir)responsibility at Administrative Fair Hearings, 43 L. & SOC'Y REV. 563, 573 (2009) (noting, as well as other procedural hurdles, the arbitrary waiting lists that accompany such hearings); *see also* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309 (2012).

101. Gray, *supra* note 34, at 179–80; *see also* Alex Coram & Lyle Noakes, *Relative Advantage, Queue Jumping, and Welfare Maximizing Wealth Distribution* 2 (U. Mass. Amherst Econ. Dep't Working Paper Series, Working Paper No. 2006-08, 2006), http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1042&context=econ_workingpaper ("In other words if not being able to move up in the queue is bad, having someone push in front may be even worse.").

102. Gray, *supra* note 34, at 187–88.

and practices of justice.[103] "Rights talk" has long been analyzed as a discursive trope in which the appeal to rights (and often, the appeal to litigation)[104] sets the domain of political argument, in both limiting and expansive ways.[105] In this Part, I suggest "queue talk" operates as a countervailing and complementary discursive trope, which invokes the concept of the queue and objection to its evasion.[106]

In the three examples of "queue talk" described in this Part, participants invoke the spatial ordering scheme of persons-in-waiting as the appropriate method of allocating scarce resources in housing, health care, and asylum claims, and use the pejorative term of "queue jumping" to describe those who proceed outside this order, including by claims of right. This is done, by and large, with the queue acting as a metaphor for distribution.

A metaphor stands in the place of words and engenders many narratives, some of them conflicting. But for a metaphor to "stick," as a trope of socio-political discourse, it must enjoy immediate intui-

---

103. For a description of constitutive processes, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); YOUNG, *supra* note 14. On the constitutive role of what is termed "rights consciousness," see MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) (conceptualizing how rights "work" as cultural conventions in social practice).

104. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

105. Waldron, *supra* note 4. For a discussion of the "myth of rights" literature, see STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2d ed. 2004); Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J.L. & SOC'Y 309 (1990). Of course, international human rights talk has distinct features, which have propelled a rich theoretical and empirical agenda in understanding how this body of law compels change. *See* RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013) (detailing processes of material inducement, persuasion, and acculturation as responsible for the uptake of international human rights law); SALLY ENGLE MERRY, HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 219–22 (2006) (presenting an anthropology of the processes of "vernacularization" of human rights law); KAY SCHAFFER & SIDONIE SMITH, HUMAN RIGHTS AND NARRATED LIVES: THE ETHICS OF RECOGNITION (2004) (exploring features of storytelling in human rights advocacy); *see also* KATERINA LINOS, THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES (2013); Adam S. Chilton, *The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study*, 15 CHI. J. INT'L L. 110 (2014).

106. I analyze the particular hold of queue talk against the background of broader social science and literary research on metaphor and narrative in Katharine G. Young, *Narrative, Metaphor and Human Rights Law: When Rights-Talk Meets Queue-Talk*, *in* NARRATIVE AND METAPHOR IN LAW (Michael Hanne & Robert Weisberg eds., forthcoming).

tive appeal and represent a cognitive reference point for many.[107] The prevalence of these metaphors suggests that queue talk has begun to rival rights talk's importance in justice claims. Of course, in each case, rights and queues have an institutional ontology, and do not just exist solely as "talk." As Part I has shown, their institutional dimension is not reducible to the way they are talked about, and indeed the two are distinct. In each of the following examples, queue talk appears to refer to an actual queue and yet the wait list or line may be largely inoperative.[108] In this respect, the discourse of queues and "queue jumping" may tell us more about the popular understanding of allocative systems, rather than the process of allocation itself.

The above description of the two concepts in the abstract leaves many questions open, as the case studies—of South Africa and housing rights contestations, Canada and patient rights contestations, and Australia and refugee rights contestations—will show. In each case, I describe the queue, the act of "queue jumping," the "queue jumpers," and those perceived as harmed by the practice, followed by a short overview of the housing, health care, or asylum processing system in place. This exercise shows how queues are understood as operating to institute, but also, importantly, to displace, rights.

The three case studies demonstrate very different uses of the same metaphor, with different understandings of the "queue," how it is evaded, and who is harmed by the evasion. The comparative analysis helps to shed light on the different values at stake in thinking about rights in terms of queueing distributional systems and challenges to that system. South Africa, as my primary case study, will be the most detailed of the three. Insofar as this analysis is comparative, it helps to shed light on the different values at stake in thinking about rights in terms of queueing distributional systems and challenges to that system. The three illustrations are therefore provided as examples of a discourse that has formed against the backdrop of

---

107. *See*, *e.g.*, the analysis of successful metaphor in MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING IN THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 238 (1998). For a similar "keyword" analysis, see Nancy Fraser & Linda Gordon, *A Genealogy of* Dependency*: Tracing a Keyword in the U.S. Welfare State*, 19 SIGNS: J. WOMEN CULTURE & SOC'Y 309 (1994).

108. Queue talk may be suggestive of either metonym or metaphor—that is, there is contiguity between the discourse and what it describes, rather than a mere analogy. As the Oxford English Dictionary defines it, in metaphor, a "descriptive word or phrase is transferred to an object or action different from, but analogous to, that to which it is literally applicable." *Metaphor*, OXFORD ENGLISH DICTIONARY (3d ed. 2001). In metonymy, "a word or phrase denoting an object, action, institution, etc.," is functionally replaced with "a word or phrase denoting a property or something associated with it." *Metonymy*, OXFORD ENGLISH DICTIONARY (3d ed. 2001).

different legal systems, as well as different socio-economic policy domains. This analysis suggests that, alongside the increasing use of the rights vocabulary in legal systems across the world, a new moral idiom of queue talk has developed that demands our attention.

Such an inquiry departs from the methodology of comparative public law that seeks causal inferences from observed convergences and divergences in law.[109] Instead, it posits the question as to whether the observed expanding international currency of rights talk is also met, in the same places, with the expansion (or adoption) of queue talk, particularly in divisive domestic controversies. For this reason, it is necessary to describe the use of rights, as well as the basic features of the legal systems, in which this discourse has appeared.

South Africa, Canada, and Australia have all inherited the English common law system, making them perhaps more conducive to queueing ideas in law.[110] Yet their legal systems can be distinguished on many relevant grounds—the legal recognition accorded to human rights being the most pertinent. South Africa's post-apartheid Constitution recognizes the most expansive list of constitutional rights, including justiciable economic and social rights;[111] Canada's Charter of Rights and Freedoms recognizes primarily civil and political rights at the constitutional level;[112] Australia's human rights regime is a patchwork of statutory protections,[113] with the emphasis on

109. For a justification of such departure, see Young, *supra* note 23 (describing the importance of the humanities, as well as the social sciences, for the multidisciplinarity of comparative public law).

110. Gray, *supra* note 34, at 175–76 (describing the analogies between the queue and the doctrine of estates).

111. S. AFR. CONST., 1996 §§ 8, 9, 26–29.

112. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). Provincial legislation also provides rights protections. *See, e.g.*, Alberta Bill of Rights, R.S.A. 2000, c. A-14 (Can.); Charter of Human Rights and Freedoms of Québec, C.Q.L.R. c. C-12 (Can.); Saskatchewan Bill of Rights Act, R.S.S. 1953, c.345 (Can.). The implications of this tier of rights protection are discussed below. *See infra* note 177 and accompanying text.

113. *E.g.*, *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Austl.); *Human Rights Act 2004* (ACT) (Austl.) (including civil and political rights and the right to education). After a nationwide consultation in 2009, a government-appointed committee recommended a federal Human Rights Act for Australia, yet this recommendation was rejected in 2010. *See generally Let's Talk About Rights—Human Rights Act for Australia*, AUSTRALIAN HUM. RTS. COMMISSION (Apr. 21, 2010), https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/lets-talk-about-rights-human-rights-act-australia. The Australian Constitution contains limited rights, in express or implied terms, and legislation is also limited. *See, e.g.*, PETER BAILEY, THE HUMAN RIGHTS ENTERPRISE IN AUSTRALIA AND INTERNATIONALLY (2009); GEORGE WILLIAMS & DAVID HUME, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION (2d ed. 2014).

parliamentary scrutiny and administrative procedures rather than judicial review.

Together, these systems have been described as "dialogic," or "weak-form," insofar as the courts and legislatures are understood to share a role in enforcing rights.[114] While this shared enterprise is highly relevant to the influence of the popular discourses studied in this Article, the emphasis taken here is on the elements of that discourse rather than on institutional differences that may, in part, be a cause.

Similarly, this Article does not foreground the comparative differences between the three administrative (welfare or developmental) states of South Africa, Canada, and Australia. These involve different levels of public resources (taxable revenue and GDP) as well as different income distribution,[115] different attitudes towards redistribution, different legal and political cultures, and different social and racial cleavages.[116] The illustrations of queue talk in such highly distinct settings are provided here to demonstrate the frequent association of rights talk with queue talk, rather than any causal claims.

Moreover, in addition to the three countries, the three socioeconomic policy domains offered for comparison—housing, health care, and immigration—are highly disparate, insofar as they involve, anywhere, differently placed beneficiaries (by class, race, and nationality), differently placed decision-makers (municipalities and bureau-

114. GARDBAUM, *supra* note 7 (including Australia, along with Canada, New Zealand and the United Kingdom, as examples of a so-called "Commonwealth model" of constitutionalism, with dialogic features, which depart from U.S. arrangements); TUSHNET, *supra* note 7, at 24 (omitting Australia from a presentation of weak-form review); Rosalind Dixon, *Creating Dialogue About Socio-Economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007) (including South Africa). This aspect is relevant to the association of queue-jumping with courts. *See infra* Part III.A.3.

115. The Gini coefficient, or normalized Gini index, measures the statistical dispersion of income distribution between a country's residents, and, despite methodological shortcomings, is the most commonly used measure of inequality. The World Bank's Gini index estimates Canada as having the lowest inequality of the three countries, at 33.7 (in 2010), Australia at 34.9 (in 2010), and South Africa at the highest of the three, at 63.4 (in 2011). *See World Databank: World Development Indictors*, WORLD BANK, http://databank.worldbank.org/data/reports.aspx?source=2&series=SI.POV.GINI&country= (last visited Dec. 2, 2016).

116. A rich literature explores the relevance of such differences. For a seminal study, see GØSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM (1990). *See also, e.g.*, Torben Iversen & David Soskice, *Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More Than Others*, 100 AM. POL. SCI. REV. 165 (2006) (applying the analytical framework to comparative politics). For specific attention to the influence of international standards in different democracies, see LINOS *supra* note 105.

cracies at the housing level; medical associations, professionals, and bureaucracies at the health care level; and international organizations and bureaucracies at the immigration level); stakeholders (industries, beneficiaries, coordinated interest or consumer groups, national or transnational advocacy groups, and social movements), and different statutory and administrative frameworks.[117] What they have in common is how contentious each policy domain is in each jurisdiction. Nonetheless, it is precisely these differences within policy domains that reveal the contingencies of the relationship between rights and queues, in ideological and institutional terms.

A. South Africa and Housing Rights

"Queue jumping" in South Africa is a discourse centered on the allocation system for state-subsidized housing. In this context, of course, the South African Constitution famously guarantees the right to have access to housing, which has been deftly upheld by the Constitutional Court.[118] The queue is the register of low-income households in need of housing assistance established in 1994, at the same time as the post-apartheid Constitution endorsed a guarantee of the right of everyone to "have access to . . . housing."[119] State-subsidized housing is delivered based on various criteria such as location, special needs, age, along with, importantly, time spent on the "waiting list."[120] Jumping the queue implies any perversion of the waiting list system, such as through "occupying" vacant lots earmarked for development or empty houses, and then using anti-eviction rules and courts to defend that occupation.[121] At the same

117. For the relevance of such institutional differences, see illustrative references *infra* Part III.B.

118. S. AFR. CONST., 1996 § 26; *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.); *see infra* notes 125–36 and accompanying text.

119. S. AFR. CONST., 1996 § 26; Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (S. Afr.) (setting out the standards that must be met before evictions can occur); Housing Act 107 of 1997 (S. Afr.) (setting out the responsibilities of the national, provincial, and municipal governments in housing delivery).

120. KATE TISSINGTON ET AL., 'JUMPING THE QUEUE', WAITING LISTS AND OTHER MYTHS: PERCEPTIONS AND PRACTICE AROUND HOUSING: DEMAND AND ALLOCATION IN SOUTH AFRICA 7 (2013) (providing a thorough study of the perceptions and realities of housing provision).

121. For an analysis of the evolving status of these protections, see, for example, LIEBENBERG, *supra* note 30; Stuart Wilson & Jackie Dugard, *Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights*, *in* LAW AND POVERTY: PERSPECTIVES FROM SOUTH AFRICA AND BEYOND 222 (Sandra Liebenberg & Geo Quinot eds., 2012); *see also Modderfontein Squatters, Greater Benoni City Council v. Modderklip*

time, there is also a perception that "people can pay and jump to the front of the queue,"[122] so the practice is two-fold; both practices are criticized, yet it is only the former that describes the practice of those claiming rights.

"Queue jumpers" themselves are understood to be those resident in informal settlements who are often new to the area in which they are "squatting" and who frequently arrive from rural areas in which much dislocation has occurred, or from outside South Africa.[123] The protagonists are therefore poor, desperate, and often displaced, who claim their rights to housing, but are perceived as subverting the waiting list at the expense of other poor, desperate, but patient, applicants, who themselves face very limited options for shelter.[124] Under the "queue jumping" narrative, the resulting harm falls on those waiting for housing allocation or support (recorded as some 1.8 million households),[125] as well as the general public, from the social unrest that comes as a result, and from perceptions of corruption and patronage. The discourse of "queue jumping" is deployed in the South African media, and by officials and politicians in relation to housing policy.[126] It is worth noting that, while the con-

---

Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA) para. 23 (S. Afr.).

122. TISSINGTON ET AL., *supra* note 120, at 72; Lauren Royston & Ronald Eglin, *Allocation Thought Piece for Managed Land Settlement* 11 (Dec. 5, 2011) (unpublished draft), http://www.incrementalsettlement.org.za/files/uploads/files/1323332855-allocation-thought-piece-for-managed-land-settlement.pdf (suggesting "people don't believe in waiting lists as the allocation mechanism in practice—views are widely held that they are corrupt and that people can pay and jump to the front of the queue").

123. HUMAN SCIENCES RESEARCH COUNCIL, CITIZENSHIP, VIOLENCE AND XENOPHOBIA IN SOUTH AFRICA: PERCEPTIONS FROM SOUTH AFRICAN COMMUNITIES (2008) (noting the perception that non-South African citizens are occupying national housing stock, which has been a trigger of xenophobic violence); TISSINGTON ET AL., *supra* note 120, at 71.

124. Sophie Oldfield & Saskia Greyling, *Waiting for the State: A Politics of Housing in South Africa*, 47 ENV'T & PLANNING A 1100, 1102 (2015) (describing the precarious modalities of waiting, which include: "living in overcrowded conditions with family members in rented accommodation; living in a backyard shack of a rented house, paying a rental fee for a space to erect a shack and sharing bathroom facilities with the household—sometimes family, other times a landlord; and erecting shelter in an informal settlement, which may or may not be legal with some services and infrastructure in place").

125. Of this national figure, estimates suggest that around 25% live in shacks in informal settlements, 45% live in a dwelling or other structure on a separate stand, 12% live in a traditional dwelling, and 10% live in a backyard shack. THE HOUS. DEV'T AGENCY, SOUTH AFRICA: INFORMAL SETTLEMENTS STATUS 47 (2012); TISSINGTON ET AL., *supra* note 120, at 27.

126. *See, e.g.*, *Radical Plans to Change the Face of Housing Delivery*, S. AFR. GOV'T NEWS AGENCY (Aug. 30, 2010), http://www.sanews.gov.za/south-africa/radical-plans-change-face-housing-delivery (noting, as official policy, the encouragement of "human

demnation of the practice is widespread, the connotations of land invasion and squatting may be different among and across South Africa's racial and social groupings.[127] The government itself, while often deviating from housing wait lists on the basis of need (and in accordance with constitutional rights), as well as other criteria, has been slow to announce such changes, perhaps, as suggested by one commentator, in "fear that people will torch their shacks and backyard shanties to jump the queue."[128]

The discourse has moved explicitly from politics to law. In several constitutional complaints, the government has defended its eviction practices by alleging "queue jumping" on the part of the evictees.[129] The Constitutional Court of South Africa itself has adopted the metaphor, noting that "[o]pportunists should not be enabled to gain preference over those who have been waiting for housing, patiently, according to legally prescribed procedures . . . [t]hey have to wait in the queue or join it."[130] Nonetheless, the Constitu-

settlements in terms of a demand led approach . . . [which] must be viewed and managed constructively so that is not seen as a means of queue jumping").

127. JAMES L. GIBSON, OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA 77 (2009). Gibson's research and surveys, which generated controversy in South Africa, are suggestive of a different perception of the practices of "queue jumping" by race and class—and that white South Africans see it as a rule of law issue, while others do not. Gibson's findings have been endorsed by other commentators. *E.g.*, Theunis Roux, *Book Review*, 45 TULSA L. REV. 781, 788 (noting that "[s]upport for Zimbabwe style land reform in South Africa [at two thirds], it turns out, does not mean that black South Africans attach no value to the rule of law, but that support for other values—notably rectifying past injustices—trumps support for the rule of law, at least in relation to land reform").

128. Rowan Philp & Nashira Davids, *Jumping the Housing Queue*, AFR. NEWS SERV., May 9, 2005.

129. *See, e.g.*, *City of Johannesburg Metro. Municipality v. Blue Moonlight Props. 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.); *City of Johannesburg Metro. Municipality v. Blue Moonlight Properties 39 (Pty.) Ltd.* 2011 (4) SA 337 (SCA) (S. Afr.); *see also Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) para. 60; *Modderfontein Squatters, Greater Benoni City Council v. Modderklip Boerdery (Pty) Ltd.* 2004 (6) SA 40 (SCA) paras. 23–25 (rejecting state's submission that "queue jumping" at issue, finding "no evidence that the occupation took place with the intent to obtain precedence . . . [but rather] because the people had nowhere else to go and because they believed that the land, which to them did not appear to have been cultivated, belonged to the municipality"); *confirmed in President of the Republic of S. Afr. v. Modderklip Boerdery (Pty) Ltd.* 2005 (5) SA 3 (CC) paras. 32–34; *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) para. 3, 55 (rejecting state's submission of queue jumping because "occupiers . . . are a community who are homeless, who have been evicted once, and who found land to occupy with what they considered to be the permission of the owner where they have been residing for eight years").

130. *Blue Moonlight Props. 39. (Pty) Ltd*, 2012 (2) SA 104 (CC) para. 93 (S. Afr.) (Van Der Westhuizen, J.).

tional Court has been reluctant to characterize rights claimants as "queue jumpers," arguing that those seeking temporary or emergency housing can be distinguished from those seeking "permanent housing, ahead of anyone else in a queue."[131] Similarly, a homeless community, "who ha[s] been evicted once, and who found land to occupy with what they considered to be the permission of the owner where they have been residing for . . . a considerable period of time" are not "queue jumpers," according to the Court.[132] Not surprisingly, the same factors that are relevant to the grant or refusal of an eviction order are relevant to whether occupiers are described as "queue jumpers" or not. These factors include the circumstances under which the unlawful occupiers started occupying and erecting their illegal structures on the property, the period the unlawful occupiers have resided on the land in question, the availability of alternative accommodation of land, and the rights and needs of the elderly, children, persons with disabilities, and female-headed households.[133] The Court will also examine whether occupation has occurred on public or private land (as a relevant, although not decisive factor),[134] the degree of the housing emergency faced by the unlawful occupiers, and whether they have a plausible belief in the permissibility of their occupation or have instead "deliberately invade[d] land with a view to disrupting the organised housing programme and placing themselves at the front of the queue."[135]

These uses of queue talk must be understood against the background of South Africa's housing policies. The allocation of housing has been integral to post-apartheid South Africa and its goal of providing redress for the historical, socio-economic, and racial in-

131. *Id*.

132. *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) para. 55 (S. Afr.) (Sachs, J.).

133. Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 §§ 4, 6 (S. Afr.). For commentary, see Gustav Muller & Sandra Liebenberg, *Developing the Law of Joinder in the Context of Evictions of People from their Homes*, 29 S. AFR. J. ON HUM. RTS. 554, 565 (2013).

134. *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) para. 26 (S. Afr.) (Sachs, J.) (noting that different considerations weigh in relation to the occupation of public or private land and that "private land may be derelict, with the owners having little practical interest in its utilisation, while public land may have been set aside for important public purposes, including the provision of housing"); *see also City of Johannesburg Metro. Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.) (noting that occupation on private land nevertheless raises obligations on the local municipality).

135. *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) para. 26 (S. Afr.) (Sachs, J.).

justices of apartheid.[136] Registering one's name for a house is perceived as a "rite of passage."[137] One commentator describes the "eradication of the housing backlog" as both a political target and a broader developmental goal.[138] The 1994 White Paper on Housing committed the government to provide housing for all its citizens,[139] mainly through the construction of new houses on greenfield, previously undeveloped land.[140] This scheme has, according to government reports, resulted in the construction of "an additional 5,6 million formal homes since the country's first democratic elections."[141] Who gets a house, where, and when, is thus a central terrain of South African politics.

The queue—understood as the housing register—has been pivotal in these contestations. While the goal of housing provision became a central purpose of the African National Congress in post-apartheid South Africa, many of the housing lists on which the new government relied had already been drawn up during apartheid.[142] In merging these lists and creating new databases,[143] housing claimants

136. Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 COLUM. HUM. RTS. L. REV. 816, 819–20 (2014).

137. TISSINGTON ET AL., *supra* note 120, at 58–59 (discovering from discussions with Gauteng NGO that registering one's name was "a rite of passage for people when they turn 18," with "no sense of how long they will wait . . . or what options are available to them" during this time); *see also* Oldfield & Greyling, *supra* note 124, at 1107 (noting that, based on "sustained and repeated promises from the state, putting yourself on the housing list remains the most likely route to obtain a formal house").

138. TISSINGTON ET AL., *supra* note 120; Marie Huchzermeyer, *Pounding at the Tip of the Iceberg: The Dominant Politics of Informal Settlement Eradication in South Africa*, 37 POLITIKON 129 (2010).

139. REPUBLIC OF S. AFR., DEP'T OF HOUS., A NEW HOUSING POLICY AND STRATEGY FOR SOUTH AFRICA (1994), http://www.gov.za/sites/www.gov.za/files/16178_0.pdf.

140. A major shift to this initial Reconstruction and Development Programme (RDP) of 1994 was the Breaking New Ground (BNG) plan in 2004. REPUBLIC OF S. AFR., DEP'T OF HUMAN SETTLEMENTS, "BREAKING NEW GROUND": A COMPREHENSIVE PLAN FOR THE CREATION OF SUSTAINABLE HUMAN SETTLEMENTS (2004), http://www.dhs.gov.za/sites/default/files/documents/26082014_BNG2004.pdf.

141. *South Africa Yearbook 2014/15: Human Settlements*, REPUBLIC OF SOUTH AFRICA, GOVERNMENT COMMUNICATION & INFORMATION SYSTEM 239, http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/Human%20Settlements2015.pdf (last visited Dec. 2, 2016). While the government has reported these figures, they are disputed, with less than 1.44 million state-subsidized properties registered since 1994. *See* TISSINGTON ET AL., *supra* note 120, at 23.

142. *See* TISSINGTON ET AL., *supra* note 120, at 25.

143. The post-apartheid lists are complicated by their apartheid-era roots. For example, Oldfield and Greyling demonstrate how, in Cape Town, individuals formerly classified as "coloured" (mixed race) were placed on waiting lists in the segregated group areas, but

were asked to fill in a form with details such as ID number, gender, age, and number of dependents, and were given a receipt with the date on which they had registered.[144] The expectation was that this list would work on a "first come, first served" basis, and applicants would receive a house when their name made its way to the top.[145] Later, other factors were deemed relevant, such as location and "catchment" for an intended housing project, or an applicant's income.[146] Some municipalities also created random selection or "lottery" systems, and discrete application processes for advertised, project-based opportunities.[147] Since 2008, public guidelines have been drawn up "to facilitate fair, equitable, transparent and inclusive selection and housing subsidy application approval processes" for certain housing applications, although their practical effect has been unclear.[148] Nonetheless, the waiting list has continued to be a key mechanism in housing allocations and a key focus in political contestations.

Into the mix of this legislative and administrative regime has come litigation and, as a result, judicial oversight, of the housing programs. Indeed, housing rights claims have vastly outnumbered any of the other economic and social rights as a source of constitutional complaint.[149] In an early and very well-known case, the Constitutional Court in *Grootboom* held that the government had infringed the right to housing by failing to cater to vulnerable people in desperate need of housing, including the claimant, Irene Grootboom, and her community.[150] The government had pointed to the problem

families classified as "African" (the majority) were excluded from access. This meant the place on the list reflected different dates of insertion. Oldfield & Greyling, *supra* note 124, at 1106.

144. TISSINGTON ET AL., *supra* note 120, at 25.

145. *Id*.; Oldfield & Greyling, *supra* note 124, at 1106–07.

146. Oldfield & Greyling, *supra* note 124, at 1107. The catchment refers to the area from which people are allocated to particular schools, hospitals, shops, or other services. For discussion of these factors, see, for example, Nick Gallent, *New Agendas in Planning and Rural Housing*, *in* PLANNING, MARKETS AND RURAL HOUSING 1, 1–8 (Nick Gallent ed., 2012).

147. TISSINGTON ET AL., *supra* note 120, at 26.

148. *Id*. at 33 (referring to the National Department of Housing's 2008 National Housing Allocation Strategy).

149. *See, e.g*., Jackie Dugard, *Beyond* Blue Moonlight*: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing*, 5 CONST. CT. REV. 265, 267 (2014); Brian Ray, *Evictions, Aspirations and Avoidance*, 5 CONST. CT. REV. 173, 173 (2014).

150. *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

of queue jumping, in policy (and later doctrinal) terms.[151] The Constitutional Court held that the national housing program had fallen short of the constitutional right to housing by failing to:

> provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.[152]

Despite this finding of a rights infringement, the Constitutional Court declined to issue an individual remedy, making only a declaration of unconstitutionality that was resolved incrementally by the government over time.[153] The refusal to issue a more substantive remedy to the individual plaintiffs, whose rights were infringed, has been criticized,[154] and yet many within South Africa and abroad have expressed support for the ability of this approach to support long-term, government-led (rather than court-led), reform.[155]

The Constitutional Court has continued to refuse to issue remedies that would reorder the priorities set by government in individual allocative terms. In the intervening decade and a half since *Grootboom*, the Constitutional Court has heard a large number of anti-eviction and other housing rights cases (and lower courts have heard an even greater number).[156] In making a stronger argument for

---

151. *Id*. para. 61 (policy arguments); *see also* cases cited *supra* note 129 (doctrinal arguments); discussion *infra* note 157 and accompanying text.

152. *Grootboom*, 2001 (1) SA 46 para. 66. Priority is given to the needs of the poor. *See* Housing Act 107 of 1997 § 2(1)(a) (S. Afr.); *Residents of Joe Slovo Cmty*. *W*. *Cape v*. *Thubelisha Homes* 2010 (3) SA 454 (CC) para. 350 (S. Afr.).

153. *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.). For a review and assessment of the National Housing Code changes, see Malcolm Langford, *Housing Rights Litigation:* Grootboom *and Beyond*, *in* SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 187 (Malcolm Langford et al. eds., 2014).

154. Christopher Mbazira, *Non-Implementation of Court Orders in Socio-Economic Rights Litigation in South Africa: Is the Cancer Here to Stay?*, ESR REV: ECON. & SOC. RTS. S. AFR., Nov. 2008 at 2, 3; Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. ON HUM. RTS. 383, 407 (2004).

155. *See, e.g*., LIEBENBERG, *supra* note 30; CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001) (endorsing an "administrative law" approach to constitutional rights); Langford, *supra* note 153; Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763 (2003).

156. *See, e.g*., David Bilchitz, *Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?*, 5 CONST. CT. REV. 297, 304 (2014).

the ability to evict occupiers, with the suggestion that the obligation to progressively realize the right to housing requires enforcement of the existing queue, certain municipalities have sought to elevate the housing waiting list to constitutional doctrine.[157] This has not, however, been accepted by courts, although they have been careful not to impose their own ordering in its place. In many cases, courts have ordered negotiated resolutions between the parties (the remedy of "meaningful engagement") or other procedural methods of redress, rather than issue strong, individual remedies.[158] In others, courts have indicated an even stronger fidelity to the existing prioritization of access to housing, emphasizing the difficulties faced by the government in addressing housing needs and development more broadly. In *Residents of Joe Slovo*, for example, Justice Yacoob, who had penned the unanimous judgment supporting the right to housing in *Grootboom*, emphasized that the evictions and relocations at the basis of the claimants' appeal were occurring in order to facilitate housing development, and that others had stakes in this development.[159] Under such conditions, the evictions met the test of reasonableness.[160] This consideration has been criticized as "inverting the rights entitlements in question in the case, such that the constitutional rights of those not before the Court appear, through the reasonableness test, to 'trump' the right to housing of the plaintiffs."[161]

Other members of the Constitutional Court have indicated a great willingness to scrutinize current housing priorities in addressing

157. *See, e.g.*, *City of Johannesburg Metro. Municipality v. Blue Moonlight Properties 39 (Pty.) Ltd.* 2011 (4) SA 337 (SCA) para. 21 (S. Afr.) (City of Johannesburg making submissions that the queue represents "the sequence of steps in [the State's] housing policy directed at the *progressive* realisation of housing rights, namely, from emergency housing to temporary accommodation and then finally to permanent accommodation"); *see also* Young, *supra* note 106 (analyzing the argument that the queue could fill the doctrinal vacuum of the obligation to progressively realize the right to housing).

158. *Occupiers of 51 Olivia Road, Berea Twp., and 197 Main St., Johannesburg v. City of Johannesburg*, 2008 (3) SA 208 (CC) (S. Afr.); *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.); *see also* Lilian Chenwi, *Democratizing the Socio-Economic Rights Enforcement Process*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE, *supra* note 27, 178, 180–88; Ray, *supra* note 149; *infra* note 266.

159. *Residents of Joe Slovo Cmty. W. Cape v. Thubelisha Homes* 2010 (3) SA 454 (CC) paras. 115–16.

160. *Id.* paras. 116–18.

161. JESSIE HOHMANN, THE RIGHT TO HOUSING: LAW, CONCEPTS, POSSIBILITIES 100–02 (2013) (suggesting that the standard of reasonableness moves the right to housing from "a transformative, substantive right, towards administrative oversight of government procedure"). *But see* LIEBENBERG, *supra* note 30, at 173–86 (indicating a fuller role for reasonableness review); Young, *supra* note 30 (suggesting a more weighted decision-making process in assessments of reasonableness).

claims of rights infringements. In *Joe Slovo*, several justices noted their dissatisfaction with the "either/or" nature of legal title versus the status of "unlawful occupier" in the context of South Africa's history;[162] and argued for a less "mechanistic" application of property entitlements under a public law, rather than private law, paradigm.[163] On this latter view, the constitutional right to housing is said to usher in (and even compel) a "move away from a static, typically private-law conceptualist view of the Constitution as a guarantee of the *status quo* to a dynamic, typically public-law view of the Constitution as an instrument for social change and transformation."[164] Yet it is clear that the criticism of "queue jumping" casts a long shadow over such cases. Before unpacking this criticism, let us introduce Canada's, and then Australia's, practice of queue talk.

B. Canada and Health Care Rights

"Queue jumping" in Canadian political discourse takes place in a very different context from South Africa. Rather than a public housing program, the metaphor of the queue, and its evasion, is used to describe a subversion of the public health care system.[165] The queue is the waiting list established for this publicly-funded care: services deemed "medically necessary" under the Canada Health Act, whose scarcity requires some mechanism for distribution for patients in need.[166] Following a distributive principle of providing health care based on need and not ability to pay, the federal government matches provincial spending on covered services in exchange for a provincial prohibition on "user charges" by hospitals or "extra billing" by physicians.[167] Jumping the queue is the act of subverting the planned

162. *Joe Slovo Cmty. W. Cape*, 2010 (3) SA 454 (CC) para. 148 (Moseneke, D.C.J.), para. 291 (O'Regan, J.), para. 343 (Sachs, J.).

163. *Id.* para. 343–44 (Sachs, J.).

164. *Id.* para. 343; *see also Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) para. 16 (S. Afr.) (quoting *First Nat'l Bank of SA Ltd. v. Comm'r for the S. African Revenue Servs.* 2002 (4) SA 768 (CC)). For a different invocation of a transformational jurisprudence, see YOUNG, *supra* note 14, chs. 5–7; Dennis M. Davis, *The Scope of the Judicial Role in the Enforcement of Social and Economic Rights: Limits and Possibilities Viewed from the South African Experience*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE, *supra* note 27, 197.

165. For a recent, more focused use of the term in Canada, as applicable to remedial redress in constitutional litigation, see Kent Roach, *Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response*, 66 U. TORONTO L.J. 3 (2016).

166. Canada Health Act, R.S.C. 1985, c C-6 (support for "medically necessary" hospital care and "medically required" physician services).

167. *Id.* §§ 18–20. Further prohibitions or disincentives are applied to private insurance

distribution system by "purchasing" hospital or physician services outside of the waiting list, for example, by accessing cataract surgery through a private clinic[168] or the H1N1 vaccine outside of the government-approved priority line.[169] Invoking a set of ordering assumptions very different from South Africa's public housing register, the queue is the waiting list for particular medical services that applies to *all* Canadians, not just those who have been means-tested as qualifying for a public subsidy.

"Queue jumpers" are therefore deemed the especially privileged or politically influential in society—those who can exit the program and access services over others in the wait list, by paying for private medical care or by exploiting political connections.[170] The

for publicly insured services. Colleen M. Flood & Tom Archibald, *The Illegality of Private Health Care in Canada*, 164 CANADIAN MED. ASS'N J. 825 (2001).

168. A report by the federal Health Ministry on compliance under the Canada Health Act found that "[i]n 2008–2009, the most prominent concerns with respect to compliance under the *Canada Health Act* remained concerning patient changes for medically necessary services in private clinics, and queue jumping." HEALTH CANADA, CANADA HEALTH ACT ANNUAL REPORT 2011–2012, at 1 (2012). One commentator describes "both the success of these private clinics in attracting affluent patients and the consternation of the Canadian public with these clinics" and discusses public criticism of "queue jumpers." DONALD A. BARR, INTRODUCTION TO U.S. HEALTH POLICY: THE ORGANIZATION, FINANCING, AND DELIVERY OF HEALTH CARE IN AMERICA 54 (4th ed. 2016) (referencing a June 18, 2007 Montreal Gazette news story "criticiz[ing] Jack Layton, leader of the New Democratic Party, for 'jumping the queue' and undergoing hernia surgery at a private clinic[] . . . [and reporting] that the president of the Canadian Autoworkers union had jumped the queue to get an MRI of his leg"). Such references are ongoing, including many references in parliamentary debates. *See, e.g.*, 148 Official Report (Hansard) No. 103 (Nov. 2, 2016) (statement of Member of Parliament Kamal Khera) ("Permitting payments for faster access to medically necessary services such as MRIs or CT scans at private diagnostic clinics, what has often been called 'queue jumping,' contravenes both the spirit and accessibility criteria of the Canada Health Act. . . . This is not access based on medical need. This is access based on ability or willingness to pay and it runs counter to the underlying principle of Canada's health care system.").

169. *E.g.*, Karen Howlett et al., *Private-Clinic Patients Jump the Line For Flu Shot*, GLOBE & MAIL (Nov. 2, 2009), http://www.theglobeandmail.com/life/health-and-fitness/health/conditions/private-clinic-patients-jump-the-line-for-flu-shot/article1204357 (describing reports that public health agencies in Toronto and Vancouver had administered several thousand doses of the H1N1 vaccine to private clinics that treated patients who had paid an annual membership fee); *see also* BARR, *supra* note 168, at 54.

170. Alberta launched a Health Care Preferential Access Inquiry in 2012, which found, in the words of the Commissioner, Mr. Vertes, "incidents of improper preferential access and . . . several systemic issues that could foster and environment conducive to such improper access." Carrie Tait, *Queue-jumping Common in Alberta Health-care System, Inquiry Finds*, GLOBE & MAIL (Aug. 21, 2013), http://www.theglobeandmail.com/news/politics/queue-jumping-common-in-alberta-health-care-system-inquiry-finds/article13900015. However, the inquiry did not find "specific evidence that anyone had been medically

victims of "queue jumping" are imagined, not only as the (actually quite small)[171] proportion of people on the waiting list at any one time, but also the access of Canadian citizens as a whole, and particularly lower-income Canadians, given the potential effects on the long-term sustainability of the "single-tier" model of health care financing in Canada.[172] In some cases, such as for access to scarce vaccines, this is because the "queue jumper" directly diverts resources away from those on the government wait list. But in others, it is understood that the evasion of the queue undermines the solidarity, and, more indirectly, the resources that support public health care.[173] In this respect, even though the number of resources available in the queue remains the same, "queue jumping" destabilizes the universalist ideals espoused in the Canada Health Act: a statute which "holds a . . . talismanic power over progressive Canadians, and is viewed as the Magna Carta of universal health care."[174] The queue is recognized as universal: exit from it connotes a breakdown of the justification for public health care,[175] as well as the creation of a

harmed" as a result of queue jumping. *Id*.

171. One conservative-leaning think-tank estimated that, with 894,449 procedures in 2015, and the assumption that each person waited for only one procedure, 2.5% of Canadians were on a waiting list in 2015. BACCHUS BARUA, WAITING YOUR TURN: WAIT TIMES FOR HEALTH CARE IN CANADA, 2015 REPORT, at iv (2015), https://www.fraserinstitute.org/sites/default/files/waiting-your-turn-2015.pdf.

172. For a canvassing of this argument, see Robert G. Evans, *Health Care Reform: Who's Selling the Market, and Why?*, 19 J. PUB. HEALTH MED. 45 (1997).

173. Commentators note that principles of solidarity were also undermined by underinvestments, austerity, and federalism-stymied reforms in Medicare in the 1990s. *See, e.g.*, Vandna Bhatia, *Social Rights, Civil Rights and Health Reform in Canada*, 23 GOVERNANCE 37, 40, 43 (2010) (drawing attention to the individualized consumer claim made against the waiting list, and suggesting that such claims of right make private financing more compelling); *see also* CAROLYN HUGHES TUOHY, ACCIDENTAL LOGICS: THE DYNAMICS OF CHANGE IN THE HEALTH CARE ARENA IN THE UNITED STATES, BRITAIN, AND CANADA 231–34, 254–62 (1999) (noting the importance of different coalitions of political support—which must include the medical profession—for securing publicly financed health care systems).

174. Colleen M. Flood, *Litigating Health Rights in Canada: A White Knight for Equity?*, *in* THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY 79, 84 (Colleen M. Flood & Aeyel Gross eds., 2014); *see also* Chaoulli v. Quebec (Att'y Gen), [2005] 1 S.C.R. 791 (Can.), para. 16 (suggesting the principles of access underlying Canadian Health Act have "become the hallmarks of Canadian identity. Any measure that might be perceived as compromising them has a polarizing effect on public opinion") (Deschamps, J.); ROY J. ROMANOW, BUILDING ON VALUES: THE FUTURE OF HEALTH CARE IN CANADA 47 (Nov. 2002) [hereinafter Romanow Report], http://publications.gc.ca/collections/Collection/CP32-85-2002E.pdf (citing a comment that "[m]edicare has as much iconic force here as the Constitution does in the USA").

175. COLLEEN M. FLOOD, INTERNATIONAL HEALTH CARE REFORM: A LEGAL, ECONOMIC AND POLITICAL ANALYSIS (2000) (arguing from principles expressed in ALBERT O.

breakaway market.[176]

Defenders of privatized access to health care do not, of course, see the practice in "queue jumping" terms; theirs, rather, are claims of right. The most well-known manifestation of this defense involved the constitutional challenge mounted by a doctor, Dr. Jacques Chaoulli, and a patient, Mr. George Zeliotis, on the ban by Quebec on private health insurance. The Supreme Court of Canada partly accepted their claim that the prohibition on private health insurance infringed the right to life and security of the person under Section 1 of Quebec's Charter of Human Rights and Freedoms[177] and Section 7 of the Canadian Charter of Rights and Freedoms.[178] By a 4–3 majority, the Supreme Court accepted that the health care financing system had required patients to endure long wait times in the public system, which interfered with their rights to life and personal security in violation of the Quebec Charter, although only three Justices accepted that an infringement of the Canadian Charter had occurred, thus limiting the national effect of the judgment.[179] The Supreme Court thus overturned the legislative ban on private health insurance, holding that it infringed the constitutional rights of Quebeckers.[180] The dissent, on the other hand, noted the inevitability of waiting lists; that "rationing occurs on the basis of clinical need rather than wealth and social status"; and that "who should be allowed to jump the queue . . . [in] a public system founded on the values of equity, solidarity and collective responsibility . . . can and should be addressed on a case by case basis."[181]

The *Chaoulli* decision has been criticized as representing an unwarranted judicial intervention in social policy and described in one prominent comment as "worse than *Lochner*."[182] Under this

---

HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970)).

176. For the view that "[m]arkets have a way of breaking out" when "there are people who want to buy [something] and others who want to sell it," see JOHN MCMILLAN, REINVENTING THE BAZAAR: A NATURAL HISTORY OF MARKETS 5, 16 (2002); *see also*, *id*. at 32–36, 160–61 (discussing limitations on a market for health care).

177. Charter of Human Rights and Freedoms of Québec, C.Q.L.R. c. C-12 (Can.).

178. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

179. Chaoulli v. Quebec (Att'y Gen.) [2005] 1 S.C.R. 791 (Can.); *see also* Flood, *supra* note 174, at 94.

180. *Chaoulli*, [2005] 1 S.C.R. 791.

181. *Id*. para. 223 (Binnie & LeBell, JJ., dissenting).

182. Sujit Choudhry, *Worse than* Lochner*?*, *in* ACCESS TO CARE, ACCESS TO JUSTICE: THE LEGAL DEBATE OVER PRIVATE HEALTH INSURANCE IN CANADA 75, 75 (Colleen M.

view, the Supreme Court of Canada committed three prominent mistakes that were attributed to the U.S. Supreme Court's notorious overturning of a statute which limited workers' hours on health grounds[183]—first, in overreaching in the judicial role; second, in enacting a theory of economic libertarianism; and third, when read in comparison with other contemporary *Charter* decisions implicating economic and social rights,[184] in suggesting a bias in favor of middle class claimants over earlier unsuccessful claimants. Added to these criticisms was the majority's unsophisticated reliance on comparisons with other health systems;[185] evidence that served to support a conclusion that the presence of a parallel private sector would not necessarily undermine the equality of the public health care regime.

Nonetheless, the fact that *Chaoulli* established only a narrow "negative" right tied to the Quebec system has limited its effect.[186] Similar prohibitions in other provinces remain in force. Moreover, the form of remedy issued in the *Chaoulli* case—a declaration against the impugned legislation, stayed for one year—provided Quebec with "some room for policy maneuver."[187] In 2006, the province passed an amending statute that addressed the time spent on wait lists.[188] This statute empowered the Health Minister to identify and circum-

---

Flood et al. eds., 2005).

183. Lochner v. New York, 198 U.S. 45 (1905) (ruling 5–4 that the law limiting bakers' working hours was invalid, as an interference with the liberty of contract; thus giving rise to the so-called *Lochner* era of substantive due process). Justice Holmes's famous dissent accused the majority of judicial activism, of imputing to the Constitution a particular economic theory, and of favoring *laissez-faire*. *Id*. at 74–76 (Holmes, J., dissenting).

184. Choudhry, *supra* note 182, at 93–94 (comparing Charter decisions of Auton v. British Columbia (Att'y Gen.), [2004] 3 S.C.R. 78 (Can.) and Gosselin v. Quebec (Att'y Gen.), [2002] 4 S.C.R. 429 (Can.) against *Chaoulli*).

185. *See* Colleen M. Flood, *Chaoulli: Political Undertows and Judicial Riptides*, 2008 HEALTH L.J. (SPECIAL ISSUE) 211, 212 (providing an analysis of the flaws of the Supreme Court's "simplistic" use of international and comparative materials); *see also* Choudhry, *supra* note 182, at 80 (describing an argument that the majority's recourse to OECD data was "amateur public policy tourism"); Kent Roach, *The Courts and Medicare: Too Much or Too Little Judicial Activism*, *in* ACCESS TO CARE, ACCESS TO JUSTICE: THE LEGAL DEBATE OVER PRIVATE HEALTH INSURANCE IN CANADA, *supra* note 182, at 184, 193; *see generally* TUOHY, *supra* note 173, at 263–65 (noting the dangers of comparative studies in health care policy-making).

186. Flood, *supra* note 174, at 95–96.

187. *Id*. at 95; *see also* Lorraine E. Weinrib, *Charter Perspectives on* Chaoulli*: The Body and the Body Politic*, *in* ACCESS TO CARE, ACCESS TO JUSTICE: THE LEGAL DEBATE OVER PRIVATE HEALTH INSURANCE IN CANADA, *supra* note 182, at 56, 56.

188. An Act to Amend the Act Respecting Health Services and Social Services and Other Legislative Provisions, S.Q. 2006, c 43 (Can.).

vent long wait lists by implementing alternative procedures, and established a specific market for the sale and purchase of insurance "for hip, knee, and cataract surgeries."[189] In this latter context, Quebec also instituted a mechanism by which demand for private health insurance would be kept low by guaranteeing public payment for private admission if the wait for certain surgery exceeded six months.[190]

Thus, ten years after the *Chaoulli* decision, the provincial single-payer universal health insurance plans have not changed, in part, perhaps, because the constituency for reform—either private life and health insurance firms or politicians—appears to have had little incentive to challenge it.[191] Nonetheless, a reframed discourse of rights, and with it the counter-discourse of "queue jumping," now set the parameters of much of the political discourse around health care in Canada. Focus on the queue gives rise to complaints against the system itself, rather than government underfunding: that is, the wait times are seen to compromise the health of Canadians.[192] Newer rights claimants defend their right to private services—and to jump the queue—on the basis of newly reframed solidarity goals.[193] In an ideological setting with markedly different contours than South Africa's, the collective social right to health care in Canadian Medicare has been transformed into "health care as an individual's *civil right*—that is, something that individualized consumers have the right to obtain freely in a marketized society."[194] This case study shows the deep, but also deeply contingent, ideological and political aspects of queue talk.

---

189. *Id*. art. 42; Flood, *supra* note 174, at 95.

190. Flood, *supra* note 174, at 95 n.90; *see also* An Act to Amend the Act Respecting Health Services and Social Services and Other Legislative Provisions, S.Q. 2006, c 43, arts. 7, 8, 17(1) (Can.). For summary of subsequent litigation, see Flood, *supra* note 174, at 96.

191. Daniel Cohn, Chaoulli Ten Years On: Still About Nothing? (2015) (unpublished manuscript) (on file with author) (paper prepared for the 2015 Canadian Political Science Association Annual Meeting, Ottawa).

192. *E.g*., BARUA, *supra* note 171 (reporting Fraser Institute surveys).

193. Bhatia, *supra* note 173, at 52–53. Bhatia cites one example of how solidarity norms are changed through queue talk; Keith Martin, physician and Member of Parliament, states:

> The problem is that we have been cutting away at our [publicly funded] healthcare system, and now we are cutting the muscle and bone of the system. . . . Under a private system, as individuals move off public waiting lists to private ones, waiting lists in the public system would decrease, resulting in faster access for people—especially on the public system. Essentially, those who can afford to pay for medical services would be subsidizing those who cannot.

Id. (italics omitted).

194. *Id*. at 40.

C. Australia and Asylum Rights

In Australia, the "queue jumping" metaphor has been a central trope in political debates deployed by those that support the restriction of access to asylum processing, especially by asylum seekers arriving by boat. The queue represents the waiting list for a limited number of temporary or permanent visas that are granted by the Australian executive on humanitarian grounds.[195] In this political discourse, the practice of "queue jumping" is presented as the act of arriving in Australia by boat and forcing the processing of a refugee claim in front of other refugees who have registered with the United Nations High Commissioner for Refugees (the "UNHCR") in camps or other sites abroad.[196]

The so-called "queue jumpers" are desperate people, mainly, in the last decade, from Afghanistan and Iraq, who are seeking protection.[197] When processed, most maritime asylum seekers have

195. In 2015, Australia's quota was set at 13,750 places, which included 6000 offshore applicants (reserved for those recommended by the UNHCR), and 7750 for a special humanitarian program. *See* Jane McAdam, Editorial, *Australia and Asylum Seekers*, 25 INT'L J. REFUGEE L. 435, 438 (2013); *see also* Janet Phillips, *Asylum Seekers and Refugees: What Are the Facts?*, (Mar. 2, 2015), http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/HGNW6/upload_binary/HGNW6.pdf;fileType=application/pdf#search=%22asylum%20seekers%20and%20refugees%22. For some recent revisions, see *infra* note 216 and accompanying text.

196. Australia is one of the twenty-six States Parties to the 1951 Refugee Convention, out of an overall 145, which participate in the UNHCR resettlement program and accept quotas of refugees on an annual basis. Others include Argentina, Belgium, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Japan, the Netherlands, New Zealand, Norway, Portugal, Romania, Spain, Sweden, the United Kingdom, the United States of America, and Uruguay. U.N. High Comm'r for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/1P/4/ENG/REV.3 (2011), http://www.refworld.org/docid/4f33c8d92.html; *see also Information on UNHCR Resettlement*, UNHCR, http://www.unhcr.org/en-us/information-on-unhcr-resettlement.html (last visited Dec. 2, 2016). Notwithstanding that resettlement has attracted criticisms "that it facilitates 'brain drain', is susceptible to fraud and abuse, and is an expensive durable solution that benefits only a limited number of refugees," its more comprehensive approach is commended by other commentators insofar as it is "an expression of international solidarity and a means of burden or responsibility sharing." Gil Loescher & James Milner, *UNHCR and the Global Governance of Refugees*, *in* GLOBAL MIGRATION GOVERNANCE 189, 203 (Alexander Betts ed., 2011).

197. An analysis of data from the then-Department of Immigration and Citizenship found the largest number arrived from Afghanistan and Iran, with the subsequent countries being Sri Lanka and Pakistan. The majority of those arriving by boat were also male, and aged between 18–30. *Australia and Asylum Seekers: The Key Facts You Need To Know*, GUARDIAN: DATABLOG, https://www.theguardian.com/news/datablog/2013/jul/02/australia-

been found to be declared refugees, that is, have been found to have a "well-founded fear of being persecuted," based on "reasons of race, religion, nationality, membership of a particular social group or political opinion," thus invoking Australia's obligations under the Refugee Convention.[198] The harm of "queue jumping" is attributed both to the refugees waiting patiently in camps or urban sites abroad, as well as to the general system of orderly control of Australia's immigration system.[199] References to the control and security of the border are frequently made,[200] and the policy to deter "queue jumpers" by "turning back the boats" has deep populist appeal.[201] Indeed, it is impossible to overstate the resonance of the "queue jumping" meta-

asylum-seekers#data (last visited Dec. 2, 2016).

198. The Refugee Convention was completed in Geneva on July 28, 1951. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. The Protocol was signed on January 31, 1967, and ratified by Australia on December 13, 1973. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The Convention covers events causing a refugee problem before January 1, 1951, while the Protocol extends the definition to events occurring after that date. Data from 2013, for example, showed that over ninety-three percent of boat arrivals were Convention refugees. McAdam, *supra* note 195, at 446–47.

199. As Jane McAdam notes, the notion of "queue jumping" can be traced to a dual system of processing, whereby offshore applicants "recognized by UNHCR as having a protection need" are reserved a certain quota (6000) and boat and plane arrivals then displace others who would enter through a special humanitarian quota. McAdam, *supra* note 195, at 438–39.

200. The Department of Immigration and Citizenship changed its name in 2013 to the Department of Immigration and Border Protection. *Administrative Arrangements Order 2013* (Cth) (Austl.). Operation Sovereign Borders—which took effect on the day the new conservative government of Tony Abbott was sworn in on September 18, 2013—is a military-led operation premised on the idea that Australia is experiencing a border protection crisis that constituted a national emergency. McAdam, *supra* note 195, at 440; *see also Operation Sovereign Borders*, AUSTRALIAN GOV'T, DEP'T IMMIGR. & BORDER PROTECTION, http://www.osb.border.gov.au/ (last visited Nov. 30, 2016). The Australian Border Force was established in 2015 to integrate, amongst other tasks, investigations into both "illicit goods and immigration malpractice." *Who We Are*, AUSTRALIAN GOV'T, DEP'T IMMIGR. & BORDER PROTECTION, https://www.border.gov.au/australian-border-force-abf/who-we-are (last visited Dec. 2, 2016).

201. Andreas Schloenhardt & Colin Craig, *'Turning Back the Boats': Australia's Interdiction of Irregular Migrants at Sea*, 27 INT'L J. REFUGEE L. 536 (2015). For analysis of popular response, see Katherine Gelber, *A Fair Queue? Australian Public Discourse on Refugees and Immigration*, J. AUSTRALIAN STUD., Jan. 2003, at 23; Fiona H. McKay et al., *'It Would Be Okay If They Came Through the Proper Channels': Community Perceptions and Attitudes Toward Asylum Seekers in Australia*, 25 J. REFUGEE STUD. 113, 117, 125 (2011); Anne Pedersen et al., *The Role of False Beliefs in the Community's and the Federal Government's Attitudes Toward Australian Asylum Seekers*, 41 AUSTRALIAN J. SOC. ISSUES 105 (2006).

phor in this context by the Australian media, politicians, and public officials (although expressly not by courts). The epithet is used "to pillory [the] opponent's sense of fairness" and "to denigrate the undeserving and disorderly claims for protection" of asylum seekers arriving by boat.[202] In this respect, the metaphor invokes the particular hostility directed to boat arrivals (in a nation with no land borders), as opposed to other, controlled, modes of entry (namely, by air). A long preoccupation of Australian policy, this hostility has increased in the most recent phase of arrivals,[203] and, indeed, the issue of boat arrivals was pivotal in the re-election of Prime Minister John Howard after the infamous *Tampa* incident in 2001.[204] The two major parties in Australia now agree on a policy of refusing entry to those who arrive by boat.[205] This bipartisan agreement is significant in a policy context that is invariably viewed as under executive control and in a constitutional system in which rights protections are largely entrusted to the legislature.[206]

Australia is a party to the Refugee Convention of 1951 and its Protocol, a central tenet of which is that persons seeking a declaration of refugee status acquire certain rights as soon as they are under a States Parties' jurisdiction or territory.[207] This includes the duty of

---

202. DARSHAN VIGNESWARAN, TERRITORY, MIGRATION AND THE EVOLUTION OF THE INTERNATIONAL SYSTEM at ix–x (2013).

203. Boat arrivals have occupied a particular place in modern Australia's politics and have come in three distinct phases: from the first arrivals from Vietnam in the 1970s (small numbers accepted), to the second in the 1990s, and the last, latest, and particularly virulent discourse. *See, e.g.*, JANET PHILLIPS & HARRIET SPINKS, BOAT ARRIVALS IN AUSTRALIA SINCE 1976 (Feb. 11, 2011), http://www.aph.gov.au/binaries/library/pubs/bn/sp/boatarrivals.pdf. For a slightly different categorization, see FRANK BRENNAN, TAMPERING WITH ASYLUM: A UNIVERSAL HUMANITARIAN PROBLEM 7 (rev. ed. 2007) (noting the first Vietnamese, Cambodian, and Chinese arrivals, until the last phase, beginning late 1999, with arrivals in larger numbers, from Afghanistan, Iraq, and Iran via Indonesia).

204. This incident and its repercussions through the judicial, executive, and parliamentary branches is examined in detail in BRENNAN, *supra* note 203, at 33–68; *see also* DAVID MARR & MARIAN WILKINSON, DARK VICTORY (2003) (providing an investigative account of the electoral campaign's focus on boat people, including those rescued by the Norwegian container vessel the *Tampa* in August 2001).

205. *A Humane and Compassionate Approach to Asylum Seekers*, LAB. PARTY, http://www.alp.org.au/asylumseekers (last visited Dec. 2, 2016); *Our Plan: Protecting Our Borders*, LIBERAL PARTY, https://www.liberal.org.au/our-plan/protecting-our-borders (last visited Dec. 2, 2016).

206. Mary Crock, *Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law*, 26 SYDNEY L. REV. 51 (2004); *see supra* note 113 (describing the lack of a federal constitutional or legislative human rights framework and the limited patchwork of state-based statutory rights protections in Australia).

207. These include those that arise, as summarized by James Hathaway and Michelle

non-refoulement, meaning they may not be returned to a dangerous country once they are at the border, giving rise to a de facto "individual right of asylum" that the Convention itself avoids.[208] Indeed, Australia was one of the key states involved in the design of this Convention,[209] having legislated its obligations under the Migration Act 1958.[210] Australia's acceptance of refugees is presently set at 13,750 per year,[211] which is a small number compared with other countries, on a per capita or geographical measure.[212] In light of the virulence of the populist discourse against "queue jumpers," Australia has adopted a system of mandatory detention of asylum seekers and now processes the claims of boat arrivals "off-site" through expensive administrative arrangements outside of Australia on Nauru and Papua New Guinea.[213] In these arrangements, all people seeking

---

Foster, under "Arts. 3 (non-discrimination), 4 (religious freedom), 12 (respect for personal status), 13 (preservation of property rights), 16(1) (access to the courts), 20 (access to rationing systems), . . . 29 (fiscal equity), 31 (non-penalization for illegal entry and freedom from arbitrary detention), and 34 (consideration for naturalization)" as well as Art. 33 (duty of non-refoulement). JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 40, 46–47 (2d ed. 2014).

208. Convention Relating to the Status of Refugees, *supra* note 198, art. 33; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 102 Stat. 382, 1465 U.N.T.S. 85. Indeed, it might be seen that the principle of *non-refoulement* privileges onshore, rather than offshore, arrivals, in contradistinction with Australia's peculiar approach. *See* McAdam, *supra* note 195, at 439; *Migration Act 1958* (Cth) s 39A (Austl.).

209. Crock, *supra* note 206, 53–54.

210. *Migration Act 1958* (Cth) s 39A (Austl.).

211. Phillips, *supra* note 195, at 1. For attention to the special numbers reserved for refugees from Syria, see *infra* note 216.

212. Compare with 70,000 placements in 2015 in the United States, an annual range of between 10,000 and 14,000 in Canada (bolstered to 44,800 in 2016), and individual quotas in Europe. White House, *Presidential Memorandum—FY 2015 Refugee Admissions* (Sep. 30, 2014), https://www.whitehouse.gov/the-press-office/2014/09/30/presidential-memorandum-fy-2015-refugee-admissions; Gov't of Austl., *Country Chapter: Australia*, *in* UNHCR RESETTLEMENT HANDBOOK (Apr. 2016), http://www.unhcr.org/3c5e542d4.html; Gov't of Can., *Country Chapter: Canada*, *in* UNHCR RESETTLEMENT HANDBOOK (Oct. 2016), http://www.unhcr.org/3c5e55594.html; Gov't of U.S., *Country Chapter: United States*, *in* UNHCR RESETTLEMENT HANDBOOK (Oct. 2014), http://www.unhcr.org/3c5e5a764.html. Europe's present refugee influx saw over 1,000,000 arrivals by sea in 2015, and even greater numbers of refugees seek protection outside of Europe. Jonathan Clayton & Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015*, UNHCR (Dec. 30, 2015), http://www.unhcr.org/en-au/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html. For further evidence, see *infra* note 216 and accompanying text.

213. BRENNAN, *supra* note 203, at 127–38 (providing a history of the so-called "Pacifici Solution"); *see, e.g.*, Michael Pezzullo, Sec'y, Dep't of Immigration & Border Prot., *Opening Statement to the Senate Select Committee Regarding the Regional Processing*

to arrive in Australia by boat are intercepted and taken to external sites: any asylum seekers found to be refugees under these processes are sought to be resettled outside Australia.[214] The motivation for the off-shore detention scheme is expressed as a way of "stopping the flow of boats" and removing the incentives that people may have to risk travel to Australia by refusing any visa at the end of the voyage.[215] At the same time, the Australian government has committed itself to increasing its quota of humanitarian and protection visas, particularly in light of the recent surge in numbers from Syria.[216] Thus, while the government has increased the size of the quota for entry into Australia, in light of certain humanitarian events, those who seek to access this "queue" outside of its terms of entry—namely, boat arrivals—are barred from it.

Centre in Nauru (June 9, 2015), http://www.border.gov.au/about/news-media/speeches-presentations/2015/regional-processing-centre-in-nauru (noting, along with details of the challenges associated with each processing center, that the Australian government first signed agreements with Nauru and Papua New Guinea in August and September 2012, respectively). After the PNG Supreme Court held that the detention center at Manus Island was unconstitutional, the two countries have negotiated its impending closure. *See* Stephanie Anderson, *Manus Island Detention Centre to Be Shut, Papua New Guinea Prime Minister Peter O'Neill Says*, ABC (Apr. 27, 2016), http://www.abc.net.au/news/2016-04-27/png-pm-oneill-to-shut-manus-island-detention-centre/7364414; *see also* Stephanie Anderson, *Manus Island Detention Centre to Close, Peter Dutton and PNG Prime Minister Confirm*, ABC (Aug. 17, 2016), http://www.abc.net.au/news/2016-08-17/manus-island-to-close-png-prime-minister-confirms/7759810.

214. The federal government has proposed legislation that will prevent any asylum seeker whose claim was processed on Nauru or Manus Island from ever entering Australia. *See* Dan Conifer, *Manus Island, Nauru Refugees to be Banned from Entering Australia, Malcolm Turnbull Says*, ABC (Oct. 30, 2016), http://www.abc.net.au/news/2016-10-30/manus-nauru-refugees-asylum-seekers-to-be-banned-turnbull-says/7978228.

215. The former Prime Minister, Tony Abbott, has recommended a similar policy of deterrence for Europe's current refugee crisis. *See* Austin Ramzy, *Tony Abbott, Ousted Australian Leader, Urges Europe to Take Hard Line on Migrants*, N.Y. TIMES (Oct. 28, 2015), http://www.nytimes.com/2015/10/29/world/australia/tony-abbott-australia-europe-migrant-crisis.html.

216. Canada announced in November 2015 that it would admit 25,000 Syrian refugees. Adrian Edwards, *Syrian Refugees Receive Warm Welcome in Canada*, UNHCR (Dec. 11, 2015), http://www.unhcr.org/en-us/news/latest/2015/12/566ad0029/syrian-refugees-receive-warm-welcome-canada.html. In September 2015 Australia announced a commitment of 12,000 additional humanitarian visas in response to the conflicts in Syria and Iraq, awarded with special priority to those "assessed as being most vulnerable—persecuted minorities, women, children and families with the least prospect of ever returning safely to their homes, [and] located in Lebanon, Jordan and Turkey." *Australia's Response to the Syrian and Iraqi Humanitarian Crisis*, AUSTRALIAN GOV'T, DEP'T OF IMMIGRATION AND BORDER PROTECTION, https://www.border.gov.au/Trav/Refu/response-syrian-humanitarian-crisis (last visited Dec. 2, 2016).

This example demonstrates our third context in which queue talk has become ubiquitous and in which it openly contrasts with rights talk.[217] In many ways, this context is an idiosyncratic one from which to analyze the discourses of rights and queues. First, a nation's immigration policy is substantively distinct from its housing or health care policies. Second, the norms of distributive justice that are debated by a political community in resolving national housing and health care contestations are very different from those that must be negotiated in determining who may become entrants to that political community in the first place.[218] Indeed, many have observed an inverse relation between the generosity of a welfare state and the openness of its borders.[219] Yet the example is illuminating. Despite its different setting, queue talk in the Australian asylum-seeking context reveals many of the same assumptions of the South African and Canadian examples. Disaggregating these assumptions helps to clarify the stakes of queue talk and emphasize how the political discourse of "queue jumping" distorts the legal relations between rights and queues.

III. DISAGGREGATING THE QUEUE AS METAPHOR AND CONCEPT

We have seen that the connotations of "queue jumping" are distinct in South Africa, Canada, and Australia. While those seeking to access public housing, private health care, or asylum are all deemed as evading norms of fairness and order, these norms are expressed in very different ideological settings. In this section, I return to the frame of rights versus queues and examine the discursive role played by the metaphor against the conceptual classifications presented in Part I. I suggest that the underlying narrative structure of these three examples of the queue is one that underlines the distinction between three broad instruments of distribution in modern states: rights, markets, and government. In adopting certain assumptions

217. For an examination of the human rights obligations around non-refoulement, see Vijay M. Padmanabhan, *To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement,* 80 FORDHAM L. REV. 73 (2011).

218. *See, e.g.*, WALZER, *supra* note 103; JOHN RAWLS, THE LAW OF PEOPLES (1999). For further discussion, see *infra* Part III.B.3.

219. *See, e.g.*, Matthew J. Gibney, *Liberal Democratic States and Responsibilities to Refugees,* 93 AM. POL. SCI. REV. 169, 173 (1999) (suggesting that "[t]o demand that a state show equal concern and respect to those beyond the state may be to ask it to pursue policies that would undermine those practices and institutions which make for a semblance of equality and social justice within the state"); Michael W. Howard, *Basic Income and Migration Policy: A Moral Dilemma?* BASIC INCOME STUD., June 2006, at 1.

about each, queue talk is a discourse that suggests that order is preferable to corruption, bureaucracies are preferable to markets, and governments are preferable to courts. And yet the inconsistencies that I described as inherent in the legal concept of the queue, set out in Part I of this Article, show that the assumptions are contestable, or, as I suggest in Section A below, that they raise but do not resolve the critical distributional questions that attend housing, health care, and claims of asylum. Moreover, as I argue in Section B, queue talk obscures the complexities within each.

A. Unresolved Questions

Queue talk poses a number of questions about the preferable methods of ordering in society, but the answers it suggests are unreliable. Each of the case studies shows us how queue talk operates to imply the strengths and failures of certain ordering systems, based on certain assumptions about rights, markets, and government. In each context, the queue metaphor is used to raise complaints about order and corruption, governments and markets, and governments and courts. In housing, health care, and asylum seeking, queue talk sets up the method of appropriate ordering as a choice between two and responds by favoring the first alternative and dismissing the second. And yet, such answers are misleading due to the deep contingency of the queue in question.

1. Order Versus Corruption

The first connotation associates queues with order and their evasion with corruption. In this sense, queues are related to the integrity of the rule of law itself. Their breach consists of the deployment of arbitrariness, whether by power, influence, money, or deception. Corruption is, of course, a major problem for the rule of law in the modern state and involves bending or upending formal systems of allocation.[220] It is susceptible to several definitions. The evasion of a publicly administered queue is most closely associated with a conventional focus on public officials seeking private gain through bribery, nepotism, and misappropriation.[221] But such evasion is compli-

220. See, for example, the World Bank's two-decade long initiative against corruption. *Anti-Corruption*, THE WORLD BANK (May 10, 2016), http://www.worldbank.org/en/topic/governance/brief/anti-corruption. For an overview of this and other international initiatives, see Jan Wouters et. al., *The International Legal Framework Against Corruption: Achievements and Challenges*, 14 MELB. J. INT'L L. 205 (2013).

221. *E.g.*, J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61

cated by the more extended meanings of "corruption," such as signifying moral disapproval of a situation when ruling elites and the wealthy fail to look after the poor and indigent.[222] At the most basic level, public administration of any queue must occur in the presence of monopoly and discretion—two elements that public officials can exploit in engaging in corruption. Outside of queues, other methods of public allocation may be less open to this form of corruption, however, it is worth noting that attempts to replace queueing systems with lotteries or randomized placements are also besieged by administrative difficulties.[223]

In each of our case studies, defense of the queue is an argument for order, while "queue jumping" is associated with corruption. In South Africa, the association is most stark: allegations and perceptions of corruption have beleaguered the housing delivery system, which has been administered by provinces in ways open to abuse.[224] The complaint of corruption is targeted at government administrators, who, in their turn, are quick to allege improper land squatting on the part of community members, drawing on the same rhetoric of queue-

---

AM. POL. SCI. REV. 417 (1967). Compare with the more market focused definitions which book "all payments [legal or illegal] to agents that are not passed on to superiors." SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 7 (1978); *see also* Susan Rose-Ackerman, *When is Corruption Harmful?*, *in* POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 353, 355, 358 (Arnold J. Heidenheimer & Michael Johnston eds., 3d. ed. 2002).

222. AKHIL GUPTA, RED TAPE: BUREAUCRACY, STRUCTURAL VIOLENCE, AND POVERTY IN INDIA 80 (2012) (providing an ethnology of narratives and practices of corruption, and the related concept of *brashtaachaar*).

223. *E.g.*, TISSINGTON ET AL., *supra* note 120. In their follow up to an exploration of queues, Ronen Perry and Tal Zarsky explore lottery devices, which are also surprisingly present in law. Ronen Perry & Tal Z. Zarsky, *"May the Odds Be Ever in Your Favor": Lotteries in Law*, 66 ALA. L. REV. 1035, 1060 (2015). While Perry and Zarsky note that lotteries are detached from human agency and discretion, and thus less open to corruption, the lack of accountability and reason that also follow from such processes may make corruptibility ironically more likely, in that there may, even in automated processes, be scope for lotteries to be carried out improperly. *Id*. at 1060–64. *See also* CALABRESI & BOBBITT, *supra* note 4, at 41–44 (comparing lottery and first-come-first-served); NEIL DUXBURY, RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING (1999); BARBARA GOODWIN, JUSTICE BY LOTTERY (1999). While lotteries are common to the award of certain visas in immigration regimes, which are relevant to our Australian illustration, the contemporary award of citizenship-by-birth can be understood to itself involve accidental, lot-like features. *See* AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009) (presenting the policy prescriptions that flow from this conceptualization).

224. There is a current shift from provincial departments to accredited municipalities. *See* TISSINGTON ET AL., *supra* note 120, at 9.

ing.[225] During the auditing of one list, for example, "it was discovered that 50 percent of beneficiaries' ID numbers were invalid, while 65 percent did not match the applicants' records."[226] The complaint that the housing system is mired in corruption takes place against the backdrop of a recognized problem with official corruption in South Africa, which is widespread and widely reported.[227]

Allegations of "queue jumping" as corruption would seem to be far afield in the higher income democracies of Canada and Australia;[228] nonetheless the sense of an inappropriate subversion of public office for private gain is apparent in each system. In Canada, such subversion occurred during the H1N1 vaccine scandal, where hockey players were given preference for access to a vaccine, before people deemed especially vulnerable and thus placed in priority in the medical wait list.[229] In Australia, the perception of boat arrivals as "illegals," who pay smugglers to arrive by boat is tied to both ideas of system corruption, as well as market, discussed below. In this respect, "queue jumpers" are often perceived as "bogus" refugees or economic migrants, who are assumed to fall outside of the protection of international law.[230] And more perniciously, associations between

---

225. *Id*. at 7. These practices are monitored by Anti-Land Invasion Units, which draw on the rhetoric of the "queue" to justify evicting people from the land, houses, or buildings they occupy. *Id*.

226. *Id*. at 61 (quoting Press Release, Dep't of Hous. Gauteng Provincial Gov't, An Appeal to Update Your Details on Demand Database (May 27, 2009), http://www.gov.za/appeal-update-your-details-demand-database).

227. Margot Rubin, *Perceptions of Corruption in the South African Housing Allocation and Delivery Programme: What It May Mean for Accessing the State*, 46 J. ASIAN & AFR. STUD. 479 (2011).

228. *See Anti-Corruption*, *supra* note 220 (describing corruption as a low-income country problem); *Corruption Perceptions Index 2015*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/cpi2015 (last visited Dec. 2, 2016) (giving a rank to the perceived levels of public sector corruption worldwide: in 2015, placing Canada at ninth place, Australia thirteenth, and South Africa sixty-first for corruption).

229. Tait, *supra* note 170.

230. McAdam, *supra* note 195, at 436 (referring to the discourse of "illegals"); BRENNAN, *supra* note 203, at 56 (noting "[t]he Australian stereotype of . . . a young man from a wealthy family who cuts a deal with a people smuggler for transport to one of a range of first-world countries where the young man will be able to settle and provide the option for other family members to join him"). In most cases, boat arrivals are, in fact, successful in acquiring refugee status once their claims are processed, far more so than other arrivals. *See, e.g.*, *supra* note 198 and accompanying text. Those actually guilty of domestic and international crimes are prevented from accessing asylum through the international framework. The Refugee Convention itself notes that persons seeking to evade legitimate prosecution or punishment for serious domestic crimes, those who have committed serious international crimes, or other acts contrary to the principles and purposes of the U.N. are

the illicit operations of people smugglers, human traffickers, and transnational organized crime are increasingly drawn,[231] implying a system-level corruption in this mode of entry to Australia.

Despite the power of this narrative, the association of "queue jumping" with corruption is often just that—a mere association created by the broader defense of the queue as a legal, administrative procedure to be upheld. The "queue jumping" as corruption complaint does not invariably pit queues against rights, as do the other distinctions drawn out below, since there are much broader instances of corruption in the housing, health care, and immigration contexts than linked with those claiming rights in South Africa, Canada, and Australia respectively. There are thus parallel cases of those who attempt to gain access to goods and services by an illegal payment to, or other forms of undue influence on, government officials or third parties. Yet, if only by association, the perception of "queue jumping" as corruption is a particularly corrosive one for rights-claimants. Whether they are used to allocate interests in housing, health care, or asylum, queues distribute scarce goods and, in doing so, enact the kind of "tragic choices" that Philip Bobbitt and Guido Calabresi analyzed in their seminal account of the conflicts that arise in the allocation of scarce resources. In such choices, the values of honesty and equal treatment must be especially safeguarded, since honesty and fairness represent the "structural premises designed to moot, or at least set the terms of, any particular ordering of preferences."[232] When they are undermined (by corruption, actual or perceived), the present ordering of goods and opportunities is undermined, but so, too, are future attempts to do so.[233] The association of "queue jumping" with corruption produces a stigma on rights claimants in each of the settings of markets, courts, and rights claims described below.

---

denied refugee status. *See* Convention Relating to the Statute of Refugees, *supra* note 198, art 1(F); *see also* HATHAWAY & FOSTER, *supra* note 207, at 524.

231. Such associations are increasingly made within Australia and internationally. *See, e.g.*, Matthew Cameron, *From "Queue Jumpers" to "Absolute Scum of the Earth": Refugee and Organised Criminal Deviance in Australian Asylum Policy*, 59 AUSTRALIAN J. POL. & HIST. 241, 242 (2013); *see also* Protocol Against the Smuggling of Migrants by Land, Sea and Air, Dec. 12, 2000, 2241 U.N.T.S. 507, as a supplement to Convention Against Transnational Organized Crime, Dec. 12, 2000, 2225 U.N.T.S. 209; Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, FORCED MIGRATION REV., Jan. 2002, at 25, 25–28.

232. CALABRESI & BOBBITT, *supra* note 4, at 24.

233. For an assessment that anti-corruption strategies can undermine the state provision of the goods and services necessary for the fulfillment of economic and social rights, see, for example, James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125 (2009).

2. Bureaucracy Versus Market

The second connotation of "queue jumping" relates to the availability of market access to the good or opportunity in question. The assumptions that set up bureaucracies against markets rely on the fact that queues support bureaucratic, or at least ex ante, decision-making, while the evasion of these processes through payments relies on markets.[234] Queues represent a general allocative scheme, usually administered by the government (although sometimes by private actors). At the same time, opportunities for evasion are created by a market for acquiring a higher place in the queue or for skipping it altogether. Indeed, for political theorist Michael Sandel, the subversion of queues is a quintessential example of the growing role of markets in society. He emphasizes the associations between "queue jumping" and privilege: "It's long been known that, in fancy restaurants, a handsome tip . . . can shorten the wait on a busy night."[235] "Queue jumping" by purchase adds to "the advantages of affluence and consigns the poor to the back of the line."[236]

Economists have favored both queues and the permissibility of "queue jumping," for the reason that combining the two forms of allocation can be efficient. In principle, the queue allocates goods according to willingness to wait, whereas markets allocate goods according to willingness to pay. It follows that the queue discriminates against those with less time, while the market discriminates against those with less money.[237] In economic theory, then, a queueing system, which operates with a secondary market (for instance, scalping), can be defended on efficiency grounds, since each unit of time is given a price. At the very least, a system that allows for queue-jumping-by-purchase is preferable, on efficiency grounds, to one that prevents this occurring.[238]

The use of dollars to provide access outside of the queue is the main trope in our Canadian example.[239] Health care specialists

234. For the implications of "lining up and paying off," see, for example, ROSE-ACKERMAN, CORRUPTION, *supra* note 221, at 85–88 (describing the market structure of bribery payments and countering arguments about their supposed efficiency).

235. MICHAEL SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 17 (2012).

236. *Id*. at 20.

237. *Id*. at 32.

238. For comparisons between fairness and efficiency considerations, see Perry & Zarsky, *supra* note 34 (adopting the framework of Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001)).

239. Lisa Gregoire, *Alberta's Hybrid Public-Private "Third Way"*, 174 CANADIAN MED.

note that, with a growing demand and infrastructure of private care, the public system may be threatened.[240] Recall that the main criticism of *Chaoulli* was the method by which the Supreme Court upheld a challenge to a universal social program, where the legal and practical inability to opt out of waiting lists—that is, the mandated queue—was a central requirement.[241] Nonetheless, the regulation of physicians seeking to provide privately funded care outside of the system, or of patients seeking access, is both difficult and, suggests one commentator, politically thankless in recent years.[242] Patients have paid to access private health care services abroad, thus weakening the argument against allowing private services in Canada.[243] And patients' rights litigation has been replicated in other provinces, such as Alberta and British Columbia, with *Chaoulli* being seen as "the first battle in a larger campaign" to create opportunities for private financing of medically necessary care.[244] The "queue jumping" metaphor is used as a progressive defense of universal health care amidst the "common perception . . . that Canadians face unacceptable wait times for health care, and that the panacea is to allow private financing of medically necessary care."[245] Thus, perceptions of the illegitimacy of "queue jumping" in this context are mixed. As the consumerist orientation of the modern state increases,[246] the legitimacy of "queue jumping" in this sense, by market, may become more acceptable, and the metaphor may lose its local resonance.

In South Africa, the market for an earlier place in the public housing queue is often inseparable from the corruption criticism, just as, in Australia, the payment of people smugglers is seen as a sign of corruption, or, at the very least, a clandestine "black market."[247]

ASS'N J. 1076 (2006).

240. See arguments in Chaoulli v. Quebec (Att'y Gen.), [2005] 1 S.C.R. 791 (Can.); Romanow Report, *supra* note 174.

241. *See* discussion *supra* Part II.B.

242. Flood, *supra* note 174, at 83.

243. Bhatia, *supra* note 173, at 51–52.

244. Flood, *supra* note 174, at 96.

245. *Id*. at 83.

246. For a comparative map of this trend, see James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340 (2007); *see also* Bhatia, *supra* note 173, at 40 (describing a drift toward the acceptability of the individualized consumer); Colleen Flood et al., *The Borders of Solidarity: How Countries Determine the Public/Private Mix in Spending and the Impact on Health Care*, 12 HEALTH MATRIX 297 (2002) (noting the acceptability of "queue jumping" in health care distribution in Australia).

247. The rhetoric of "breaking the people smugglers' business model" has appeared on both sides of politics in Australia. *See, e.g.*, Jeremy Thompson, *High Court Scuttles*

Nonetheless, there is an additional role for the market, which takes place when those who have been allocated subsidized houses and are prohibited from selling their home for eight years pass on the houses to those who can pay a higher amount. These sales, which often go unregistered, fuel community perceptions of corruption in allocation, but also press upon fears of "downward-raiding" of public housing by richer individuals who have the means to pay.[248] According to utilitarian principles of welfare and choice (that is, a sale based on the utility of individual buyers and sellers), these sales may appear perfectly legitimate.

As Sandel notes, markets may have their appropriate place in social allocations; however, he suggests corruption may be endemic in markets in certain goods or opportunities. He gives the example of the line-standing industry on Capitol Hill, which is an extension of the lobbying industry.[249] The public has the opportunity to stand in line to participate. But professional line-standers (often, as it turns out, homeless people) are hired by lobby groups, who capitalize on the arrangement. This practice, suggests Sandel, is not illegal, nor is it non-transparent, but "degrades Congress by treating it as a source of private gain rather than an instrument of public good."[250] A similar criticism was made about subversion of the queueing practices that determine admission to popular hearings of the U.S. Supreme Court, which recently revised admission rules to prohibit professional

---

Malaysia Swap Deal, ABC NEWS (Sept. 6, 2011), http://www.abc.net.au/news/2011-08-31/high-court-rules-on-asylum-seeker-challenge/2864218. Nonetheless, the social acceptance of markets for entry has shifted in recent years. For the (at the time) provocative suggestion of a market for visas, see Julian L. Simon, *Auction the Right to Be an Immigrant*, N.Y. TIMES, Jan. 28, 1986 at A25, *as reprinted in* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 236–37 (5th ed. 2003). Since 1990, and with dramatic uptake since 2008, the United States and other countries have created a visa for significant investors. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 343–48 (8th ed. 2016) (describing U.S. requirement of $1 million (or $500,000 for investment in rural communities) for special EB5 visa, despite early criticism that "the rich should not be able to buy their way into this country").

248. TISSINGTON ET AL., *supra* note 120, at 20, 70 (referring to Social Housing Policy, The National Housing Code 2009, vol. 6 pt.3 (S. Afr.), http://www.dhs.gov.za/sites/default/files/documents/national_housing_2009/6_Social_Rental_Interventions/3%20Vol%206%20Social%20Housing%20Policy.pdf).

249. SANDEL, *supra* note 235, at 5, 33–35.

250. *Id*. at 35. For the widespread practice of professional queuers selling places in the queue for the visa section of the American Embassy, see Ha-Joon Chang, *Poverty, Entrepreneurship, and Development*, U.N. U. WORLD INST. FOR DEV. ECON. RES.: WIDER ANGLE (Oct. 2010), https://www.wider.unu.edu/publication/poverty-entrepreneurship-and-development.

linestanding.[251] Each case indicates how "market values are corrosive of certain goods but appropriate to others."[252] Better, for Sandel, is to defend the social condemnation of market-based queue jumping in certain cultural domains, such as "[t]he court hearing, the doctor's surgery, and the supply of aid in an emergency."[253] The appropriate question in this respect is whether substantive claims of "rights" help to draw this distinction. Certainly, a fuller conception of the role of rights in responding to claims of basic needs is required in order to work out when market competition is permissible and when it is not.[254]

3. Government Versus Courts

The third target of the "queue jumping" criticism is the use of courts. When rights claimants—"queue jumpers"—bring their claims to courts, they are seen as jumping a queue devised elsewhere (by provincial bureaucracies, in South Africa's case; or by medical experts in deliberation with government, in Canada; or by politics and diplomacy, in Australia). Thus, this complaint accords with common understandings of the way in which the adjudication of rights is understood to "judicialize" the complex political decisions that go into the basic question of distribution and redistribution. While judicialization is a criticism that is also made about all constitutional rights that are subject to judicial review,[255] it is in the area of economic and social rights that it receives its strongest force.[256] This criticism has been a main source of the long-standard argument against the "justiciability" of economic and social rights, and its

251. Pamela Karlan, Professor, Stanford Law Sch., The End of the Line: Marriage Equality and Racial Equality at the Supreme Court (Nov. 12, 2015) (presented as the 2015 David C. Baum Memorial Lecture on Civil Liberties and Civil Rights, held by the University of Illinois College of Law) (on file with author).

252. SANDEL, *supra* note 235, at 35 ("The existence of socially acceptable limits to queue-jumping suggests a widespread public acknowledgment that there are spheres of culture where the queue is recognized as a better way to distribute resources than the market.").

253. *Id*. at 35 (noting also the fluidity of these "queueing ethics").

254. Thanks to Molly Doggett for the suggestion that rights for which there is no market competition are also rights for which there is no queue—on this see also FABRE, *supra* note 14.

255. *See, e.g*., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

256. *E.g*., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001); Michelman, *supra* note 21 (describing this criticism).

strands relate to the distortion of public debate, the usurpation by the judiciary of the role of the elected branches, the inevitable vagueness and indeterminacy of such rights,[257] and the uneven access to the courts as between the poor and middle class.[258] In these terms, "queue jumping" becomes a shorthand complaint about accessing courts to deliver rights that have not been decided during legitimate and accountable political debate.[259]

This is a criticism that has been fully internalized by courts in South Africa. While the introduction of liberal constitutionalism and judicial review was central to the post-apartheid compromise and settlement,[260] and the centrality of courts was accepted for the realization of economic and social rights,[261] courts have repeatedly felt the need to address the "queue jumping" critique. One of the central architects of the new bill of rights, Albie Sachs, has suggested that ways must be found to ensure that those who are successful in their claims for economic and social rights are not those "with the sharpest elbows (and the best lawyers)."[262] In the lower courts, they have done so by defending their choice of review and remedy (usually structural interdicts) in general terms.[263] In the Constitutional Court,

257. Cross, *supra* note 256; Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462 (2004).

258. Cross, *supra* note 256; Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643 (2011); David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189 (2012).

259. For a recent exploration, see Roach, *supra* note 165.

260. *See* HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000); Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669, 673 (1997); *see also* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

261. Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. ON HUM. RTS. 451 (1992) (arguing for constitutionlized economic and social rights on democracy grounds); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. ON HUM. RTS. 464 (1992) (arguing for the entrenchment of economic and social rights alongside a new culture of justification); *cf*. D.M. Davis, *The Case Against Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. ON HUM. RTS. 475 (1992) (providing an early caution, later revised, against the involvement of courts in enforcing the constitutionalized economic and social rights).

262. ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW 181 (2009).

263. Mitra Ebadolahi, Note, *Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa*, 83 N.Y.U. L. REV. 1565 (2008).

where these orders have often been repealed,[264] the Court has sought to avoid pitting constitutional rights against each other (the most pertinent example being a refusal to balance the right to property against the right to housing),[265] and to avoid individual remedies.[266]

In Canada, the original debates against the Supreme Court judicial review of rights under the Canadian Charter have been resuscitated in the "queue jumping" guise. The dissent written in the *Chaoulli* judgment is illustrative. Despite the fact that the decision explicitly referenced "queue jumpers" as those who access the scarce medical resources outside of the public wait list, it was a dissent focused on the proper role of judges and the principle of deference.[267] Although the dissenting judges made a series of comments about the need for support for the principles of universal health care in Canada (which no party had contested), their opinion was taken up mainly with the urgency of keeping courts out of social questions and thus

264. Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 8 INT'L J. CONST. L. 385 (2010).

265. *Modderfontein Squatters, Greater Benoni City Council v. Modderklip Boerdery (Pty) Ltd*. 2004 (6) SA 40 (SCA) para. 22–24 (S. Afr.).); *see also* A.J. van der Walt, *The State's Duty to Protect Property Owners v the State's Duty to Provide Housing: Thoughts on the* Modderklip *Case*, 21 S. AFR. J. ON HUM. RTS. 144, 147 (2005).

266. The remedy of requiring a "meaningful engagement" between parties is one in which the winning claimant does not secure an individual remedy (such as title to housing, secured tenure, or even a guaranteed alternative accommodation) but rather a deliberation over available solutions to imminent homelessness. *See, e.g., City of Johannesburg Metro. Municipality v. Blue Moonlight Props. 39 (Pty) Ltd*. 2012 (2) SA 104 (CC) (S. Afr.); *Residents of Joe Slovo Cmty. v. Thubelisha Homes* 2011 (7) BCLR 723 (CC) ("*Joe Slovo II*"); *Abahlali Basemjondolo Movement SA v. Premier of the Province of KwaZulu Natal* 2010 (2) BCLR 99 (CC); *Occupiers of 51 Olivia Rd., Berea Twp., and 197 Main St., Johannesburg v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.); *see also* BRIAN RAY, ENGAGING WITH SOCIAL RIGHTS: PROCEDURE, PARTICIPATION AND DEMOCRACY IN SOUTH AFRICA'S SECOND WAVE, ch. 9 (2016) (presenting an expanded vision of what might constitute a meaningful engagement); Sandra Liebenberg, *The Democratic Turn in South Africa's Social Rights Jurisprudence*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (Katharine G. Young ed., forthcoming 2017)).

267. Chaoulli v. Quebec (Att'y Gen.), [2005] 1 S.C.R. 791, para. 161 (Can.); *see also* Martha Jackman, *Charter Review as a Health Care Accountability Mechanism in Canada*, 18 HEALTH L.J. 1 (2010) (suggesting that such deference is inappropriate); Bruce Porter, *A Right to Health Care in Canada: Only if You Can Pay for It*, ESR REV.: ECON. & SOC. RTS. S. AFR., Nov. 2005, at 8, 10 (suggesting that manageable standards should have been set, and proposing the following questions: "What is treatment within a reasonable time? What are the benchmarks? How short a waiting list is short enough?"). Porter argues that "these are the very issues that a court must be prepared to consider—and to give governments direction on—in assuming their role of guardians of the constitutional rights of all, including those who rely on the state for access to necessary health care." *Id*.

exclusively focused on legal questions.[268] Such debates have continued to surface and are unresolved in Canada.[269] The early *Charter* cases involving support for positive obligations under the right to life in Canada have not been developed,[270] and there is a preference for "dialogic" remedies,[271] which avoid the perception of individual remedy. While this remedial form has its costs,[272] advocates of the "weak-form" approach point to the fact that even unsuccessful cases in court have sometimes changed public opinion in the long run, particularly in the health care scenario.[273]

In Australia, while the refugee issue has been so charged in the partisan-political context, perceptions of the appropriate role of courts, and the use of courts to defend the rights of asylum seekers, have been central to the controversies.[274] Initially, the Federal Court of Australia was an active defender of the rights of asylum seekers under the Refugee Convention and its implementing legislation.[275] The Federal Court had made repeated awards overriding the denial of protection visas from the administrative tribunals below and hearing arguments against the developing policies of mandatory detention

268. Chaoulli v. Quebec (Att'y Gen.), [2005] 1 S.C.R. 791, para. 163 (Can.). Judges Binnie and LeBel would require courts to determine scope of health services and length of wait times. *Id*.

269. For an examination of the Supreme Court's approach to the issue of assisted suicide, see Carter v. Canada (Att'y Gen.), [2015] 1 S.C.R. 331 (Can.); Roach, *supra* note 165, at 49–50.

270. *See generally* Gosselin v. Quebec (Att'y Gen.), [2002] 4 S.C.R. 429 (discussing positive obligations flowing from section 7) (Arbour and L'Heureux-Dube, JJ., dissenting); Eldridge v. British Columbia (Att'y Gen.), [1997] 3 S.C.R. 624 (discussing positive obligations flowing from section 15).

271. Little Sisters Book & Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 69, para 258 (Can.) (Iacobucci, J., dissenting) ("[D]eclarations are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government. However, declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance."); *see also* TUSHNET, *supra* note 7; Dixon, *supra* note 114; Young, *supra* note 264.

272. Roach, *supra* note 165 (noting the double-standards of such approaches and the risk they pose to judicial legitimacy, and advocating instead a "two-track" combination of strong and weak remedies). *Compare* Canadian Doctors for Refugee Care v. Canada (Att'y Gen.), 2014 FC 651 (Can.) (approving refugee's health care claim with suspended remedy), *with* Roach, *supra* note 165, at 41–42 (suggesting an alternative remedial approach to the case).

273. Flood, *supra* note 185.

274. *E.g*., Crock, *supra* note 206.

275. *Id*. at 60 (noting the discipline from the Minister to the Refugee Review Tribunal in 1997 and forbiddance of the "re-invent[ion]" of the definition of refugee).

and offshore processing.[276] However, their role was circumscribed by the introduction of a series of privative clauses, which operated to restrict the jurisdiction of the Federal Court in such cases.[277] At this point, the High Court of Australia became the main source of appeal in immigration decisions. Its judgments—particularly in the controversial *Tampa* incident, but also in cases involving the legality of indefinite detention in Australia[278]—have arguably been influenced by perceptions of the appropriate limits to the judicial role.[279] In cases in which the courts have explicitly recognized the discourse of "queue jumping," they have rejected it as a consideration in merits determinations.[280]

The answering trope to the connotations of "queue jumping" through courts lies in the characterization of judicial review in constitutional democracy. If courts are charged with adjudicating rights, it should follow that a successful claim results in the correct application of extant queueing principles, rather than the subversion of them. While it is clear that such justification is less likely to be required in civil and political rights cases (where successful rights claims are more easily understood as protecting the rights of everyone),[281] there are queues established by such claims as well—think of *Brown II*, for example.[282] In that case, the order to desegregate "with all deliberate speed" permitted a wide variety of re-ordering systems with an un-

276. *Id*.

277. *Id*.; Simon Evans, *Australia*, 1 INT'L J. CONST. L. 123 (2003).

278. For further background, see BRENNAN, *supra* note 203.

279. Crock, *supra* note 206. For a candid account of the challenges of jurisdiction in this area, see Stephen Sedley, *Asylum: Can the Judiciary Maintain its Independence?*, *in* STEMMING THE TIDE OR KEEPING THE BALANCE—THE ROLE OF THE JUDICIARY 319 (New Zealand Association for Comparative Law eds., 2002), http://www.iarlj.org/general/images/stories/WorldConferences/5-2002-wellington.pdf.

280. *E.g*., *Surinakova v Minister of Immigration Local Gov't and Ethnic Affairs* (1991) 33 FCR 87 (Austl.); *Seiler v Minister for Immigration, Local Gov't and Ethnic Affairs* (1994) 48 FCR 83, 85 (referring to the policy of the Department of Immigration and Ethnic Affairs to prevent "queue jumping," at the time of "immigration selection procedures and/or breaches of undertakings given in securing entry to Australia."); *David John Lally v Minister of Immigration & Ethnic Affairs* [1985] FCA 1 (17 January 1985) (Austl.); *Kioa v West* (1985) 159 CLR. 550 (Austl.).

281. *E.g*., DWORKIN, *supra* note 6.

282. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955) ("*Brown II*") was the remedial follow-up to the Supreme Court's holding that "separate but equal" was incompatible with constitutional equal protection under Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954). In *Brown II*, the Supreme Court ordered states to desegregate schools "with all deliberate speed." *Brown II*, 349 U.S. at 301.

specified time.[283] Even in a desegregation case involving higher education, in which *Brown* rather than *Brown II* was held to apply, evasion continued.[284] A fuller analysis is beyond the scope of this Article, but it can be observed that the issue of queue jumping via courts is clearly more complex than a discussion of the appropriate role of the judicial branch. Answers to this complaint will vary in their emphasis on the substance of rights or the procedures for protection, such as the protection of discrete and insular minorities;[285] other forms of liberty- or dignity-protecting measures;[286] or the astute design of remedies that can circumvent the challenges of "queue jumping" through courts.[287] On the more procedural end of these theories lie conceptions of "destabilization rights,"[288] perhaps the most explicit challenge to extant queueing systems.

B. Obfuscations

There is thus, as we have seen, a number of differently perceived wrongs—by administrators, markets, and courts—that give

283. *Brown II*, 349 U.S. at 301. This phrase "could neither constrain evasion nor bolster compliance." MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 318 (2004). As Klarman notes, the court omitted any comment on the constitutionality of the mechanisms of ordering, including queue design, that could be used to circumvent desegregation, such as, among others: pupil placement schemes, which assigned students to schools based on a long list of ostensibly race-neutral criteria; transfer options, which permitted parents to move their children out of desegregated schools; and grade-a-year plans, which started desegregation in the first or twelfth grade and then expanded it to one additional grade every year. *See id*. at 316–18, 349–63.

284. KLARMAN, *supra* note 283, at 256–58 (discussing the appeal by Virgil Hawkins to enter a white-only university).

285. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)); *cf*. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985) (presenting concern for those that have neither discrete, insular, nor minority status).

286. *Compare* DWORKIN, *supra* note 6, *with* FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (1999) (suggesting different paths forward in the U.S. context).

287. TUSHNET, *supra* note 7; YOUNG, *supra* note 14; Roach, *supra* note 165 (drawing on comparative examples of different models of review and different models of remedy).

288. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (presenting methods to disentrench bureaucratic power, including inevitable inertias built into administrative systems); *see also* CÉSAR RODRÍGUEZ-GARAVITO & DIANA RODRÍGUEZ-FRANCO, RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH 63–75 (2015) (describing the judicial "unlocking" of the state apparatus, as well as other effects, that are evidenced by recent decisions of the Colombian Constitutional Court).

rise to the "queue jumping" complaint. Yet a discourse of rights focused on duties on the state to respect, protect, and fulfill them would signal certain avenues for redress. The queue is maintained as a respectable and transparent default mechanism for distribution, but is discarded in respect of exceptional needs, much like an ambulance is allowed to bypass other vehicles and traffic signals. Even informal queueing systems internalize some criteria for permitting "queue jumping," and, depending upon the stakes involved, the criteria may be notably lax.[289] Nonetheless, if too many exceptions are made, support for the queue is eventually undermined. In this way, rights and queues have a parasitic, but contradictory, relation.

Yet, it will be seen that the focus on queues conceals many of the more important questions about the socio-economic distributions at stake. In this sense, instead of providing a straightforward mechanism for distribution in conditions of scarcity, and providing order to such distribution, the queue serves to distract from highly relevant and political questions of rights, access to material goods and services, and distributive justice. This section notes how, in cases of housing, health care, and refugee claims, the queue obfuscates rights at the same time as it draws attention to them.

There are, for example, initial questions about the production of scarce resources (how many houses? how much health care? how many humanitarian visas?) that involve population-wide resource decisions that are rendered invisible to those focused on "the queue." These we might call the first-order decisions, which are left uncontested.[290] There are also other issues, and competing beneficiaries, that are avoided by a focus on queues, such as, for example, mortgage subsidies in housing, social determinants and health, or entrants who overstay their visas. In such cases, the queue offers a category

289. *See, e.g.*, Ellen Langer et al., *The Mindlessness of Ostensibly Thoughtful Action: The Role of "Placebic" Information in Interpersonal Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 635, 637 (1978) (finding that even an empty, "placebic" request—"May I use the xerox machine, because I have to make copies?"—would be perceived as sufficient justification to permit someone to cut in line). For the influence of this research in behavioral economics, see Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003).

290. *E.g.*, CALABRESI & BOBBITT, *supra* note 4, at 19 (noting that, in confronting any decision about a scarce good, society must first "decide how much of it will be produced, within the limits set by natural scarcity, and also who shall get what is made, triggering a succession of decision, rationalization, and violence."); *see also* GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 73–83 (2016) (updating an approach that considers that goods such as basic education, health care, and environmental protection should not merely be allocated on the basis of existing wealth distribution).

of thought supported, if not imposed, by the state[291] that obscures the stakes of distributions and the effect on rights. This Part first describes how such obfuscations play out in each policy domain, before addressing the stakes of rights and queues in general.

1. Housing Allocations

Discourses on the right to housing can become dominated by perceptions of a housing queue, and of opportunistic breaches of this queue. And yet the queue is the veritable tip of the iceberg in the distributive and redistributive decisions that are made about the allocation of publicly-subsidized housing. The housing waiting list represents a small number of the decisions made about housing and can only represent such a fraction, in South Africa just as elsewhere.

As a right, housing represents a safe and secure space that shields one from the elements and provides refuge from external physical threats.[292] Housing provides a material base from which to build a livelihood and take part in the life of the community.[293] And it provides a space where psychological needs can be met.[294] But the right to housing can be realized by different forms of fixed dwelling––the affordability of one's own house, for example, but also access to a service or accommodation (with some security of tenure).[295] There is an irrepressible social aspect of the right to housing—that is, the spatial relationship of the home to other houses, workplaces, schools,

---

291. Like Pierre Bourdieu, we may simply find out that "one of the major powers of the state is to produce and impose . . . categories of thought that we spontaneously apply to all things of the social world—including the state itself." Pierre Bourdieu, *Rethinking the State: Genesis and Structure of the Bureaucratic Field*, 12 SOC. THEORY 1, 1 (1994).

292. *See, e.g.*, Comm. on Econ., Soc. and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (art. 11(1) of the Covenant), U.N. Doc. E/1992/23 (1992).

293. *E.g.*, Oldfield & Greyling, *supra* note 124.

294. HOHMANN, *supra* note 161, at 4–5.

295. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 7: The Right to Adequate Housing (art. 11(1) of the Covenant): Forced Evictions, U.N. Doc. E/1998/22 (1997) [hereinafter General Comment No. 7]; Tony Fahey & Michelle Norris, *Housing*, *in* THE OXFORD HANDBOOK OF THE WELFARE STATE 479, 482 (Francis G. Castles et al., eds. 2010) (noting, amongst other observations, how "owning" and "renting" represent different bundles of legal rights in various regimes, but that long-term rights over housing as capital and shorter-term rights over housing as service is a useful distinction); *see also I.D.G. v. Spain*, *supra* note 25 (noting procedural entitlements before foreclosure); Raquel Rolnik & Lidia Rabinovich, *Late-neoliberalism: The Financialization of Homeownership and the Housing Rights of the Poor*, in ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS, *supra* note 26, at 57.

shops, and a web of social relations is important.[296] The notion of a queue limits the complexities of rights realization, just as it limits claims. The discourse of housing rights can extend to the issue of women's exclusion from holding property rights,[297] or to the restitution interests of internally displaced persons.[298] Forced and arbitrary evictions do, of course, point to clear infringements of the right to housing,[299] but advocates of the right are also concerned about the other myriad forms of insecurity of tenure, and of the demands on human dignity and freedom presented by population shifts, mobility, financialization, and displacements.[300] None of this complexity is addressed by the focus on the queue.

For example, in South Africa, since at least 2001, there has been a decline in state-subsidized housing delivery and a shift towards informal settlement upgrading and the provision of subsidized rental housing.[301] This change has meant that location has become a more important criterion than waiting time in determining a person's access to subsidized housing because in situ housing projects and area-based projects rely on local residents. In temporal terms, waiting lists are turned to after a housing project is identified for development, and has been developed, thus diminishing the importance of the list in first-order decisions. Added to this are the other unavoidable political realities: there are area-specific upgrading agendas;[302] housing implementation is supply driven;[303] and the strategy of creating "mixed" neighborhoods that desegregate communities may create

296. HOHMANN, *supra* note 161, at 27 (particularly important in resettlement, where alternative accommodation has been constructed for evictees or those subject to voluntary relocation); JIM KEMENY, HOUSING AND SOCIAL THEORY 159 (1992); *see also* Kyra Olds, Comment, *The Role of Courts in Making the Right to Housing a Reality Throughout Europe: Lessons from France and the Netherlands*, 28 WIS. INT'L L.J. 170, 190 (2010).

297. HOHMANN, *supra* note 161, at 39 (noting small attention to housing in CEDAW, despite the fact of "women's exclusion from the home as a matter of law and the simultaneity of this exclusion with women's profound connection to the home in ideology and practice").

298. *Id*. at 1.

299. *See, e.g*., General Comment No. 7, *supra* note 295.

300. HOHMANN, *supra* note 161, at 23.

301. REPUBLIC OF S. AFR., DEP'T OF HUMAN SETTLEMENTS., *supra* note 140; TISSINGTON ET AL., *supra* note 120, at 15–18 (detailing the shift towards a public-sector approach in 2001 and the later development, in 2004, of the Upgrading of Informal Settlements Programme (UISP) (Chapter 13 of the National Housing Code) as part of the Breaking New Ground program).

302. Royston & Eglin, *supra* note 122, at 9.

303. TISSINGTON ET AL., *supra* note 120, at 59.

other social problems.[304]

Moreover, the waiting list itself creates its own problems of administration: it does not cater to the growth and split of families over time; it accommodates other special needs or other criteria in often uncertain ways; there are practices of "multiple" waiting lists;[305] and "gaps" in the purportedly transparent program have been reported in terms of identifying beneficiaries, screening beneficiaries, deploying the appropriate criteria, and educating beneficiaries.[306] In the large province of the Western Cape in South Africa, for example, more than half of the households on the waiting list who are living in informal settlements have been on the list for five or more years.[307] Housing allocations are thus the mirror side of evictions policies. These latter decisions are made on the basis of a "special cluster of legal relationships" between a municipality and the residents of its jurisdiction, which "possess an ongoing, organic and dynamic character that evolves over time."[308] In such cases, a "one-fits-all solution in eviction cases is, therefore, not only unworkable but also unacceptable."[309]

In a representative example, the Alexandra Renewal Project in Johannesburg departed from the waiting list approach to a "block-by-block" allocation strategy, with a result that:

---

304. JEREMY SEEKINGS ET AL., THE SOCIAL CONSEQUENCES OF ESTABLISHING 'MIXED' NEIGHBOURHOODS 1 (May 2010), http://www.cssr.uct.ac.za/sites/cssr.uct.ac.za/files/pubs/SocialConsequences.pdf (suggesting that waiting lists lead to mixed (racial and place of origin) communities, especially sourced from those living in backyard shacks or overcrowded formal housing rather than informal settlements, but that case studies suggest that they may have "a lower quality of 'community' and, perhaps because of this, would be more prone to violent conflict").

305. Rubin, *supra* note 227, at 484 (documenting the choice of a municipality to replace the old "waiting list" with a "demand database" to allocate housing).

306. TISSINGTON ET AL., *supra* note 120, at 38; *see also id*. at 39 (noting that, according to the Gauteng Department of Local Government and Housing, updated information captured by a newer Housing Demand Database is now intended to, amongst other things, "prioritise beneficiaries with special needs (these beneficiaries are identified as the aged, disabled, families, child-headed households and destitute military veterans)" and to "[a]ssist municipalities in counteracting 'queue-jumping' by land invaders").

307. *Id*. at 27–28.

308. *Residents of Joe Slovo Cmty*. *W*. *Cape v*. *Thubelisha Homes* 2010 (3) SA 454 (CC) para. 343 (S. Afr.). For its extension to the duties of local authorities to provide electricity, see *Joseph v*. *City of Johannesburg* 2010 (4) SA 55 (CC) (S. Afr.); *see also* Muller & Liebenberg, *supra* note 133, at 562–65.

309. *Blue Moonlight Properties 39 (Pty) Limited v*. *Occupiers of Saratoga Avenue and Another* [2008] ZAGPHC 275 (HC, WLD) para. 64 (S. Afr.); Muller & Liebenberg, *supra* note 133, at 566.

> [R]eprioritised limited resources from one poor group to another. The housing waiting list approach meant that it would be primarily old residents who were on the waiting list who would benefit, but the block by block approach changed this completely by benefiting primarily shack dwellers and excluding and frustrating those who had been on the waiting list.[310]

Moreover, of course, the decisions to switch to informal upgrading or alternative tenure arrangements are also made in the context of deciding how many houses are being built: a first-order decision that is recognized, but is a less constant source of complaint.[311]

2. Health Care Allocations

The allocation of health care is similarly determined by a myriad of decisions that are hidden by the "queue jumping" metaphor. Indeed, the metaphor exaggerates a general bias in thinking about health in curative, treatment, terms.[312] Yet as analysts are quick to point out, the background questions of inequality and the social determinants of health—access to education, food, and water, to name a few—play a larger role in determining the justice of the overall system and its distribution of health.[313]

In Canada, the health care wait list is a fractional component of the decisions made about the realization of health rights. Three issues, arguably more central to the realization of such rights, relate to the decision as to what is, and what is not, included in the publicly financed system, as well as how the large private market is regulated and how the social determinants of health are addressed. First, the demarcation of what should be publicly funded, "medically necessary" hospital care and "medically required" physician services are annually negotiated at the provincial level by Health Ministries and Medical Associations.[314] But these negotiations are primarily limited

310. Luke Sinwell, *The Alexandra Development Forum (ADF): The Tyranny of Invited Participatory Spaces?*, 74 TRANSFORMATION: CRITICAL PERSP. ON SOUTHERN AFR. 23, 38–39 (2010).

311. TISSINGTON ET AL., *supra* note 120, at 68.

312. For criticism of this bias, see PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS AND THE NEW WAR ON THE POOR (2003); *see also* General Comment No. 14, *supra* note 80.

313. NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY (2008); General Comment No. 14, *supra* note 80.

314. Flood, *supra* note 174, at 79.

to costs rather than what aspects of care and services are to be included or excluded.[315] This preserves the status quo, a default.[316] Secondly, despite perceptions to the contrary, Canada is only nominally a "single payer" system, with 30% of health care privately financed, and 65% of Canadians holding private insurance for such services as prescription drugs and dental care.[317] Thus, when not deemed medically necessarily, treatment is "left largely to the free market to determine who has access, leading to serious inequalities in access and quality of care" in critical areas of health care, exemplified by the issue of access to pharmaceuticals.[318] As Colleen Flood has cautioned, "[p]eering beyond the boundaries of what is deemed, somewhat arbitrarily, to be medically necessary, one finds profound inequalities, with vulnerable populations denied access or receiving sub-standard care."[319] Thirdly, the question of public spending across a range of social services vital to health, such as the provision of water and sanitation, is barely registered as a health-related decision. These social determinants are thus missed.

Why the Canadian debate over equitable access to health care centers not on these issues (the lack of comprehensiveness of public coverage, inadequate regulation of the private sector, and broader socioeconomic inequalities) but instead on aspects of the "single-payer" system is another feature of the resonance of the "queue jumping" metaphor and its intrinsic appeal. Queue talk has coincided with a shift to what has been called a "negative" or "civil" right to health care,[320] and the obfuscation of the ways in which health care outcomes are both individually allocated and broadly distributed.

---

315. TUOHY, *supra* note 173, at 217–21 (describing the processes of "delisting" from what is deemed necessary); Flood, *supra* note 174, at 79–80; Aeyal Gross, *Is There a Human Right to Private Health Care?*, 41 J.L. MED. & ETHICS 138, 143 (2013) (noting the importance of the inclusion of a comprehensive range of health care services, at sufficient quality, in the publicly subsidized tier of a two-tier system).

316. Flood, *supra* note 174, at 79–80. For a suggestion of more participatory aspects to such processes, and the removal of professional and market capture, see Alana Klein, *So Long as You Have Your Health: Health Care Distribution in Canada and Proceduralist Human Rights*, 30 WINDSOR Y.B. ACCESS JUST. 247 (2012).

317. Flood, *supra* note 174, at 79 (providing comparative examples).

318. *Id*. at 80; *see also* Flood et al., *supra* note 246. The complex ways in which pharmaceutical financing impact the accessibility of health services and human rights are presented in INCENTIVES FOR GLOBAL PUBLIC HEALTH: PATENT LAW AND ACCESS TO ESSENTIAL MEDICINES (Thomas Pogge et al. eds., 2010).

319. Flood, *supra* note 174, at 81.

320. Bhatia, *supra* note 173, at 38; Flood, *supra* note 174, at 95–96. For a different formulation of the right to health care, based on both negative and positive obligations, see Jackman, *supra* note 267; *see also* General Comment No. 14, *supra* note 80.

3. Asylum-Seeker Processing

In Australia, the queue can be seen to obscure the fact that "states allow for more mobility across their borders than they prevent."[321] Many of the first-order decisions on immigration are made outside of the refugee debate; just as many of the applicants for asylum are produced, not by the attractiveness of the good in question (access to Australia), but by "push" factors such as civil war, conflict, poverty, and even climate-induced displacements.[322] Moreover, while the grounds for distributional decision-making in this context are very different from the more bounded contexts of access to national housing or health care discussed above,[323] queue talk emphasizes the same construction of competition in housing, health care, and other state transfers that make the rights of non-nationals politically unpopular.[324]

Recall that the Refugee Convention sets out a framework for processing claims to asylum, along with the principle of *non-refoulement*, to protect victims of political or religious persecution who are understood as making the most forceful claim for admission to any country to which all States Parties agree.[325] Even if a country's immigration policy—and the choice of whom to admit and

321. VIGNESWARAN, *supra* note 202, at 109.

322. A point made poignantly clear with the unprecedented rise in global forced displacement over the last three years. *See* U.N. HIGH COMM'R FOR REFUGEES, WORLD AT WAR: UNHCR GLOBAL TRENDS: FORCED DISPLACEMENT IN 2014 (2015), http://www.unhcr.org/en-us/statistics/country/556725e69/unhcr-global-trends-2014.html (stressing major movements, with the starkest increase from Syria, Afghanistan, and Somalia); *supra* notes 211–16 and accompanying text. For the different causal effects, see HUMAN SECURITY AND NON-CITIZENS: LAW, POLICY AND INTERNATIONAL AFFAIRS (Alice Edwards & Carla Ferstman eds., 2010). See further the ways in which international human rights standards operate as a benchmark in the case law which elucidates the meaning of "serious harm," from which people are entitled to seek refugee status. HATHAWAY & FOSTER, *supra* note 207, at 182–287.

323. *See supra* note 219 and accompanying text.

324. The entry of asylum seekers puts additional pressure on the public queues—discussed in both housing and health care scenarios—at an administrative level, but also a political one, in South Africa and Canada no less than in other systems. *See, e.g.*, Jackman, *supra* note 267, at 10–11, 24–25 (discussing caselaw denying health care coverage to undocumented migrants); Tara Polzer Ngwato & Zaheera Jinnah, *Migrants and Mobilisation Around Socio-Economic Rights*, *in* SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 389, 396–417 (Malcolm Langford et al. eds., 2014) (describing formal and informal obstacles to rights protections for non-nationals in South Africa, despite constitutional and statutory protections).

325. For an extension of such protection to human rights, see JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007).

whom to exclude—is at the heart of its self-determination,[326] it is subject to a basic principle of mutual aid. With its sea borders and geographical position, Australia is one of the few countries in which the ability to achieve near perfect control of immigration is a credible goal. It is these features that have led to a surprisingly draconian mainstream political discourse, as compared with other recipient countries. Of course, the "queue" must be administered outside of Australia, and the discourse never entertains a realistic analysis of the capacities of the UNHCR, or any other global administrative process, to satisfy the conditions of fairness and order that are theoretically offered by queues.[327] Rather, queue talk obscures its inevitable effect––the rejection of rights to asylum—by suggesting an overall rights-approving stance, as long as claimants wait their turn.

Scarcity, or the fact that all asylum seekers cannot be granted protection simultaneously, appears to be an inevitable feature, and yet scarcity is as much a political construct as it is a material fact. As David Martin has argued, "[a]sylum's scarcity is political . . . not physical."[328] In this case too, attention to the queue obscures the countervailing political traditions that might help to decrease the scarcity of political will: not only of human rights, but others that

326. WALZER, *supra* note 103, at 51; *see, e.g.*, Andrew Shacknove, *From Asylum to Containment*, 5 INT'L J. REFUGEE L. 516, 521–22 (1993) (noting that "[o]nly isolated States, such as Britain, Japan, and Australia, may be capable of" preventing large scale entry); *cf.* Gibney, *supra* note 219, at 173. (questioning Walzer's baseline, that liberal states are entitled to protect their "shared sense of what they are about" as an internally variable standard). The recent crisis in Europe highlights the difference in entry-points between different states of the Global North.

327. Only one percent of refugees are resettled through the UNHCR program, and it has been estimated that to fulfill the resettlement aims of this program would take 117 years. *See, e.g.*, McAdam, *supra* note 195, at 447. Commentators have stressed the importance of domestic implementation. *See, e.g.*, Gil Loescher & James Milner, *supra* note 196, at 190 (noting that, while UNHCR is the "central actor of the global refugee regime," its "power and influence has been eroded as a result of both the changing dynamics of forced migration and the changing interests of states"). For gaps in procedural fairness in UNHCR's processing, see Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INT'L J. REFUGEE L. 1, 1–2, 9 (2006) (noting problems that remain unaddressed, despite the efforts by the UNHCR to set "Procedural Standards for Refugee Status Determination under UNHCR's Mandate" in September 2005). For a detailed ethnography of "new illegalities" and "corrupt practices" that accompany such soft law measures, see Kristin Bergtora Sandvik, *Blurring Boundaries: Refugee Resettlement in Kampala—Between the Formal, the Informal, and the Illegal*, 34 PoLAR: POL. & LEGAL ANTHROPOLOGY REV. 11, 12–13 (2011).

328. David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES 30, 36 (Howard Adelman ed., 1991).

emphasize non-discrimination, for example, or otherwise eschew anti-immigration rhetoric.[329] Effective political responses in liberal democracies may depend, as other commentators have argued, on how a variety of factors are represented and understood in particular country contexts, such as the needs of those seeking asylum, and perhaps their number (as against the host state's population); the host state's economy; particular ethnic affinities; the history of integration; and how other states are behaving towards entrants.[330] Queue talk simply passes over such factors.

C. The Stakes of Rights and Queues

The unresolved questions, and obfuscations, that are produced by the queue's role as metaphor and concept, distort the democratic political space in which we expect our normative commitments to rights to play out. As discussed above, distributive allocations made in conditions of scarcity are popularly, and often intuitively, understood in terms of queues. It is my final contention that this may be highly distortive of rights talk, particularly for claimants in the most desperate positions. In addition to the unresolved questions and obfuscations discussed above, the discourse of "queue jumping" places a burden on rights-claimants to justify their claim and may set up conditions of anti-solidarity, and indeed enmity, on behalf of differently situated rights-holders whose claims may be less urgent.[331]

This is because "queue jumpers" are perceived as having misappropriated otherwise legitimate criteria—the criteria of need—and are therefore moving up the system of allocation illegitimately. Again, there are links to perceptions of "corruption," but the argument is separate and has a particularly disempowering effect on rights claimants.

First, in South Africa's example, the "queue jumper" is the homeless person, or squatter, whose very need and vulnerability are grounds for their claim for housing, or to the anti-eviction protections

329. *See, e.g.*, Ngwato & Jinnah, *supra* note 324, at 397 (noting worker-solidarity traditions, or pan-African expressions in South Africa, as well as the fact that major political parties have eschewed such rhetoric in their policy platforms there, unlike in other developed and developing countries).

330. Gibney, *supra* note 219, at 176–77. It should be noted that Gibney uses these elements to approve a policy that does not privilege the claims of needy people on the grounds of proximity (like maritime boat arrivals).

331. That this consequence is contingent is made clear in comparing the queue talk deployed in Canada and South Africa. My thanks to Mattias Kumm for help with this point.

accorded by the state.[332] In a sense, the "queue jumper" is perceived as racing to the bottom of the needs-based hierarchy in order to be first served. There is an assumption of active agency by the "queue jumper," and a selfish disregard for others who are waiting patiently in the system. Second, in the Australian case study, the boat arrivals are perceived as risking life and limb inappropriately, rather than waiting their turn.[333] While, in pursuing legal recognition, asylum seekers' passivity is well-documented, it is at the moment that they assert agency that their claims become so unpopular.[334]

This criticism is directed to individuals, but it also applies to communities seeking to organize with particular results. For example, in South Africa:

> If an organised community takes initiative, or wins a court case, then the public system is not very adept at being responsive to a departure from the "waiting patiently" (for your name to come up on a waiting list) mentality. It could be said that this mind set has actually disempowered people over the last fifteen years or so, as it has undermined some community's ability or will power to get on with it themselves. In contrast, some of the social movements stand in contrast to this ("nothing for us without us").[335]

In this way, the waiting list stands in as a "tool of political and social control in housing delivery,"[336] no less than in asylum claims. "Queue jumping" may thus be seen as a "blame frame" that is used by those who must be passive in the face of inequities of others,[337]

---

332. Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998 §§ 4, 6 (S. Afr.).

333. McAdam, *supra* note 195, at 439 (noting the way the policy, adopted only by Australia "pits onshore and offshore applicants against each other by creating a system in which onshore applicants are seen as 'taking' places which could be used to resettle family members").

334. Matthew Zagor, *Recognition and Narrative Identities: Is Refugee Law Redeemable?*, *in* ALLEGIANCE AND IDENTITY IN A GLOBALISED WORLD 311 (Fiona Jenkins et al. eds., 2014) (noting that, as reinforcement of the stereotype of passivity, "the refugee who displays too much autonomy is portrayed as duplicitous, a queue jumper, opportunist and liar"); Roger Zetter, *Labelling Refugees: Forming and Transforming a Bureaucratic Identity*, 4 J. REFUGEE STUD. 39 (1991) (describing the institutions responsible for the shaping of the refugee narrative).

335. Royston & Eglin, *supra* note 122, at 4–5.

336. TISSINGTON ET AL., *supra* note 120, at 58. There is a related fear by some that the "'so-called database' may be used as evidence in court to evict people by claiming that people are 'queue-jumping.'" *Id*. at 62.

337. Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice*

but one that is peculiarly hostile to the political agency exercised by unpopular groups—in comparison with common tropes of "welfare queens" or "dependents,"[338] which invoke passivity, rather than agency, as the source of blame. The consequence is to undermine the very norm of individual agency that the recognition of rights purports to mobilize. Unlike the legal stakes of the classifications of rights and queues, described in Part I above, in which we observe constitutional or human rights co-existing with an administrative structure of queues in varied relations, the political stakes of such classifications work on a metaphorical level and, as such, may represent a greater challenge to the implementation of human rights.

The discourse of queues and "queue jumping" is one that operates perniciously to treat queues as creating ancillary rights, which, in apparent support of order and collective fairness, must trump the claims of others. This contradictory result may be seen as distinct from the perceptions of the liberty-affirming politics that arise by claiming and litigating other human rights: one person's guarantee of free speech is thought to assist the free speech of others, not unsettle or rival it. It was T.H. Marshall's thesis that a grant of social rights would lead to an ever-widening protection, such that one person's successful claim of social security would lead to the social security of others.[339] But in the "queue jumping" discourse, one person's recognition of rights can do precisely the opposite. These are the less obvious stakes of queue talk.

---

in America, 41 HARV. C.R.-C.L. L. REV. 413, 419 (2006) (discussing the social psychology of understandings of fairness that is upheld through blaming victims of inequities and excuses perpetrators or passive observers). For a pertinent U.S. example, see ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT 152 (2016) (noting the power of the queue metaphor, particularly in conservative rural communities in America, in expressing hostility against the state and others, whereby the "federal government [is perceived as] on the side of those unjustly 'cutting in' [minorities, women, immigrants, refugees, and public sector employees]," while the "free market [is perceived as] the unwavering ally of the good citizens waiting in line").

338. For examples of each, see HANDLER & HASENFELD, *supra* note 100, at 159 (noting that "[t]he 'welfare queen' myth is the joining of two stereotypes: race and the 'underserving poor'"); Fraser & Gordon, *supra* note 107, at 321 (showing how the keyword of "dependency" distorts welfare policy).

339. T.H. Marshall, *Citizenship and Social Class*, *in* INEQUALITY AND SOCIETY: SOCIAL SCIENCE PERSPECTIVES ON SOCIAL STRATIFICATION 148 (Jeff Manza & Michael Sauder eds., 2009).

CONCLUSION

In the age of rights, the queue is seen to represent a system in which legitimate claims are ordered and rendered orderly by a recognizable system of allocation. And yet, when people seek to access their constitutional or human rights through making claims upon the state, they are often perceived as "queue jumpers" who are contravening the norms of the queue, conflicting with extant allocative schemes, and dislodging the claims of others waiting for the same resources and opportunities. Rights in modern States give rise to queues, and yet are invoked discursively both to unsettle present queues and to admonish those who attempt to do so. This Article has sought to unsettle the metaphors of the queue and "queue jumping" in the three examples of housing rights in South Africa, health care claims in Canada, and asylum claims in Australia. This has revealed very different complaints harbored within "queue talk": against courts, administrators, markets, and claimants themselves. A sophisticated discourse of rights, which acknowledges the breadth of the correlative duties to respect, protect, and fulfill, is a potential rejoinder. Rights can co-exist with queues, and be supported by principles of administrative fairness, where the queue operates as a default norm of allocation, which may be abrogated when important claims of human dignity, liberty, justice, or fairness require it. Yet to treat the queue at face value is to overlook its deceptive appeal. The first-order distributional decisions that force some into queues and allow some to exist outside of them, are also appropriately part of our understanding of rights. Of course, one may question the pursuit of rational answers to metaphoric conceptions arguably immovable by logic. Yet I suggest that analytical attention can explain the different sources of the power of the metaphor, and therefore different sources of redress.