THE EXTENSION OF LIBERALISM BEYOND DOMESTIC BOUNDARIES: THREE PROBLEM CASES

by
Rachel Brown

M. Phil., Philosophy, Cambridge University, 1993
B.A., Philosophy, Cambridge University, 1992

Submitted to the Department of Linguistics and Philosophy in Partial Fulfillment of the Requirements for the Degree of

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Signature of Author: _____

Department of Linguistics and Philosophy
August 5, 1999

Certified by: _____

Joshua Cohen
Professor of Philosophy and Sloan Professor of Political Science
Thesis Supervisor

Accepted by: _____

Vann McGee
Chairman, Committee on Graduate Students

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ABSTRACT

Liberalism, in any of its forms, places a strong emphasis on the individual—it prioritizes equal rights and liberties, and measures are taken to assure for all citizens the opportunity to make full use of their freedoms and entitlements. Many conceptions of human rights are objected to on the grounds that they are based on liberal premises, and insufficiently sensitive to the fact of reasonable cultural pluralism. Using as a foil recent work in this area by John Rawls, I argue in chapter one for a justificatory basis of human rights that advances values—in particular values of minimal democracy including the right to political participation—that may have emerged historically alongside liberalism but that we ought not consider specifically liberal. My account diverges form Rawls' at this point: he does not believe that such values can be defended from premises that are not specifically liberal.

Since a group is, after all, a collection of individuals, liberalism appears to be committed, unsatisfactorily, to a permissive right to secede in the sense that, other things being equal, groups ought always to be permitted to secede voluntarily. I show in my second chapter that liberalism is not committed to this permissive view. Though liberalism implies that no one has a duty to refrain from secession, it does not support the stronger thesis that states must permit groups to secede if they wish. My treatment of secession argues for a more general framework in which those liberties whose protection is of basic importance to liberalism are distinguished from those whose protection is not so guaranteed.

Derek Parfit has put forth a general difficulty regarding our obligations to future generations, to which I respond in chapter three. Parfit claims, plausibly, that we may suppose a major public policy decision to have sufficiently broad ramifications that in about two hundred years there would be nobody alive who would have been alive had some different policy been selected. But then the choice of such a policy would not make *those people* worse off, since they would not otherwise have been born. This would remain so even in the case of policies that cause the lives of future generations to be of a very low quality. Parfit's "Non-Identity Problem" challenges us to provide plausible moral reasons against pursuit of such public policies.

I argue that the only adequate response to this problem comes from a liberal focus on the rights of future generations, and the moral status that this confers on them. Taking such seriously, many public polices can be shown to be objectionable despite the fact that they may not harm the interests of those affected by them.

Thesis supervisor: Joshua Cohen
Title: Professor of Linguistics and Philosophy, Sloan Professor of Political Science

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PREFACE

Liberalism, in any of its forms, assigns to every adult a set of basic rights, liberties and opportunities, and aims to ensure that all individuals are able to use these rights, liberties, and opportunities to pursue their aims. In this way, liberalism shows a commitment to respect and protect individual liberty. Basic rights include the right not to be killed, the right to bodily integrity, the right to hold property, the right of due process under the law, the right to political participation, and the right to fair equality of opportunity. Basic liberties include liberty of conscience, of expression, of religion, of association, and the liberty to select and pursue one's own goals and projects. These rights and liberties are assured a high priority by the liberal state, and measures are taken to assure for all citizens the opportunity to make full use of their freedoms.

The puzzle that motivates this thesis is a simple one. As outlined above, liberalism has a strong individualist component—it prioritizes equal individual *rights*, and hence is focused on the individual and her entitlements; the individual is conceived in a particular way, as the primary and basic unit of moral concern. At the same time, however, liberalism is concerned with the arrangement of basic societal institutions. Since different institutions are, presumably, appropriate to different domains—"extensions"—liberal theories have typically advocated that distinct principles apply to domestic justice than they do to global or intergenerational justice.[1] While such a distinction may not turn out to be a problem, it is certainly a puzzle that requires explanation: why should an individualistic theory such as liberalism track moral distinctions based on where or when one was born? To what extent would this be defensible?

The idea that distinct fundamental principles apply to domestic justice, global justice, and intergenerational justice is not embraced by all. Utilitarian theories, for example—including

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[1] The term "extension" is Rawls'; Rawls says "We may think of these [other] questions as problems of extension. Thus, there is the problem of extending justice as fairness to cover our duties to future generations [...]. Another problem is how to extend justice as fairness to cover the law of peoples, that is, the concepts and principles that apply to international law and the relations between political societies." Rawls, (1993), *Political Liberalism* (hereafter *PL*), New York: Columbia University Press, pp. 20-21.

liberal utilitarian theories—when they have broached the topic at all, have extended a straightforward analysis beyond the territorial borders of the domestic state: in the domains of global and intergenerational justice, as in domestic justice, each person is to count for one and no more than one, and utility is thus calculated. Nobody is excluded from the utilitarian calculation.

But most contemporary liberal theories, influenced largely by Rawls, are not utilitarian. These theories—and it is these that primarily interest me—do not tend to assert a general principle or a set of general principles that holds for any moral domain from interpersonal activity to international law. However, since liberalism has historically been formulated to apply to a single domestic society, and to domestic institutions, it is not obvious what its extension to other areas of political life might be, and perhaps not surprising that there is little consensus in this area. This thesis provides an analysis of three of the ways in which it has seemed most problematic to extend liberal principles to an international or intergenerational domain. (These three are by no means supposed to be exhaustive of such problematic extensions—they are, for one, cases that are focused on human beings. Other cases that warrant consideration are our relations with the environment and with non-human animals.) I offer a brief summary of each problem here.

First, it has appeared to many people that the extension of liberalism to global justice is significantly hindered by the fact of reasonable cultural pluralism—the fact that there is a plurality of ways in which a society might reasonably be ordered. As noted above, liberalism is an individual-focused political conception that is framed in the first instance to apply to a single political society. So when liberalism is extended to relations between and among societies, it is not clear whether the fact that it is focused on individuals or the fact that it is focused on relations within a single political society will control the extension.

In particular, the fact of reasonable cultural pluralism presents a difficulty for any liberal account of human rights. For liberalism's commitment to the freedom and autonomy of individuals will, surely, undergird its account of human rights. Many conceptions of human rights are thus dismissed as based on objectionably liberal premises, and insufficiently sensitive to the

fact of reasonable cultural pluralism. But this seems undesirable: it is in tension with liberalism's own commitments of tolerance, and potentially a source of interstate conflict.

My first paper is based on recent work in this area by John Rawls and Avishai Margalit. I agree that the liberal society must, as a part of its conception of global justice, tolerate and cooperate with societies that are not ordered according to the full set of liberal principles, and that are not, in this respect, individual-focused. Following Rawls, I think that a more neutral statement of "decent" principles is available to characterize political orders that merit cooperative treatment. Nonetheless, I argue that we are able, from such principles of decency, to construct a bases of human rights that includes values—in particular values of minimal democracy such as the right to political participation—that may have emerged historically alongside liberalism but that we ought not to consider specifically liberal. My account diverges from Rawls' at this point: he considers his conception of decency to be further removed from democratic values than I believe is tenable.

The second problem that I address might be called the "libertarian problem." The idea is that from its attention to the rights and liberties of individuals, liberalism is driven to some unpalatable conclusions concerning the integrity of the state. In particular, liberalism appears to attribute, in its moral calculations, too little moral weight to territorial borders. Admittedly, the moral weight of such borders is not at all clear, but, for a theory to be minimally realistic, it must either account for or satisfactorily explain away their importance. I take up this issue through an examination of the liberal response to secession.

Liberalism appears to be committed to a permissive right to secede in the sense that, other things being equal, groups ought always to be permitted to secede voluntarily. Since a group is, after all, merely a collection of individuals, liberalism is bound to uphold the group's collective desire for self-government because it is bound to uphold the autonomy of the individual members of the group. But this is not a satisfactory result, for a number of reasons, many of which have to do with the unwelcome incentives such easy access to secession might encourage. I show, however, that liberalism is not committed to this permissive view. Though liberalism implies that no one has a duty to refrain from secession, it does not support the stronger thesis that states must permit groups to secede if they wish. Because the right to secede is so weak, liberalism is well-

equipped to accommodate giving a realistic weight to the significance of borders. My treatment of secession provides us with a more general framework in which to distinguish those individual liberties whose protection is of basic importance to liberalism from those whose protection is not guaranteed.

My third paper takes up the topic of what our obligations to future generations are. There is a general difficulty in this area, articulated by Derek Parfit. Parfit claims, I think plausibly, that we may suppose a major public policy decision to have sufficiently broad ramifications that in about two or three hundred years there would be nobody alive who would have been alive had some different policy been selected. But then the choice of such a policy could not make *these people* worse off—since they would not otherwise have been born—even if it did have the effect that the quality of their lives was low. Take the policy of permitting—doing nothing to eradicate—population growth. Plausibly, if we *were* to take measures to bring the global population growth rate down to zero, very different individuals would be alive two hundred years hence than if we took no such measure. But if, according to Parfit's argument, population growth—despite its apparently bad effects— would not make the future generations who consequently exist any *worse off*, then what reason is there not to permit it?

I argue that the only adequate response to Parfit's argument comes from a liberal focus on the rights of individuals, and the status that this confers on them. I deny that the violation of rights corresponds in any exact fashion with the deterioration of people's interests. In particular, it is perfectly possible to experience a violation of one's rights without a setback to one's interests. Since this is so, there is no difficulty on my account in the fact that certain choices violate the rights of future individuals but fail to make them worse off. If we take seriously the status of future generations as rights holders of equal moral status with ourselves, it is clear that policies—or lack thereof—such as the failure to attend to population growth mentioned above are objectionable on the basis that they violate individuals' rights.

My three papers in global and intergenerational justice present, I think, the basis of an account as to how liberal principles might legitimately and usefully be extended beyond domestic boundaries. A full account would—working from papers one and three—develop more precisely

the sort of status that is conferred upon a person *qua* her being a holder of moral rights, taking care to delineate the limits of such—along the lines suggested in paper two.

HUMAN RIGHTS AND POLITICAL PARTICIPATION:

THE BASES OF HUMAN RIGHTS IN JOHN RAWLS' THEORY OF THE LAW OF PEOPLES

I. INTRODUCTION

In *A Theory of Justice* John Rawls writes:

> [Now at this point] one may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states. [...] The basic principle of the law of nations is a principle of equality. Independent peoples organized as states have certain fundamental equal rights. This principle is analogous to the rights of citizens in a constitutional regime. One consequence of this equality of nations is the principle of self-determination, the right of a people to settle its own affairs without the intervention of foreign powers. Another consequence is the right of self-defense against attack, including the right to form defensive alliances to protect this right. A further principle is that treaties are to be kept, provided they are consistent with other principles governing the relations of states.[1]

Since writing *A Theory of Justice* Rawls has elaborated and expanded upon his treatment of international relations, producing an interesting and sophisticated theory.[2] Rawls wants to use a version of the original position to obtain a just Law of Peoples; represented at this original position will be "decent societies," some liberal, some non-liberal. Decent societies are those that

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[1] Rawls, (1971), *A Theory of Justice,* The Belknap Press, Harvard University Press, p.378.

[2] See Rawls, (1993), 'The Law of Peoples' in *On Human Rights: The Oxford Amnesty Lectures,* ed. Susan Hurley and Stephen Shute, pp. 41-82 (hereafter *HR*); and (1998) 'The Law of Peoples,' a monograph not yet published (hereafter *LP*).

meet a threshold of adequate treatment for their members.[3] Rawls is keen to divorce the concept of decency from western liberal values such as protection of equal freedom and autonomy for individuals, democratic values, or a full-blown list of human rights. In this paper I examine Rawls' success in this enterprise, and attempt to evaluate how far democratic values and a strong human rights conception can be divorced from the concept of decency. My answer in short: not so far as Rawls believes. From within Rawls' framework I show that some features of minimal democracy and a strong support for human rights are already rooted in the allegedly neutral concept of decent treatment that he advocates. To illustrate this I focus on the human right to political participation in one's government, which I take to be representative of both a strong set of human rights, and conditions of minimal democracy.

Although my conclusions concerning the connection between decency and human rights are free-standing in their own right, the conception of decency that I use is taken largely from Rawls' work. I shall thus frame this paper around a critical presentation of Rawls' theory of the Law of Peoples, highlighting the role that the decent society plays in it. Rawls is attempting to argue for "principles of the Law of Peoples," which are those principles that a world society of decent peoples would contract to as the "political conception of right and justice that applies to the principles and norms of international law and practice."[4] Rawls' statement of his Law of Peoples is as follows:

1. Peoples are free and independent, and their freedom and independence is to be respected by other peoples;
2. Peoples are to observe duties and undertakings;
3. Peoples are equals and parties to the agreements that bind them;

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[3] I shall explain more fully what Rawls means by 'decency' below. At this point it is sufficient to say that indecent treatment, to Rawls, is inhuman treatment: it is a *minimal expectation* of a society, unrelated to any particular conception of justice, that it conform to principles of decency. On the nature of decency, Rawls says (somewhat vaguely): "Decency I think of as a normative idea of the same kind as reasonableness, though weaker. It covers less than reasonable does, and we give it meaning by how we use it." (*LP*, p. 45)

[4] *LP*, p. (i). A 'people' is not to be conceived of as a nation; we shall see in section (2.3) how peoples are said to differ from nations.

4. Peoples are to observe a duty of non-intervention;
5. Peoples have the right to self-defense but no right to war;
6. Peoples are to honour human rights;
7. Peoples are to observe certain specified restrictions in the conduct of war;
8. Peoples have a duty to assist other peoples under unfavourable conditions that prevent their having a decent or just political regime.[5]

I am particularly interested in principle (6), the conception of human rights that is sanctioned under the just Law of Peoples. In Rawls' theory, human rights have the following roles:

i) Their fulfillment is a necessary condition of the decency of a people's political institutions and of it legal order.

ii) Their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.

iii) They set a limit to the pluralism among peoples.[6]

The role of human rights in Rawls' account is, therefore, enormous; they set the parameters for the other principles of the Law of Peoples. And the conception of human rights that is endorsed under Rawls' theory, in turn, owes its formulation to his account of decency. Decent societies will, by their nature, honour human rights, thus a conception of human rights emerges from a conception of decency. This idea is not a priority claim: that our intuitions about decency are logically prior to our intuitions about human rights. The idea is rather that our intuitions about one illuminate our intuitions about the other. Admittedly, in some instances a conception of decency will not inform a conception of human rights, because intuitions about the latter run so strong. It is hard to imagine, for example, that our convictions regarding the human rights against torture or wrongful imprisonment are particularly sharpened via a consideration of the decent society. Nonetheless, I am inclined to think that some of what are plausibly held to be human rights are clearly seen as such only in a political setting, because they can be made sense

[5]See *LP*, p.21

of only from the perspective of such a setting. If the right to political participation is plausibly a human right, then it is a right of this type. My focus in this paper is on the conception of human rights that Rawls believes will be contracted to by decent peoples. In particular, consider article 21 (i) of the Universal declaration of Human Rights (UDHR):

Article 21. (i) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

This principle, or something like it, Rawls would claim, upholds democratic values in a way that is not sufficiently respectful of non-democratic peoples who are nonetheless organized in a decent fashion. I claim that upon careful consideration Rawls' account of decency (which I believe is more or less the right account of decency) itself supports something like article 21 of the UDHR. Thus, I claim, at least this basic democratic value is in fact *a part of* what it is for a society to be a minimally decent society.

This conclusion I take to be a positive one. I use it to respond to a common criticism of human rights conceptions. Such conceptions are frequently criticized as sectarian in their underlying philosophy, and are accused as consequently intolerant in an objectionable way. While human rights are claimed to apply to every person, regardless of her culture, ethnicity, or tradition, the ideas that are typically put forward by a conception of human rights are said to be Western, liberal ideas, founded in an allegedly "individualistic" spirit. I respond by attempting to uncover just what the justificatory bases of a typical human rights conception like the UDHR in fact amount to. *Insofar as* these justificatory bases do not appeal to specifically liberal values—and I think it plausible that they do not—then a human rights conception that is supported by the conception of the decent society avoids the criticism just described to a great extent.

This paper will now proceed—in broad outline—as follows. I shall spend the next section (section 2) providing some background on the motivation, structure, and methodology of Rawls' Law of Peoples. This section is necessary largely in order to give context to Rawls' account of

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[6] *LP*, p.56.

decency, with which I shall be engaged for the bulk of the paper; it does, nonetheless, draw some conclusions in its own right. These conclusions concern certain features of Rawls' account that may incline him to believe that the concepts of decency and minimal democracy can be further divorced than I say is plausible. In section (3) I shall outline—and over the course of the section detail—Rawls' account of decency. I argue that this conception of decency—which seems to me to be a reasonable conception of decency—strongly supports the claim that along with the less controversial human rights, a decent society will surely secure for all of its citizens a right to political participation. In section (4) I revisit some of the reasons that may have inclined us against this claim, and find them to be lacking. Since I am following Rawls in taking the decent society to generate a plausible human rights conception, I conclude that article 21 has stable footing in the catalogue of human rights.[7]

[7] A word on what will *not* be covered in this paper is in order. Given the very many and very stark inequalities at a global level, one challenge frequently presented to Rawls is to justify his conception of international justice, with its emphasis on the equality of peoples, their rights of self-determination and non-intervention rather than on, *inter alia*, a global difference principle or some other method of redressing the inequalities between persons at a global level. See for instance Beitz, (1979), *Political Theory and International Relations*, Princeton University Press: Princeton, New Jersey, part three; and Pogge, (1989) 'An Egalitarian Law of Peoples,' in *Philosophy and Public Affairs* 23(3): 195-224. Along with Beitz and Pogge, I think that an account of the just Law of Peoples will need to contain certain equalizing principles that are not present in Rawls' theory. This is, however, one area in which we may prize a clear distinction between what the just political act is and what the legitimate political act is. Since any principles of redistributive responsibility on a global scale are so far removed from what we currently know, and so unlikely to be widely accepted, it may well be illegitimate for any authority to impose them. Certainly it is a hard task to work out how such principles are to meet Rawls' stated requirement of *minimal realism*—they do not accord with our current practices to any significant degree. I shall not pursue this matter further in this paper.

2. RAWLS' THEORY

2.1 A REALISTIC UTOPIA

Let us take a step back to consider what is being attempted in Rawls' Law of Peoples. Principles 1-8 (see above, page 3) are recommended as principles that "apply to" international law and practice. This is not a particularly clear recommendation. Are the principles such that Rawls believes they actually have a realistic chance for adoption? Or are these principles an ideal specification of the norms of international law? The eight principles describe what Rawls calls a "realistic utopia." He says that:

> Political philosophy is realistically utopian when it extends what are ordinarily thought to be the limits of practicable political possibility, and in so doing reconciles us to our political and social condition. [8]

This is not a straightforward idea. Rawls starts from a basis that is realistic: "we view peoples as they are (as organized within a reasonably just domestic society)."[9] In particular, a realistic conception is to rely on the actual laws of nature (it must not take persons or societies as anything other than they can reasonably be supposed to be), and it must be workable and applicable to ongoing political arrangements and relations between peoples. Rawls then proceeds to a utopian vision of the Law of Peoples "as it might be," by the use of "political (moral) ideals, principles, and concepts to specify the reasonably right and just political and social arrangements for the Society of Peoples."[10] The "Society of Peoples" is the group of fully cooperative peoples, characterized by principles of decency and their conformity to principles 1-8.

We might put Rawls' project of a realistic utopia in the following way: do not make any assumptions about the motivation and behaviour of societies or persons other than realistic

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[8] *LP*, p. 1.

[9] Ibid. p.5. Rawls is following Rousseau's opening thoughts as expressed in *The Social Contract.*

[10] Ibid. p. 6

assumptions, but, subject to this constraint, articulate the just cooperative conditions between societies as they might be, and in accord with political ideals. Rawls' principles are *consistent with*—not ruled out by—realistic assumptions, but he is silent as to the likelihood of their adoption.

One important way—which we shall return to—in which this constraint of realism affects Rawls' theory is through his attention to the 'fact of reasonable pluralism.' The fact of reasonable pluralism is drawn from the domestic case, and finds its analogue in the society of peoples in the diversity of reasonable peoples with their varied traditions of thought, culture and religion.[11] Taking this fact seriously motivates Rawls to make his theory *tolerant*; we shall see presently that the construction of his Law of Peoples includes allegedly decent hierarchical societies as well as more or less just liberal societies. But a realistic utopia founded on a conception of decency of course includes only those peoples that uphold that conception; and, as we shall see, no decent society should pursue hierarchical arrangements to the extent that Rawls believes palatable. While such inclusiveness to the extent that Rawls favours may have a role in pragmatic political debate, it is misplaced in a realistic utopia.

It could be, for example, that for the *pragmatic* purpose of working towards a more fully cooperative and peaceful society of peoples, certain negotiations are conducted with societies which do not meet all of our conditions of decency; societies that are ordered around a closed political hierarchy might be 'tolerated' in this sense. Such negotiations are, it is to be hoped, a part of the means to realization of the stable realistic utopia that our principles of the law of cooperative peoples describe. However, there is obviously still a world of difference between, for example, the sort of society just described, with its closed political hierarchy, and a deeply illiberal Nazi regime. While the former may not be shown *full cooperation* from the society of decent peoples, it is unlikely that anything but diplomatic sanctions and pressure should be

[11] See Rawls, *PL*, p.36. The fact of reasonable pluralism states that "we assume that a diversity of reasonable religious, philosophical, and moral doctrines found in democratic societies is a permanent feature of the public culture and not a mere historical condition soon to pass away."

employed against it, whereas full military intervention will be required (if it is possible) against a Nazi regime.

A further question remains. I have suggested that the appropriate response to violations of different elements of the Law of Peoples may be rather varied—ranging from diplomatic pressure to military intervention. One might wonder, then, whether certain elements of the Law of Peoples would be better considered *recommendations* for improvement rather than actual legal specifications, with rules for enforcement, etc. Perhaps these might be features of a "Code of Peoples," rather than a "Law of Peoples." I think that this question is mainly generated by a relative uncertainty with respect to international law in general, as compared with legal procedures in a domestic setting. In the latter, offenders are identifiable as individuals or groups of individuals, and sanctions are usually implemented to affect those particular individuals or groups of individuals—and to deter, but not *punish*, others. So long as the government is legitimate, it is generally accepted that such sanctions are legitimately administered by the government or suitably delegated authorities.

These characteristics are not, however, reflected exactly in international law. International law is supposed to monitor the conduct between states (including intervention on behalf of citizens). Importantly, the perpetrators of crimes against international law are generally governments or corporations, rather than individuals, and it is notoriously difficult to direct sanctions specifically against these parties in any exact fashion (even assuming that this would be an ideal goal). That is, sanctions directed against the practices of a particular government, for example, will obviously affect more than that government as such; in particular they will affect the citizens of the state in question. Moreover, there is little consensus as to the legitimate powers that an international law-enforcing body such as the United Nations might be invested with.

Given these (and other) discrepancies between international and domestic law, it should be apparent that we still have much to learn as to the precise functioning of the former. It is, in fact, this uncertainty—or these sorts of difficulties—that makes it unclear where international law should end and 'proposed international conduct' begin.

These qualifications notwithstanding, I take the project of describing principles of a realistic utopia to be quite different than those of pragmatic negotiation. A realistic utopia is, most

fundamentally, designed to provide us with a vision of how things might realistically be; a vision of how things ought to be, subject to realistic constraints. A human rights conception, in particular, is an important vision spelling out the minimally satisfactory treatment of persons by their governmental institutions. If anything is to be a part of international law I think it appropriate that human rights protections should be. The fact that different types and different extents of human rights violations merit correspondingly different sanctions is not in itself a problem. The main point is that the human rights we subscribe to as an international body describe those rights that we assert it unacceptable to deny people. Subject some constraints of humanity and diplomacy, measures will then legitimately be taken to ensure that such rights are internationally realized.

2.2 The Structure of Rawls' Theory

The construction of Rawls' Law of Peoples has four main stages: first, the Law of Peoples as constructed among just and well-ordered liberal societies; second, that law as constructed among decent (not necessarily just) and well-ordered hierarchical societies; third, the law of just and unjust war; and fourth, an outline of the duties of assistance that just and decent well-ordered societies owe to societies that suffer from unfavourable conditions and hence cannot realize just or decent institutions. It is from the first two stages that Rawls argues for his principles (1) - (8), and thus it is these stages that I shall be concerned with. The central upshot of the first two stages is that liberal peoples and hierarchical peoples would in fact select the very same Law of Peoples, which is thus the just and appropriate Law of Peoples. Since liberal peoples and hierarchical peoples arrive at the same Law of Peoples independently from one another, their agreement is not the result of compromise; rather, it is a genuine consensus.[12]

Schematically, then, we are working with the following picture. (1) We are to use an extended interpretation of the original position, whose principal actors are representatives of peoples. (2) Among peoples represented at (1) are decent hierarchical societies. (3) The Law of

[12] This obviously parallels the model of overlapping consensus that is found in *PL*.

Peoples selected by the representatives of decent hierarchical societies is precisely that selected by the representatives of liberal societies, and is thus the just Law of Peoples.

At the very outset, we might contest Rawls' reasoning here. Consider the following case. We ask Beth and Pam what they want to do this evening, and find that they agree to go to the cinema. We then ask Bert and Fred what they want to do this evening, and find that they also agree to go to the cinema. We cannot conclude from this, however, that as a group Beth, Pam, Bert and Fred would want to go to the cinema. For instance, they may prefer to go dancing since their group is now bigger, or perhaps Beth hates to watch movies with Fred and would on no account have selected that option had she known that Fred was to be a member of her group.

Similarly, from the fact that representatives of liberal societies choose option A, and representatives of hierarchical societies choose option A, we cannot conclude that option A is the option each party would have selected had the original selection been made among *all* parties together.[13] Different questions might be addressed when all parties sit down together. But since the Law of Peoples that is under consideration is to bind all decent peoples, together, it appears that its construction must be generated by all decent peoples, together.

Consider article 21 of the UDHR. Rawls invites us to consider hierarchical societies that do not accept article 21. He argues that these societies are nonetheless decent; members in good standing in the society of peoples. It may be, however, that this suggestion is less plausible in the context of liberal and hierarchical societies interacting *with* one another than it is in the context of hierarchical societies carrying on their business quite apart from liberal societies. In contrast with this picture of societal independence, a conception of human rights draws the picture of each person's membership in a larger human family than her native people alone. If we are to have a conception of human rights *at all*, our conception needs to show sensitivity to this latter fact. Compare the domestic case of educational rights. The status of a 'right to education' plausibly

[13] This is a general criticism of—or at least a worry for—any use of the overlapping consensus model insofar as it is designed to specify cooperative principles from multiple, independent bases; I do not consider here, however, what implications, if any, this criticism has for the overlapping consensus model in the case of domestic justice.

depends on what the broad social perception of the worth of education is. The more a person's education is viewed as a necessary means to her successful functioning, the less plausible a case can be made against providing education to her. Thus in these circumstances, while various conceptions of the good will be welcomed or tolerated, none such will be tolerated that deny those requiring it a right to education. And similarly, perhaps, given the interactive nature of our world, the more societies view a person's access to political participation as following from her status as an adult human being, the less justifiable it becomes to restrict that access on any other ground.

We shall, of course, be returning to this issue throughout. The point here is simply that the very construction of Rawls' Law of Peoples evades some of the issues that any contemporary theory of global justice must face: in a world of diversely ordered peoples, what principles might order peoples' cooperation with *each other*, and not simply with the peoples most similar to themselves? Not to bring this question to the fore may, I believe, prejudice our result right from the outset, and goes some way towards explaining why Rawls gives insufficient treatment to the inclusion of principles of minimal democracy such as article 21 in his Law of Peoples.

2.3 Concepts and Terms: Peoples, States and Societies.

Before getting to the heart of Rawls' theory, a few more preliminary steps are necessary. First, we must for reasons of comprehension examine what Rawls has in mind by the use of "peoples" as the central actors in his international theory, as opposed to states or nations.

Peoples are detailed in Rawls' theory to be analogous to persons. At very least, this analogy holds insofar as peoples are the actors in our conception of international justice, just as citizens are the actors in our conception of domestic justice. The particular characteristics of each people will vary according to its nature (for instance, a hierarchical people may have slightly

different characteristics than a liberal people), but there are at least three general ways in which peoples are said to parallel persons.[14]

First, peoples are similar to persons in that they have a moral nature, and a particular conception of themselves. The latter is based on their history and shared culture, and thus it is presumably rather a rich conception: members of the same people will view one another as sharing certain bonds, be they cultural, religious, philosophical or moral. (Note that since groups that share a history and a culture frequently do not share a territory, we may reason that a people need not occupy exactly the same territory as any state; for instance Jews would form a people although they live in many states.)

Second, most peoples have a sense of the reasonable which enables them to cooperate on fair terms with other peoples, terms that are acceptable to all involved. (I say "most" because there are, as part of Rawls' theory, so-called "outlaw peoples" who are neither cooperative nor reasonable. I shan't be discussing such peoples here. The main point is that the peoples (unlike states) who are members in good standing in the society of peoples, are guided by a sense of the reasonable.[15])

Lastly, peoples are rational, although pursuit of their own interests is constrained by what is reasonable. It is a people's reasonableness and moral nature that allows Rawls to be optimistic for the upholding of a Law of Peoples. If principles that are recognized as fair are agreed upon, then a people can be relied on to honour those principles, and to show to other peoples the due recognition and respect that it would wish shown itself.

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[14] For Rawls' political conception of the person, see *PL* pp. 29-35. Three things are important to note. First, persons are free and politically equal and conceive of themselves as such. Second, persons possess intellectual powers, of thought, reflection, judgment and inference. Lastly, persons are *moral* agents; in particular, they possess two moral powers: they possess a capacity for a sense of justice, and a capacity for a conception of the good. This means that persons are concerned with and able to evaluate their society in terms of its fairness; they are also able to endorse some conception, perhaps religious, philosophical, or naturalistic, of what is the most meaningful and satisfying form their lives could take. Each of these three points is reflected at the level of peoples.

[15] *LP*, pp. 48-50.

Peoples do not have all of the familiar powers of sovereignty that are typically associated with states. Such powers grant a state the right to go to war in the pursuit of state interests, and a large degree of autonomy in the treatment of its own people. These powers have, however, diminished since the second world war.[16] International law now tends to limit a state's right to wage war to issues of self-defense and collective security, and greater attention is paid to states' human rights records. Rawls is, therefore, hoping that his use of peoples as the actors in international relations will emphasize such changes, fusing his utopian vision of peaceful, non-expansionist peoples with a realism drawn from current trends in international law.

To focus on peoples rather than on states enables Rawls to begin a response to certain theories of international relations, namely those that emphasize the 'non-moral' characteristics of states as presenting a barrier to relations of justice between them. Rawls is certainly concerned to answer such critics: he considers the 'incredulity' that his proposal may receive from the realist school of international politics to be one of his most pressing problems. The worry advanced by the realist school is that states are rational and always guided by their own interests, which frequently is tantamount to the pursuit of power, influence and the ability to dominate other states. If all states are interested in the domination of other states—or at least interested in having powerful economic, diplomatic and perhaps military influence over other states—then states' interests conflict, which threatens security and creates the background to hegemonic war.[17]

Rawls may now respond that the realist theory has pessimistically characterized the relevant actors of international relations. When peoples pursue their interests rationally it is not necessarily at the expense of reasonable, considerate policy, and thus this pursuit of interests is not threatening to other peoples. Moreover, it is reasonable to think that peoples are a (somewhat idealistic) characterization of future world powers. If it is peoples that international relations is

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[16]Rawls notes this. See *LP*, p.13.

[17] This tradition has roots with Hobbes, who thought that all nations were in a state of nature, and with Weber. For extensive argument against the realist school of politics see Beitz, *op. cit.*, also Pogge, *Realizing Rawls*, Ithica: Cornell University Press; for an attempted reconciliation of the realist school of international politics with the demands of morality see Stanley Hoffman, (1981), *Duties Beyond Borders*, Syracuse University Press.

concerned with rather than states, then the realist's concerns fade: it is characteristic of a people that it is reasonable and prepared to allow the advancement and flourishing of other peoples.

Of course, this response is not entirely satisfactory. We should like to hear more about the extent to which actual governments are representative of, or related to, peoples. For it seems that there needs to be some robust connection, if Rawls' theory is rooted in realism, as he claims it is. I think it is fair to grant Rawls' focus on peoples as entities enthusiastic for peace and cooperation—rather than entities in pursuit of domination, for instance. Nonetheless, it remains unclear that peoples, as they were described above,—having a moral nature, and robust internal cohesion—meet the conditions of minimal realism that constrain our project.

I press this issue because there are at least two alternatives to the use of peoples that Rawls advocates. First, we might argue that since we are abstracting away from the actual conduct of nations to find a 'moral baseline' from which to build a theory of global justice, then why rest with peoples? Peoples are somewhat unfamiliar conceptually; it is not even clear exactly how they are to be counted—persons can, presumably, belong to more than one people. Peoples are also unfixed, changing, and subject to revision. Why not instead make our moral baseline the person, which is a much more secure starting point, since we have some fairly well accepted principles and strong intuitions concerning the interests and the rights of persons? *If* it is possible to derive an account of global justice using persons rather than peoples as our principle actors, then it seems to me that this would be preferable.

This leads to a question concerning Rawls' methodology. We were told in *A Theory of Justice* that "one may extend the interpretation of the original position and think of parties as representatives of different nations who must choose together the fundamental claims among states." And this is, indeed, the approach that Rawls takes in his later work. However, it seems at least equally plausible to argue for an extension of the original position that includes all persons, and to say that they must select principles of justice for international affairs without knowing which country they will be born into. Such an extended interpretation of the original position will not obviously yield the same results as Rawls derives from his own extended interpretation of the original position, for the interests of persons who are members of a global order may not mirror the interests of representatives of the peoples who are members of a global order—it is plausible

to think that the interests of a people are not merely a function of the interests of its members. Beitz and Pogge (1979; 1989) directly challenge Rawls' extended interpretation of the original position as a debate between representatives of peoples.[18]

Rawls' response to this worry is clear:

> The difficulty with an all-inclusive, or global, original position is that its use of liberal ideas is much more troublesome, for in this case we are treating all persons, regardless of their society and culture, as individuals who are free and equal, and as reasonable and rational, and so according to liberal conceptions. This makes the basis of the Law of Peoples too narrow.[19]

Rawls' point is that to obtain our principles of global justice by way of a global original position prejudices the result from the outset, in a way that is unacceptable. He claims that such a method would lead to a Law of Peoples whose first principle would be that all persons have equal basic rights and liberties.[20] This foreign policy "simply *assumes* that only a liberal society can be decent. Without trying to work out a reasonable Law of Peoples, we cannot know that non-liberal societies cannot be decent."[21] I don't agree with Rawls that the use of a global original position assumes any such thing: if, in a global original position, it were held that non-liberal societies were in fact decent and well worth living in then there is no reason that they should be outlawed *tout court.* On the other hand, if it were held that such societies were not decent and not worth living in, it does not seem to be a matter of unreasonable prejudice that we rule against them.

Nonetheless, I do agree with a further point of Rawls': the analysis of a global original position is at best an unwieldy prospect. I find it difficult even to have a sense of which questions would be raised at this original position, let alone how they should be answered. For instance, the

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[18] Despite expressing some puzzlement at Rawls' selection of an original position between representatives of peoples rather than between persons, the thrust of Pogge's argument does not lie here. He argues that even if we concede Rawls' preference, the Law of Peoples that will be selected is rather different from that outlined by Rawls'; in particular, it includes a form of the difference principle which is supposed to account for inequalities in natural resources that cause some peoples to do better than others.

[19] *HR*, p. 66.

[20] *LP*, p.57.

[21] Ibid. p.58.

global original position appears to raise questions such as whether states will be formed at all, how they shall be divided, etc. I do not wish to pursue such questions here. Moreover, for the purposes of this paper—which is a discussion of the bases of human rights—I think that the *upshot* of a global original position and an original position involving peoples *as I characterize them* (to be spelled out below) is largely equivalent. There may be more differences between the two approaches when addressing those questions I have bracketed—questions of global distributive justice.

Thus while I am not persuaded by Rawls' arguments that a global original position is inherently problematic, I shall not pursue the possibility of a global original position held between individuals as the most appropriate basis on which to build a conception of human rights, since for one thing I do not think that a global original position yields, with respect to our concerns, significantly different results from the original position I shall propose; and for another thing I wish to focus primarily on Rawls' contributions to the human rights debate, which requires working within his framework.

I said, however, that there were at least two alternatives to the use of peoples that Rawls advocates, and should like now to consider the second of these. This draws on the fact that Rawls' "peoples" seem to be rather unrealistic, indeed romantic. I suggested that Rawls' analysis invites the thought that state boundaries are rather incidental to the fundamental moral concerns of international relations. This is because of the emphasis that is placed on shared history and culture, and a unified moral end. Nonetheless, there is also some reason to think that Rawls does not want to stray from the principle that peoples are unified under governments—and, as we know, governments have jurisdiction over precise territory. Consider the following:

> [A further reason for proceeding thus is that] peoples as corporate bodies organized by their governments now exist in some form all over the world. Historically speaking, all principles and standards proposed for the Law of Peoples must, to be feasible, prove acceptable to the considered and reflective public opinion of peoples and their governments.[22]

We cannot, however, have it both ways. We are to consider peoples as on the one hand having a moral nature, and a particular conception of themselves that is based on their shared history and culture. On the other hand, peoples are modeled on the "corporate bodies organized by their governments now exist in some form all over the world." But these accounts are not equivalent. To say otherwise seems to greatly exaggerate the unity of those who share government. As Rawls famously remarks:

> We assume that a diversity of reasonable religious, philosophical, and moral doctrines found in democratic societies is a permanent feature of culture and not a mere historical condition soon to pass away.[23]

Given that such diversity is going to characterize any society that is not unreasonably oppressive (and such societies will not meet Rawls' conditions to be members in good standing of the society of peoples), we can dispute the claim that a people, conceived as those grouped under a government, have any particular conception of themselves, based on shared history and culture, that unifies their social vision in a substantial way. Moreover, I think that since we are trying at least to *ground* our Law of Peoples realistically, there is good reason to take peoples as grouped under a government, since it is governments who wield political power.

I propose therefore that our notion of what a people is should *not* include the requirement that a people be in any way "bound" by any particular conception of themselves, whether it is a moral, a religious, or a philosophical conception. A people may be unified in its vision only in the following sense: each member will wish for the peaceful prospering of all reasonable individuals and groups who make up her people. My conception of a people retains from Rawls' the condition that peoples are concerned to conduct reasonable, considerate foreign policy, that is not threatening to other peoples but that is grounded in mutual respect and good will. I am wary, however, of any conception of peoples that holds their members to be unified in any more substantial way, and take seriously the fact of reasonable pluralism within each people.

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[22] *HR*, p. 50.

For the remainder of this essay, I shall speak of "societies" as groups organized around a common government; societies, like Rawls' peoples, are reasonable and rational. Societies do not necessarily have any particularly rich conception of themselves, though given that members of the same society share a political structure it *may* be that the society gains a sense of integrity from that (for instance, a society might have its own unique constitution). I use the term "society" in order to avoid the connotations of shared cultural tradition that I think "people" carries with it. I think that this slightly altered focus has consequences with respect to which principles are selected by representatives of societies in the original position. Crudely, since societies cannot be assumed to have any robust cultural or ethnic unity, representatives will be keen to ensure that members of their society are protected from possible gluts of power that may arise and attempt to impose any such unity on unwilling members of the society. To gain this assurance, representatives will need to subscribe to a strong set of international human rights.[24]

2.4 Characterization of the Original Position

Recall that the first two stages of Rawls' theory concern respectively an original position between representatives of liberal societies and an original position between representatives of hierarchical societies (I have also argued that the theory would do better—it would be more persuasive—if it were to combine these original positions). At each of these stages the relevant original position must mirror the use of the original position that is already familiar, that between reasonable and rational citizens in order to specify fair terms of regulation for the basic structure of their society. In particular, the original positions of the first and second stages mirror the previous use of the original position in the following four ways.

1. Parties are represented fairly and reasonably: parties are symmetrically situated, each free and equal.

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[23] *PL*, p. 36.

[24] Despite having switched from talk of "peoples" to talk of "societies," I shall retain the phrase "Law of Peoples" for the sake of continuity with Rawls' essay, although strictly speaking "Law of Societies" would

2. Parties are represented as rational: the selection of the Law of Peoples is based on societies' fundamental interests; in this case given either by a liberal conception of justice, or by a hierarchical conception of justice. Either way, the representative party has knowledge of the conception of justice her society endorses, and principles of the Law of Peoples are selected accordingly.
3. Parties are represented as deciding between available principles of justice to apply to the appropriate subject, in this case the content of the Law of Peoples (in the domestic case the appropriate subject is the basic institutional structures of society).
4. The reasoning of parties is restricted appropriately. Representatives do not know how large a territory or population is enjoyed by their society, nor how strong that society is economically or in natural resources.[25]

2.4.A Liberal Societies

It will be helpful to present briefly Rawls' account of what constitutes a liberal society, before we get to the heart of this paper, which focuses on the conception of a 'decent, hierarchical society.' Liberal societies, according to Rawls, have at least the following three characteristics: (a) a list of certain basic rights and liberties and opportunities for their citizens; (b) a high priority for these fundamental freedoms; and (c) measures assuring for all citizens adequate all-purpose means to make effective use of their freedoms.[26] Community or state interests may be important to a liberal society, but they will be important because they are grounded in a concern for the individual. These features may be realized through Rawls' own preferred principles of justice, or through some other means. Whichever is the case, it will be the task of representatives from liberal societies to defend such features—there should be no acceptance of principles in the Law of Peoples that will predictably disable a liberal state from the protection of (a)-(c).

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now be the more accurate phrase. I shall also occasionally speak of a "society of peoples," rather than a "society of societies," as a preference of style.

[25] *HR*, p.54.

[26] *LP*, p. 14.

3. Decency and Human Rights

3.1 Criteria of Decency

I turn now to the conception of a decent hierarchical society. Rawls' main motivation for the introduction of hierarchical societies is to dispel worries that his Law of Peoples would not express due toleration for societies that are not ordered according to liberal principles, but are nonetheless decent. Decency is important; Rawls is not of course concerned to extend toleration and cooperation to *all* methods of ordering a society. A hierarchical society will have to meet certain basic criteria of decency before it is to be considered as an equal member of the society of peoples, worthy of recognition and respect.

It need not be denied that in any particular instance the *best and most just* political arrangement will be, to a degree, relative to the history and the culture of the society whose lives it is to arrange. But a decent society is proposed as one which, irrespective of one's conception of justice, can be recognized as promoting institutions that treat people—both internal and external to the society—at least minimally well. The idea is that such a society will then be bound to be one that also honours human rights.

Interestingly, the notion of decency that Rawls uses is one of a minimum, as opposed to the sense of decency more frequently considered in moral philosophy, that classifies a decent act as one that is supererogatory—above and beyond the call of justice. For example, we say that while it would be decent of Smith to give generously to the Children's Hospice, this is not required of Smith by justice. Here we're looking at what is below and prior to the call of justice. I think it an interesting project to explore the connection between these two uses of the term "decency," but it's not a project I undertake here.

There are three main criteria that Rawls outlines as necessary and sufficient for decency, and the second of these is supposed to ensure the third, though the third is spelled out for the sake

of clarity.[27] First, a decent society must be not be aggressive and it must not have expansionist ambitions. Second, its legal systems will be guided by what Rawls calls a "common good conception of justice"—this rather obscure term will be explained it in just a moment. Third, a decent society must honour basic human rights. Indeed, if it has met the second condition of decency, it will *follow* that a society honours human rights. I'll now spell out these criteria of decency in some more detail.

The first seems straightforward enough: it follows from the idea that decent societies will be those that are willing to *cooperate* in normative international relations, and that recognize their treatment of other societies as governed by normative constraints that include specifications regarding the just conduct of war or intervention. Rawls is surely correct, in attempting to specify just terms of cooperation between societies, to include the requirement that a society not have aggressive aims and that it pursue its goals in peaceful and diplomatic ways. Historically, many hierarchical societies have not met this criterion, since where possible they have attempted to expand their domain of influence, often, particularly when the hierarchy is a religious one, in the name of the greater good of humankind. Consider, for example, the crusades of the Ottoman Empire during the Middle Ages, or the expansionist ambitions of European societies during that time and beyond. Nonetheless, for Rawls' purposes we need simply accept that it is neither necessary nor integral to a hierarchical society that it should seek to expand its influence in an aggressive manner. There is nothing, so far as I can see, in the nature of a hierarchical society that prevents its aims and values from being compatible with the independence of other societies to order themselves (within limits) as they see fit. Since it is somewhat tangential to the rest of our discussion in this section, I shall take the standard of non-aggression to be a criterion of decency without further argument.

Rawls' second criterion of decency is rather more complex. It involves the decent society's system of law, which, Rawls says, must be founded on a common good conception of

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[27] These criteria are slightly adapted from Rawls' statement of them in *LP*.

justice.[28] This means that the law, and, I should think, general public policy, must take into sincere and serious consideration the interests of all members of the society. Nobody's interests are to be overlooked by legislation or policy. This seems right intuitively: we do not think that legislation based on the idea that some persons' interests don't count is decent legislation—and it's this intuition that Rawls is driving at in his notion of a common good conception of justice. But how are we to ensure that such consideration takes place? Rawls suggests that we need *representation of and consultation with* any social groups united by status or cause—this will ordinarily take place through group representation. Furthermore, this representation must not be a mere formality: everybody's interests are to be carefully considered by the legislature, and any decisions made must be subject to public scrutiny and publicly justifiable. "Consultation" means that an account is owed people as to why policies and laws are thus and so. So, when somebody loses out, she is entitled to an account of this, for she is owed good faith consideration.

In order to complete this criterion, we need some account of what persons' interests are. To some extent this will vary between contexts—it will be different in liberal societies than in non-liberal, for example. But those interests that cannot be reasonably denied will emerge as human rights, which we'll get to when discussing the third criterion of decency.

Rawls wants to make clear that his conception of decency is not a liberal conception, and so explains that it may be met by hierarchical societies. In order to give a more vivid account of how a hierarchical society might operate along the lines just specified, Rawls invites us to consider the case of a university, which seems a useful case; the case is useful in part because while it illustrates how Rawls' criteria of decency are supposed to work; it is also useful because there is a point at which the analogy between university and society breaks down, and the example will thus come to illustrate some of the weaknesses in Rawls' application of his ideas.[29] In the university, there are clearly several different groups with various interests: students;

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[28] By a "common good conception of justice" I do not mean a good conception of justice that is held in common, but a conception of justice that takes into account the interests (good) of everyone it applies to.

[29] This analogy is to be found in an earlier draft of *LP*, as presented at a series of seminars at Princeton University in April 1995.

faculty; administrative staff; clerical and office staff; maintenance staff, etc., not to mention benefactors and alumni. Moreover, everyone affiliated with the university is a member of some group or another.

The university is organized around a conception of the good which will vary from institution to institution: one university may value prowess in the sciences more highly than prowess in the arts; some schools give a higher priority to teaching than to research; others are guided by a religious conception. When decisions are made that affect the whole university, the interests of each relevant group are considered, but they're not considered equally; a university doesn't follow a principle of majority rule: when redesigning a departmental building, for example, the interests of faculty may be given greater consideration than the interests of students. Thus the university clearly appears to be a hierarchical system, yet it nonetheless operates through reasonable methods of consultation.

When a society's system of law is appropriately guided by a common good conception of justice Rawls claims that two things occur. One, all members of the society consider themselves to be *morally* bound by the law—so even the worst off people are reasonable in thinking that the law has moral force; and, two, there will be sincere belief on the part of the judges and other officials in the legislature that the law is indeed guided by a common good conception of justice.

Once unpacked this criterion of decency is surprisingly rich. For example, imagine a Nozickean society in which public officials offer an explanation as to their redistributive taxation policy to the impoverished soul who wonders why she and others like her do not do better. The officials explain that taxation is on a par with forced labour: it would be very nice if people chose to provide basic services for those less fortunate, but certainly they, the officials, may not institutionalize forced labour in order to meet this need. Our impoverished victim may now protest that this conception of justice fails to be a common good conception, for a common good conception takes seriously the interests of all those affected by it, but surely persons' basic interests in subsistence and dignity mean that no common good conception of justice could fail to redress extreme poverty in the face of affluence, and nor could any sincere official believe that it could.

Indeed, Rawls believes that his second criterion is sufficiently strong to unpack an adequate conception of human rights; this, following as it does from the second, was the third criterion of the decent society—a decent society must respect human rights. Human rights are thus checkpoints of decent treatment.

Central to the human rights that Rawls specifies are: the right to life (to the means of subsistence and security); the right to liberty (to freedom from slavery, serfdom and forced occupation, and to liberty of conscience insofar as it is required for freedom of religion and thought); the right to personal property; and the right to formal equality under the law, viz., that similar cases be treated similarly.[30] Also important are: the right of representation, the right to question and protest the law, and the right to a fair explanation of law.[31] Human rights are, Rawls is keen to point out, distinct from constitutional rights, from the rights of democratic citizenship, or indeed from any other rights that are identified with a particular political association. Nonetheless, the human rights just mentioned set definite limits to a tolerable political order.

This account of human rights is simply an interpretation of what decency—as outlined—requires. Since the common good conception of justice was required to take into consideration everyone's interests, and interests are in many cases relative to the social context in question, what emerge as *human rights* appear to give content to those considerations that cannot reasonably be denied to be in persons' basic interests. Hence it can't reasonably be denied that a person has a basic interest in subsistence or security, etc. In light of this interpretation Rawls' inclusion of private property on his list of human rights strikes me as rather out of place: surely the holding of private property is a basic interest only relative to certain traditions? But no matter. The rest of the list seems innocuous enough. I shall now argue that something like article 21—the right to participate in the government of one's country—ought also to be there, in consistency with what has already been said concerning decency. In this I appeal to you that it can't

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[30] See *LP*, p. 43.

[31] We should note, as this will be important later, that it follows from these considerations that no society can be a decent society unless its members are allowed a substantial role in making political decisions. This is a laudable part of Rawls' theory, though it does not, I believe, go far enough.

reasonably be denied that a person has a basic interest in feeling that she *belongs* to her society rather than that it is hostile to her; and—borrowing from the work of Avishai Margaiit—that a person has a basic interest against being humiliated.[32]

3.2 Human Rights and Cultural Pluralism

I want to pause at this point to comment on the basic aims of a human rights theory, and to revisit the challenge from cultural pluralism—as was mentioned in my introduction—that any account of human rights faces.

I take a conception of human rights like the Universal Declaration to be premised on the idea that certain ways of treating persons—whether through political arrangements or interpersonally—are not moral options. And they are not moral options because they pursue treatment that each person as such has a claim to be free from. Such treatment we categorize as inhuman, degrading, inappropriate for a *person*—with the underlying assumption that this treatment may be appropriate for things other than persons—animals, perhaps, cabbages or bicycles. In order to make any such assumptions, a conception of human rights apparently needs a prior conception of the person, and an account of what concerns us about persons as opposed to animals, cabbages, or bicycles.

One might now ask why this is not a paper in metaphysics, rather than in political philosophy. Well, for one it does have elements that might loosely belong to both, but, more importantly, a further consideration to note about human rights conceptions is their political setting. I have already said (in my introduction) that I think some of what we take to be our human rights are rights that make sense only when viewed in a political setting. This is why I believe that an informative way to specify human rights is *via* a political conception, such as that of the decent society. And this in turn means that we do not need a metaphysical account of the person so much as an account of the *political person* that underlies a conception of human rights. Insofar as she is a part of and affected by the institutions and policies of her government and her

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[32] Avishai Margalit, (1996), *The Decent Society*, Cambridge, Mass.: Harvard University Press.

society's laws a person has a political identity *qua* citizen, and it is this identity that—or so I claim—concerns a human rights conception, rather than any more contentious metaphysical identity, or even the richer sense of identity that results from a person's private, or individual, preferences and choices.

Now, consider article 1 of the Universal Declaration of Human Rights:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

And this sets the stage for the rest of the declaration. Conceptions of human rights claim to be universal in scope: they assign a set of basic rights to all human beings as such. However, such conceptions are frequently criticized as sectarian in their underlying philosophy, and are accused as consequently intolerant in an objectionable way. While human rights are claimed to apply to every person, regardless of her culture, ethnicity, or tradition, the ideas that are typically put forward by a conception of human rights are said to be Western, liberal ideas, founded in an allegedly "individualistic" spirit. Specifically, a conception of human rights is, by definition, a conception of *rights*, and is hence bound to be focused on the individual and her entitlements; the individual is conceived in a particular way, as the primary and basic unit of moral concern. But this emphasis may be alien to some traditions, if they conceive of the individual first and foremost as embedded in social relationships that assign to her a particular role having its own set of duties and responsibilities. The criticism is, then, that the usual conceptions of human rights are unfairly critical of societies not ordered according to principles of liberal individualism, but which nonetheless do not deserve such criticism: their members are treated well.

Of course, a conception of human rights has many elements, some of which—the claim that no one shall be held in slavery or servitude, for example—are less controversial than others. The proposed human right that we are considering in this paper is the right to political participation. Recall article 21, part 1 of the Universal declaration:

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

This article, interpreted as asserting that everyone has the right to take part in the government of her country, would be taken by many philosophers—western philosophers included—as too

strong to be appropriately asserted as a human right. In particular, Rawls specifically excludes from his conception of human rights anything akin to article 21. To include this article among our conception of human rights, Rawls would claim, would simply assume that the liberal conception of political person alone deserves merit.

My claim, however, is that the conception of the political person that is implied by our preceding account of the decent society—not the liberal society—is what generates support for article 21. Whether this conception of the political person turns out to *coincide* with the liberal conception of the political person is a further question. I think the two do not coincide exactly—though of course they overlap in part—I shall touch on the reasons for this in sections 3.4.c, 3.5, and in my conclusion.

The rest of this paper has two aims. One is to offer a defense of article 21; I shall argue that a right to political participation will be included in any adequate conception of human rights. But that can only be seen once we know how to go about specifying an adequate conception of human rights. Thus the second aim of this paper is to continue discussion as to how this might be done—in the light of the skeptical criticism concerning the status of human rights outlined above. We already have a sketch of the decent society. My claim—like Rawls'—is that a decent society will be one that upholds human rights. Thus once we have got more fully on board a conception of the decent society and what the conception of the political person is that motivates it, we shall also understand what conception of the political person underpins an adequate conception of human rights—by definition not a liberal conception of the political person, but a decent conception of the political person. From here we can go on to say which human rights are supported by this conception. I argue that article 21—among others of course—is supported by this conception.

3.3 Decency and the Right to Political Participation

3.3.a Accountability

Recall that when Rawls gave his account of decency, he wanted explicitly to deny anything like article 21. Rawls' general worry with article 21 would be that its inclusion would make the basis of his conception of human rights too narrow, too committed to liberal values that might

reasonably be rejected. But my claim is that article 21 follows readily from the principles of decency that were outlined in section 3.1, and moreover that the view of persons as fundamentally embedded in social relationships, with all the duties and responsibilities that brings, is quite compatible with these principles.

In order to make this point, I'll work with another of Rawls' examples. The example is fictitious, but it is not far removed from an actual Islamic society. The example is of a society, the Kazanistan, where Islam is the favoured religion, and only Muslims can hold the upper positions of political authority and influence the government's main policies.[33] Rawls claims that this society can meet his conditions of decency: the society is not expansionist; it is allegedly ordered according to a common good conception of justice that takes into consideration the interests of all its members, and it consequently upholds human rights. We can equally well imagine a society in which women are similarly excluded, or persons perceived to be of a certain race. Let us consider what we should think about this example.

To reiterate, the claim that is up for inspection is that a society may be decent and yet exclude certain classes of reasonable adult persons from holding political office and participating in their government.[34] We're not, of course, considering societies that enforce their policies of political exclusion through clearly illegitimate coercion. Clearly illegitimate coercion includes such measures as physical abuse, or blackmail on economic or psychological grounds. I take it that if a society uses such measures to gain its members' compliance, then that society is at least not decent. However, Rawls' Kazanistan is specified not to be such a society.

Since, as argued above, under a common good conception of justice whichever group wields political power in any given society is *accountable* to the rest of that society as to their decisions and policies, we can suppose that the Kazanistan hierarchy must be able to explain its policies in a way that is satisfactory to all reasonable members of the Kazanistan society as taking

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[33] See *LP*, p.52.

[34] Of course, all societies exclude *some* classes of persons from political office. Children are usually excluded, for example, along with the mentally infirm. I do not have such cases in mind here, but rather the controversial cases in which there is no obvious connection between the group excluded from political

their interests into serious consideration. Thus, I'm going to look at the question: what justification could be offered for these practices, and how should it be received?

3.3.B THE JUSTIFICATION FROM COMPETENCE

Could the justification for hierarchical exclusion on the basis of religion be that those excluded from political office are simply not competent to perform the tasks of political office? Well, I assume that one's religious category does not correspond to any cognitive abilities that one possesses. Then, insofar as the criteria to do a good job in political office correspond to certain cognitive capacities encompassing the ability to understand social, political, economic, and moral issues, or to one's resourcefulness, the exclusions from political office on the basis of religious affiliation are not connected to a competence to perform the work at hand. I say "insofar as"; of course, it is not true that a holder of high political office achieves excellence through her cognitive apparatus alone. She is also required to "in touch with" those she represents or governs, and, perhaps especially relevant to this theocratic regime, motivated to uphold the conception of the good that her society is founded on—here, that conception is Islam.

Recall the case of the university. It is not uncommon for universities to employ only those who share their particular mission. Consider the following advertisement in this year's *Jobs for Philosophers*: "College X is a comprehensive liberal arts college rooted in the Reformed tradition of historic Christianity. Applicants should express their understanding of and commitment to this tradition in their letter of application." Perhaps this advertisement was so worded because College X believes that persons committed to the reformed tradition of historic Christianity will do a better job than others teaching at their school.

Similarly, in the Kazanistan society the claim would be that those who are fully committed to Islam—Muslims, presumably—are likely to do the best job in high political office. But why should this be? I don't think it can be because non-Muslims are not fully able to *understand* the tenets of Islam—they can, surely, understand the meaning of such as well as

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office and their ability to perform the tasks required in holding political office.

anybody else; what they lack is faith, not understanding. Perhaps the claim is one of motivation, loyalty, and commitment rather than understanding: in order to complete the long and arduous hours necessary to perform in high political office one must be completely committed to the conception of the good that one's society endorses. Now there may be some truth in this, but I doubt that there is any firmly robust connection between the extent of one's faith and one's ability to work for a public good that upholds that faith. In the Kazanistan case, for instance, it appears to me quite plausible that non-Muslims should have sufficient loyalty to and interest in their society to do a fine job in the affairs of state, *despite* the fact that their state is ordered according to a conception of the good that they do not share. This is because on the one hand there are many aspects of public office that do not, even in a society ordered according to a religious conception, essentially concern religion; and, on the other hand, it is very plausible to expect a person to have loyalty to her society over and above its particular religious conception.

One might be left, however, with the doubt that admission of non-Muslims to political office, while it need not *necessarily* undermine the integrity of Kazanistan, would certainly constitute a threat to such. As I have said, I think there are reasons why this would be an over-reaction. Moreover, if somebody *is* inclined to think that sufficient loyalty and commitment for the demands of political office are *unlikely* in a person who does not fully share her society's conception of the good, then I think that she also has to concede that this provides some reason *against* the exclusion of non-Muslims from such offices. This is because, as we have seen, non-Muslims must be represented politically, and thus insofar as there is scepticism regarding the adequacy of representation by somebody of a different religion, there is also reason to allow non-Muslims to perform this task themselves—most straightforwardly and reliably through holding political office themselves.

I shall take it, then, that the justification for hierarchical exclusion from political office will not plausibly draw on arguments concerning the *competency* of those excluded to perform the task. We shall have to look elsewhere for our justification. And looking elsewhere we shall most likely find an appeal to necessity,—the social hierarchy is preordained to be such and such a way—to tradition, or to some aspect of the system that indicates why one might think it does successfully fulfill the task of entertaining in a serious fashion everybody's interests. I shall spell

out two such justifications, in order to get a better appreciation as to how these arguments might proceed.

3.3.c Two Further Justifications and a Probable Response

First, we can imagine an appeal to necessity. In the case of the Kazanistan it might be proclaimed that hierarchical exclusion from political office is based on the authority of Allah. Political leaders recognize that this authority is not fully appreciated by non believers, and so the assertion is made considerately; it is nonetheless concluded that, all things considered, political exclusion does not conflict with the requirement to consider the interests of non believers—despite their claims otherwise.

A second form that the justification we are seeking might take is a justification that focuses on a particular aspect of the governing system, and indicates that this aspect enables the system successfully to fulfill the task of entertaining in a serious fashion everybody's interests. The appeal I have in mind is one to *virtual representation.* Virtual representation is best recognized rather ignominiously in American history as the British response to its American colonies' complaint of "taxation without representation." The colonists complained that it was unjust to impose taxes on them when they lacked the privilege of sending representatives to parliament. In response, the British argued that while it was true that the colonies didn't have an elected representative, they were "virtually represented," just as many towns in England that didn't send representatives to Parliament were also virtually represented. For X to be virtually represented by Y meant that Y's interests were so caught up with X's that when Y's interests were met, it could not fail to be the case that X's were also. Kazanistan leaders might in this way appeal to those excluded from political participation that while they may not elect or otherwise obtain political representation from members of their own group, this will not hurt their interests any, because they are virtually represented.

I just presented two possible justifications that may be offered by Kazanistan officials to those excluded from political power. How should these be received? I divide my response here into two parts. I outline first what I think the *very probable* response to such claims might be, and I argue that when this response is provoked the society in question can no longer be said to affirm

a common good conception of justice. Second, I push the point further: there is good reason, I think, to assert a conceptual incompatibility between justifications of the sort just offered and a common good conception of justice. The incompatibility arises, I believe, because these justifications depend on our permitting members of the Kazanistan society to suffer systematically humiliating treatment at the hands of their governmental institutions. But, as I appealed earlier, it is surely plausible that persons have a basic interest against such forms of humiliation, and thus if such humiliation is engendered the society responsible cannot be ordered around a common good conception of justice.

One very *likely* (though not inevitable) response to these justifications is that excluded members of the hierarchical society will, upon free consideration of the rigidity of the political structure that they live under, feel strong hostility and eventual disloyalty towards those who are privileged under such rigidity. This outcome is fairly familiar, and we can imagine various scenarios, from peaceful civil disobedience, if that is possible, to outright revolution—this was, of course, the colonists' response to the British argument of virtual representation. The particular result will depend on how deeply unjust those protesting take their society to be. In any case, it does not seem plausible to me that a society that systematically generates such resentment and tension can be said to be founded on a common good conception of justice. Obviously, the society is not considered satisfactory by a sizable number of its members. Any common good conception would have, then, to claim that despite their strong beliefs to the contrary, these persons are in fact included in the conception of what is good for that society.

But this is implausible. It is implausible because the view that one is excluded from a common good conception of society—at least if this view is held by sufficiently large numbers, and is resentfully held—is self-validating. I suggest that it can't be denied that one has a basic interest in not feeling a deep-seated hostility against the society one lives in; thus insofar as that society generates such hostility and fails to act against it, it cannot be arranged around a common good conception of justice.

This gives us good reason at least to be *sceptical* of excluding article 21 from our list of human rights. It is, however, an empirical reason and does not provide us with any more conceptual endorsement for the universal status of article 21. For it may very well be that those

who are discriminated against by political hierarchies *feel no such hostility* towards their privileged counterparts. This is, presumably, the case in the Kazanistan society. Indeed, we do not have to rely on imagination: consider the status and self-conception of women in Saudi Arabia, for example. But, and here my claim becomes more controversial, in such cases too I claim that such a hierarchical system does not meet our conditions of decency. This is because the system at best treats its members in a humiliating way.

3. 4 Humiliation and Decency

3.4.a An Account of Humiliation

Humiliation, I think, is not only a personal, psychological attribute. It is not the case that one is humiliated if and only if one feels humiliation; nor is it the case that one treats others in a humiliating way if and only if one realizes that one does. It is perfectly possible not to feel that one is treated shabbily even though one is—one may be too downtrodden to expect anything else, for example; and it is also possible—and for similar reasons—not to feel that one treats another shabbily, even though one does. Moreover, the humiliation of groups is as real as the humiliation of individuals.

Consider dwarf tossing contests. Dwarf tossing is a competition in which contestants pick up dwarfs, who are wearing harnesses, and heave them as far as possible at a padded target.[35] Presumably, such contests do not use unwilling dwarfs; nor need contestants feel contempt towards the dwarfs they toss. There is, nonetheless, a clear sense in which dwarfs are being used merely as objects for amusement; and there is a definite urge to say that such contests treat dwarfs—and not just the individual dwarfs involved, but all dwarfs—in a humiliating way, whatever the dwarfs themselves or the participating contestants think of the matter. This is

[35] Gov. Mario Cuomo signed legislation banning dwarf tossing and dwarf bowling in New York bars, calling such activities a "strange diversion." Dwarf bowling is apparently an offshoot of dwarf tossing, in which a helmeted dwarf is strapped to a skateboard and rolled into bowling pins.

because, or so I contend, dwarf tossing objectifies dwarfs in a way that fails to ascribe to them the dignity due to any adult human.[36]

This is not to deny, of course, that a quite proper response to one's being humiliated is that one undergoes a feeling of humiliation; all I say is that this need not be so—one may have good reason to feel humiliated but fail to recognize it. I take it that this much is plausible—even though we have not yet specified what appropriate objective standards of humiliation might be. We must now consider how to do this.

Margalit, in his book *The Decent Society* offers the following account of humiliation: "Humiliation is the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans."[37] Margalit seems to be claiming that there are ways of treating human beings that are inappropriate because they are *persons*, rather than tools, animals, or subhumans. However, as we have acknowledged, this idea needs to be made more precise since conceptions of the person vary between different philosophies, and in particular the conception of a person is different in a liberal society than in a hierarchical one. For instance, in the former persons are viewed as entitled to an equal range of opportunities while in the latter they are not. Nontheless, insofar as our conception of the decent society made good our ambition to outline the structure of a society that is recognizable, regardless of one's conception of justice, as treating its members adequately well, we have the tools to outline an objective account of humiliation. What we need to do is to extract, from the conception of the decent society, the conception of the person that underlies it. Since the decent society is a political construction, this will be a political conception of the person rather than anything more metaphysical. My proposal is, following Margalit's basic idea, that to treat somebody as less than this conception of the person recommends constitutes treating them in a humiliating fashion. I thus propose the following principle:

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[36] If you do not find this example persuasive as such, imagine that the practice of dwarf tossing were ritualized sufficiently such that dwarfs could not be said to participate willingly, but only from a sense of inevitability or inertia.

[37] Margalit, *op. cit.* p. 121.

The principle of humiliation

> A justification of institutional practices is properly regarded as humiliating to some class of persons X when it strongly negates the political conception of the person that all decent societies may reasonably be expected to endorse in the light of their guiding principles and ideals, and justifies treating members of X as less than this conception recommends.[38]

I shall say that when a justification satisfies this principle it is reasonably called humiliating. (Note: I do not say "when and only when" because I do not wish to deny that justifications may also be humiliating—in a given context—when they do not accord with the norms of *particular* societies, but I offer this principle as a baseline by which to recognize humiliating treatment.)

3.4.B The Political Conception of the Person in a Decent Society

In order to flesh out this account of humiliation we obviously need to spell out the political conception of the person that underlies our account of the decent society. Recall that Rawls' account of decency proposed that persons were owed political representation, consultation and, if needs be, explanations that would at least demonstrate that policy makers had taken their interests into consideration in a reasonable and sincere way. Thus, when a non-Muslim member of the Kazanistan is denied a position of political authority, she is owed an account of this policy; attempts are made to persuade her that her exclusion is in fact a part of an overarching common good conception of justice.

But why should the account of decency include these features of representation and consultation in the first place? We now have to motivate our initial account of decency some more. Rawls does not elaborate a great deal on this, but there seem to me to be at least three reasons to include these basic features of representation and consultation. One, we recognize,

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[38] I use the terms "conception of the political person" and "political conception of the person" interchangeably, substituting one for the other for stylistic reasons only.

from past evils, the need to guard against unchecked balances of power. We thus incorporate into our conception of decency a sense of *humility*: any decent society recognizes the potential terrors of dictatorship, and no decent society regards itself as immune—without incorporating institutional checkpoints—from abuses of power. Consultation with and accountability to those governed are therefore of the utmost importance. Furthermore, a decent society allows for the possibility of good faith error on the part of its leaders: they may err in some aspects of public policy, and thus in order for them to demonstrate a *good faith* belief that the society's institutions uphold a common good conception of justice, consultation with those they govern is required. A decent society therefore invites opinions regarding its political structure.

Finally, bound up in standards of decency is a simple motivation to treat people respectfully—with some dignity. We need not assume that people are naturally free and equal in any robust or comprehensive sense—that they are entitled to the same opportunities, or similar sets of resources, for example—but we do recognize that persons are due respect, and furthermore that it is respectful to consult others' opinions as to the common good that they are a part of. It is recognized at least that to deny people this much would be humiliating to them.

From these suggested motivations for the decent society, we may infer that persons are considered, politically, in the following way:

1. As rational, and aware at least of the interests of the groups that they are members of;
2. As reasonable, for they are able to respond to reasoned explanation;
3. As capable of forming a conception of justice, for they are consulted as to the common good;
4. As fallible, for available consultation and explanation suggest that the fallibility even of policy makers is recognized;
5. As engaged in reciprocal relationships—the requirement of consultation suggests a system in which people are accountable to one another, since they are engaged in attempts to present their views in the light of a reasonable conception of the common good; and
6. As creatures whose interests are inextricably (and most likely permanently) bound up in the political structure of which they are members.

This political conception of the person that is proposed by our account of decency is one that begs against institutionalized social exclusion and institutionalized paternalism. It suggests instead that we recognize persons politically as facing common problems, and as owing one another an account of their political behaviour. But what occurs in the cases we've been considering, such as the Kazanistan case, is that we encourage fraternity and social inclusion right up to the point at which it matters most: the decisions that effect social change. This, those excluded may claim, on the one hand *affirms* our status as an full *members* of society, while at the same time *negating* this; at the same time saying to us, sorry, you are not really a part of what is crucial to this society. This treatment seems is rather like playing permanent reserve on a sports team: we are told that we are good, important, invaluable, but we never get to play, nor can we even hope to play. But we are as involved in our societal structure as you are; we are just as committed to its upkeep and prospering. Indeed, you allow us to speak, you understand that you are not to consider our interests in any such way, and you offer us justifications of your laws and policies, thus respecting us with standards of reciprocity. But now, when it matters most, you exclude us. This runs quite contrary to the conception of us we know you endorse, and exempts yourselves in a way that we know you accept is suspect. This dual sword of recognition followed by rejection is just as humiliating as no recognition at all!

We do not, the excluded Kazanistan continue, demand that you give a high priority to our capacity for self-determination; and we do not wish for the freedom to reject our traditions, nor to govern all aspects of our lives. Such is not how we conceive of ourselves. We remain committed to our associational ties insofar as they do not necessitate the public humiliation of our group. Thus we do not claim that certain of the priorities enjoyed by Muslims are illegitimate, and nor do we charge illegitimacy against hierarchies in certain other professions. It isn't, in fact, the *content* of these political decisions that we find objectionable, so much as the fact that we are excluded from the *process* of making them. It is one thing not to like the *outcome* of a debate; it is another thing, and we appeal to you a more fundamental thing, not ever to be allowed to participate in the debate. It is the latter that we find humiliating, because this shuts the door to us at the heart of our society. We point out that you already conceive of us as rational creatures, whose opinions concerning the public good may be wise and useful, and we emphasize how important these

opinions are to us. And thus we ask that you not merely consult us in this demeaning way, but allow us full participation, for we are a part of this social structure, just as you are.

But if these claims are right, then any justification for the exclusion of rational adults from political participation would negate the political conception of the person that all decent societies may reasonably be expected to endorse—that of a rational, reasonable adult, belonging to a group or groups whose interests and concerns are inextricably and importantly bound up in her political society. And so such exclusion would satisfy the humiliation principle. Thus if we agree that persons have a basic interest against being humiliated by the institutions that govern her, then we have a conceptual reason—as well as the skeptical worries regarding hostility that were raised earlier in 3.3.c—to deny that a society which practices hierarchical exclusion in the political sphere can be ordered according to a common good conception of justice, and so to include article 21 in our list of human rights.

3.4.c Objections to the Account

Two objections remain. The first claims that my account of humiliation is too strong; the second that it is not strong enough. In the first case, somebody might express some doubts about the objective nature of my account. It appears, for instance, that I assign a good deal of weight to the 'Political Person.' But somebody might, plausibly, reject a conception of herself as in any way 'political;' she might, for instance, think of herself in terms of her 'religious person,' and as such consider herself (on some accounts) unfitting to hold any type of political office. Is it, on my view, a demonstrable mistake—since it is humiliating—for people to reject the 'Political Person' in favor of the 'Religious Person,' or to put priority on the latter over the former?

This question revisits my claim that humiliation is best understood as an objective matter. The question might be considered in two components. (a) Is it plausible to say that somebody who eschews her political identity and consequently does not feel humiliated by the institutions that deny her a right to political participation really is humiliated by such? (b) If we agree that such exclusion is humiliating, need we also say that those persons who nonetheless accept it are at fault, in need of guidance?

It is worth noting at the outset that somebody might "eschew her political identity" both by choosing not to participate or be involved politically, or by embracing laws that prevent her from participating politically. It is an interesting question whether the former might correctly be called "humiliation of oneself," but in any case it is the latter I am concerned with here. In the case of (a), I repeat my earlier claims. I think it intuitively plausible that there should be *some* objective account of humiliation. That is, I think it possible to reprimand somebody thus: "you are treating X in an humiliating fashion" without it being the case that X feels the humiliation herself. As corroboration of this, it is not unusual for people to agree that certain ways of treating animals humiliate them—when animals are dressed up in children's clothes, for example—despite it being highly unlikely that animals feel any corresponding sense of humiliation. Indeed, it seems common enough for a person's psychological state of humiliation to outrun good reasons for humiliation at either end: a person may feel humiliated for no reason or without good reason (perhaps because her self-conception is unrealistically high, or because she feels humiliated by events beyond human control, such as certain aspects of her physical appearance); and a person may not feel humiliation when there would be good reason for her too do so (perhaps she is particularly thick-skinned). Having said that we cannot rely on psychology to recognize humiliating treatment, we need to say something about the standards that such objective humiliation might plausibly take.

Clearly, such standards will say something about permissible ways of treating persons, as opposed to other things. And so I suggested that we try to find a conception of the person that underpins our intuitions about treating persons minimally well—decently. Those were my reasons for taking the conception of the person as it emerges from the decent society as providing the objective standards of humiliation that we need. According to this conception each person or at least each social group is affirmed as an important, worthwhile part of society. It is then my contention that *mere exclusion* from the processes of government constitutes rejection from the core or roots of one's society, and rejection of the affirmation that one is an important and worthwhile part of that society. This is why it strongly negates the decent conception of the person that I outlined. Hence my response to (a) is that yes, it is plausible—for the reasons just given—to say that somebody who eschews her political identity and consequently does not feel

humiliated by the institutions that deny her a right to political participation really is humiliated by such.

(b) Raises slightly different issues. I don't think we need say that people are at fault simply because they hold a different perspective on what counts as humiliation, nor that they are irrational to hold such a perspective. What we do have to accept, however, is that since we believe there is good reason to hold *our* position, and indeed that freedom from humiliation is, in a political context, sufficiently important to ground certain of our human rights, this warrants *inter alia* the imposition of substantial pressure on governments that do not offer their citizens, or certain of their citizens, rights to political participation.

I said that there were two objections I wanted to consider. The second of these claims that my account of humiliation does not go far enough. Insofar as it is humiliating to be denied political participation, this argument would run, the same can be said of many of the civil rights that are associated with the liberal society. Thus just as it is humiliating to be excluded from political participation, isn't it also humiliating to be excluded from pursuing various other projects? Suppose that Paula's ambition in life is to become an astronaut, but her society dictates that women cannot become astronauts. Isn't Paula's exclusion from her chosen profession also humiliating, and oughtn't the laws be changed so that she isn't excluded in this way? But then we should want to say that a society's institutions are humiliating unless they protect fair and equal freedom of opportunity across the board, which sounds very similar to a liberal society.

My remarks on this matter are somewhat tentative. First, I should like to point out that what I have been interested in constructing are the *justificatory bases* of human rights as they feature in a Law of Peoples. This was an effort taken up in response to the criticism of human rights conceptions that marks them as justified only from specifically liberal premises. The premises I used in my justification of article 21, and of a human rights conception more broadly, were not specifically liberal: they were Rawls' principles of the decent society, along with the claim that a person has a basic interest against being humiliated by the political institutions she is subject to. These justificatory bases say nothing about viewing the individual as the primary unit of moral concern, nor of prioritizing the requirement that individuals gain as much freedom and

authority over the most fundamental aspects or choices of their lives as is compatible with the like freedom of every other adult. The latter I take to be specifically liberal premises. But I have not used such claims in arguing for my account of human rights.

This leaves us in the following position: it would not in fact be harmful to my original project if the concept of humiliation did in fact turn out to justify more than I have so far argued for. Nonetheless, I am inclined to think that my account so far still allows for some space between the liberal society and the decent society.

Consider the above argument that it is just as humiliating to be excluded from political participation as it is to be excluded from pursuing various other projects, or professions. We gradually arrive at the result that it is humiliating for persons not to have fair, free and equal opportunity regarding at least their most important life choices and projects. And this would, perhaps, undermine the legitimacy of certain institutions that we took to be characteristic of non-liberal regimes: institutions promoting a state religion, for example, or laws against the participation of certain social groups in particular professions.

I do not think, however, that such institutions are undermined by what has so far been claimed. In fact, I think that any argument to the contrary wrongly assumes too great a similarity between the political sphere and other types of work. When the doors to other professions are closed, or other options denied, the effect is not so dramatic. Perhaps doctors, in any given society, are traditionally males of aristocratic heritage; teachers are members of an assigned religion; and the military is composed only of those with a particular indigenous heritage. Such cases may not be unproblematic, but they are different for at least two reasons. First, unlike positions of political influence, these professions do not—or at least do not to the same degree—shape the structure and character of one's society. Political participation is a pervasive asset. And this is important not because people are to be affirmed *as much influence as possible* over their society, but, more negatively, because exclusion becomes—or so I contend—more humiliating the more central and pervasive a matter it is that one is excluded from.

Second, and perhaps even more important, it is through the political and legislative sphere that appeals and alterations may be effected in the formal make-up of other professions, and not vice-versa. And this is important if we think it important that a decent society must have

some procedure by which to assess the legitimacy of its institutions. For example, if those excluded from political office in the Kazanistan society were to find this unsatisfactory, there is no further court of appeal. (And especially not if our internationally sanctioned code of human rights contains no article 21.) Thus denial of political participation is stifling in a way that denial of different sorts of options is not.

Notice, as alluded to earlier, that our analogy with the university falls apart at each instance here: a university does not constitute, ordinarily at least, one's whole life and the lives of one's children; moreover, if one finds oneself in deep disagreement with the policies of a university there are outlets of redress. The comparison of society to university is at least in these respects inapposite.

3.5 Summary of Section 3

To take stock, I review the main points of argument over the course of section 3. I drew attention to a problem that human rights conceptions face: how are we to show that while such conceptions are presented as universal in scope, they do not in fact represent values that are peculiar to the western liberal tradition, and reasonably rejected. I then drew on the account of the decent society sketched earlier as used to establish, in Rawls' theory, a baseline for cooperation and toleration between societies as they collectively form a society of peoples. This conception of decency was proposed as one that is recognizable, irrespective of one's conception of justice, as establishing institutions that treat its members in minimally decent ways. I suggested that a decent society would be one that upholds human rights, and that we may thus find, in the principles that guide our conception of the decent society, principles to ground a conception of human rights. This is done in the following way. The common good conception of justice that we held as a criterion of decency would, we observed, take into consideration everyone's interests. Those interests—such as, I claimed, freedom from institutional humiliation—that emerge as basic according to a society honouring a common good conception of justice will be protected as human rights.

I argued that the decent society is motivated by a particular political conception of the person and that, in consistency with this conception, a decent society will uphold article 21 of the

universal declaration of human rights, which asserts a right to all to participate in their government. I claim that while the political conception of the person that motivates the conception of a decent society has features in common with the liberal-political conception—it holds that in the political sphere a baseline of dignity must be recognized in all persons, for instance—the justificatory bases of this conception are not specifically liberal: in particular, they do not show a fundamental respect for the alleged capacity of persons to pursue their own projects and form their own conception of the good; rather, what is emphasized is a person's *inclusion* in her political structure, via her membership in a group or groups that are fundamentally affected by the political structure. I suggested that to recognize these things, along with the rights of accountability from those in political power that everybody holds, but to formally deny certain groups participatory rights is to exclude and reject them in a humiliating way. Any proposed justification of the claim that a society may be decent and yet exclude certain classes of reasonable adult persons from holding political office and participating in their government thus satisfies the humiliation principle, is humiliating, and something that those persons have claims to be free from, in a decent society.

4. TOLERATION REVISITED

If I am right in my claim that a set of human rights strong enough to include article 21 is strongly *implied* by the conception of Rawls' decent society, then how are we to account for the fact that he was strongly motivated to *deny* that such a strong set of human rights follows from his conception of the decent society?

In this section I shall revisit some of Rawls' aims in his construction of the Law of Peoples, in order to better understand his motivation to include only an attenuated set of human rights as providing the parameters for his principles of the Law of Peoples. I think this important because while I have argued that a right to political participation follows from the account of the decent society that we have been working with, some people may, if they are strongly motivated against the inclusion of such minimally democratic rights as a part of the Law of Peoples, prefer to revise the account of decency than to give up this motivation.

4.1 THE MOTIVATION OF TOLERANCE

(A) There is a motivation that the Law of Peoples be *inclusive*, or that it should require a strong set of liberal rights to be endorsed by all participatory societies in good standing.

I have, of course, already referred to (A) at previous points in this essay, but now it is time to flesh it out and see what principles underlie it. Rawls gives explicit endorsement of (A):

> We recognize that a liberal society is to respect its citizens' comprehensive doctrines—religious, philosophical, and moral—provided they are pursued in ways compatible with a reasonable political conception of justice and its public reason. Similarly, we say that provided a non-liberal society's basic institutions meet certain specified conditions of political rights and justice, and lead its people to honor a

> reasonable and just law for the Society of Peoples, a liberal society is to tolerate and accept that society.[39]

The general concern is familiar from *Political Liberalism.* In this work, Rawls identifies his primary concern as the following. How is it possible that there may exist over time a stable and just society of free and equal persons profoundly divided by reasonable religious, philosophical and moral doctrines? There he wants to show that the principles of justice he proposes do not depend upon any such comprehensive religious, philosophical or moral doctrines, for if they did, they would, on this account, be inherently unacceptable to some reasonable members of the society. Public reason about public, political values prohibits using, during debate in the public arena, all of the principles that may be acceptable to a comprehensive doctrine.[40] We thus hold it to be a standard of the *political* nature of our principles of justice that they do not appeal to such comprehensive doctrines for their justification.

The motivation in Rawls' Law of Peoples is similar: one of Rawls' aims at the first two stages is to show that the Law of Peoples he proposes is just and yet not unreasonably sectarian; it may be unreasonably sectarian if all societies are required by it to be liberal. However, if it turns out that the Law of Peoples constructed by liberal societies is exactly the same Law of Peoples that is constructed by hierarchical societies (as Rawls claims it is) then "this law does not depend on aspects peculiar to the Western tradition."[41]

I have already argued (in 2.2) that this route to neutrality—which clearly models the overlapping consensus model of *Political Liberalism*—does not work. I do not think we can be confident of an argument crucially concerning the *differences* between various types of society, when that argument is generated by consideration of representatives from a homogenous set of societies collaborating only with *each other.*

In any case, it seems to me that Rawls has not sufficiently accounted for the place of social *inclusion* and the minimal demands of social equality—including an equal right to political

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[39] *LP*, p. 40.

[40] See Lecture VI of Rawls' *PL.*

participation—that his account of decency supports. In the light of this, we should suspect that motivation to uphold principle (A)—the principle of toleration given above—should not be such as to incline us against the inclusion of article 21 in principle 6 of the Law of Peoples. And, indeed, this is so. In order to see this, let us consider principle (A) again.

In order to understand the appeal of (A), or at least to understand its role in Rawls' work, we need to consider again the domestic conception of justice. A domestic society will usually have large membership, and there is no guarantee that its members will share the same conception of the good. Moreover, we cannot conclude from this that people are to blame as they form different conceptions of the good: given the different circumstances and influences to which persons are exposed, as well as their differing personal priorities, it is unsurprising and perfectly reasonable that they may reach varying conceptions of what is a good life. We may call this the fact of reasonable pluralism (cf. footnote 10). Rawls locates this fact historically, by pointing out that since the religious reformations of the sixteenth century we have learned, through trial of intolerance and error of persecution, that it is possible for people to hold conflicting comprehensive doctrines and yet live at peace in one society.[42] Similarly, it is surely unreasonable to argue that all decent societies should be ordered according to exactly the same principles of justice. The reason we are attracted to (A), then, is that we recognize, both at a domestic level and at a global level, that reasonable pluralism is a *fact*, and a fact that must be respected and accommodated as a *part* of our conception of justice.

Given these facts of reasonable pluralism, Rawls is in the domestic case concerned to show that his principles of justice are supported by persons whose conceptions of the good are not those of the comprehensive liberal; and also to show that his Law of Peoples is supported by societies whose social structure is not based on strong liberal principles of equality of rights and opportunity but which are nonetheless decent. If the Law of Peoples is not so supported, it may reasonably be rejected. The temptation now is to say that since in the domestic case *all sorts of comprehensive conceptions* are tolerated, even those that are very far from comprehensive liberal

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[41] *HR*, p. 48.

ideals, so analogously in the global case we must be prepared to tolerate societies that are ordered in a radically different fashion than liberal societies.

However, insofar as the argument for global toleration is an argument from *analogy* to the domestic case, it faces the same challenge that all arguments from analogy face: we must be convinced that the cases being compared are sufficiently similar for the desired conclusions to follow. It is not clear to me, however, that the motivation for tolerance in domestic justice and the motivation for tolerance in global justice are very similar. The reason for this is that in the case of domestic justice our convictions are rooted in a very firm baseline: a respect for the individual, and her right to pursue her own conception of the good life. We might call this a conviction that is based in recognition of the dignity of the individual. Because we recognize an inherent dignity that individual persons possess, we wish to respect this dignity by showing tolerance towards various (reasonable) conceptions of the good, and thus we try to accommodate such conceptions in our political institutions.

In the case of global justice, however, our convictions of tolerance are not grounded in anything so secure as this. If we want to pursue the analogy that has been offered, we shall have to say that our convictions are based in a respect for societies, a recognition of the dignity of societies, and due toleration of these various societies whose dignity we respect, but whose societal orderings differ from our own preferred ordering. This is, however, rather difficult to swallow. What is meant by the "dignity of a society"? Surely nothing that we understand so well that we should wish it to play such a crucial role in our theory of global justice. Insofar as I understand what it means to respect the dignity of societies, I should have to say that it is shorthand for the following: we respect the wish that members of a society frequently have, which is that they be free to establish the political institutions they prefer, without undue interference from those who are not a part of their society.[43]

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[42] *PL*, pp. 1-3.

[43] Note that if we construe motivation for toleration of non-liberal societies in some other way, so that inclusion, or toleration, of societies matters *per se,* we shall be hard pressed to say why such toleration then ceases to matter when we are considering an *indecent* regime, as opposed to the well ordered hierarchies

There may well be, admittedly, great value that arises from a group of individuals who share their culture, their traditions, and, to an extent, their fate. Nonetheless, such value is elliptically described as a value that arises from the alleged dignity of a society, but better described as value that arises from the satisfaction and flourishing of persons' social nature. *This* value is upheld in the selection of the Law of Peoples that we have been envisaging: a law that affords rights of independence to societies, but that is also monitored by a fairly strong conception of human rights.

From this discussion we may take away the following message. While there is *some* motivation to accommodate (A) in our Law of Peoples, this motivation is limited. In particular, it does not extend to an interpretation of (A) as legitimizing acceptance, in the society of peoples, of societies who do not subscribe to the full set of human rights as argued for in the earlier stages of this paper. (A) provides us with no reason to revise those arguments.

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we have been considering. This seems to me to provide some evidence against the claim that toleration could matter *per se*, in the case of global justice. Thanks to Stuart White for making this point.

5. Conclusion

I have outlined Rawls' generation of his Law of Peoples, with a particular focus on the role that the decent society plays in his theory. I first presented (2.1, 2.2 and 2.3) some background to Rawls' theory, noting certain problematic features in the structure of Rawls' theory that might *incline* us—or him—to think that societies structured around a political hierarchy meet requisite conditions of decency—these features were, most importantly, an overstatement of the moral integrity of a people, and a failure to consider what effects the fact of interaction *between* diverse societies has on the content of the Law of Peoples. In fact, I argued, societies organized around a closed political hierarchy do not meet the conditions of decency spelled out in 3.1. This is because the conception of a decent society—along with the political conception of the person that motivates it—emphasizes social inclusion and support. If we accept that this is the political conception of the person that underlies our account of the decent society, and that to be treated as less than a full person is humiliating, then, so long as we accept that persons have a basic interest against institutionalized humiliation, there is good reason to hold that the decent society recognizes a basic interest in the right to political participation. And, since we are taking the decent society to reveal a sound human rights conception, we have reason to include this right among out list of human rights.

This argument I hope goes some way toward resolving the problem I said that human rights conceptions face: how can it be shown that it while such conceptions are presented as universal in scope, they do not in fact represent values that are peculiar to the western liberal tradition, and reasonably rejected? Since our conception of human rights is drawn from the account of the *decent* society—a society proposed as one that is recognizable, irrespective of one's conception of justice, as establishing institutions that treat its members in minimally decent ways—it avoids this criticism to a large extent.

I have not extended my case for human rights securing freedom of opportunity further than *political* freedom. A liberal society would include rights to freedom of opportunity across the board, but a decent society need not secure this much. It is not implausible that a society could be decently organized—meet the conditions of decency—and yet contain hierarchical structures

in certain areas. For instance, women might be excluded from pursuing various professions. This would, no doubt, frustrate some women (and perhaps some men), but their frustrations do not, I think, amount to institutionalized humiliation since these persons would have a channel for expression and debate in the open political debate that is sustained; they are thus recognized as *included* in that debate, even when the debate is not resolved as they would wish it to be resolved.

Human rights, as we saw in the introduction, have the following roles in Rawls' theory:

i) Their fulfillment is a necessary condition of the decency of a society's political institutions and of it legal order.

ii) Their fulfillment is sufficient to exclude justified and forceful intervention by other societies, for example, by diplomatic and economic sanctions, or in grave cases by military force.

iii) They set a limit to the pluralism among societies.

Perhaps also important to mention is the fact that human rights legitimize internal appeals: if people reason that their government is in some way neglectful of their human rights they may appeal to an internationally sanctioned code to legitimize their complaint. This opens a court of appeal that may be closed when considerations of entitlement are not universal in scope, but relative to the traditions of a particular regime—because then we lack such an external critical position.

Representatives in the original position will be careful to include article 21 among their catalogue of human rights. Not only do they recognize that political participation is secured by the decent society, they also understand that if article 21 is not guaranteed under the Law of Peoples, then there may be—for some parties—no further court of appeal. If the governing parties of a certain society deny certain of their citizens freedom and equality in the political process, then there is, by definition, little that these citizens can do, internally, to right matters. A representative with the interests of her society in mind will want to guard against the possibility that members of her society be politically silenced by internal constraints. She will be particularly concerned to do this when we consider the fact, argued for in section 2.2, that a society cannot be assumed to have a uniform moral character: there will be, even within a society, many conflicting voices. One of the most effective ways for a representative to guard against the possibility that

these conflicting voices result in a silencing of certain groups is to have written into the Law of Peoples a clause requiring mutual accountability between societies with respect to their political orderings, just as societies will be mutually accountable with respect to other less controversial elements of the human rights catalogue.

LIBERALISM AND THE RIGHT TO SECEDE

I. INTRODUCTION

Secession is the withdrawal from an existing state and its government of a part of that state consisting of citizens and the portion of territory that they occupy. Allen Buchanan writes:

> Secession ... is an effort to remove oneself from the scope of the state's authority, not by moving beyond existing boundaries of that authority but by redrawing the boundaries so that one is not included within them. To claim the right to emigrate is only to challenge the state's authority to keep one within its boundaries. To claim the right to secede is to challenge the state's own conceptions of what its boundaries are.[1]

In this paper I want to examine what, given the plurality of group interests that characterizes our world, liberalism has to say about claims of secession.

At first blush, liberalism appears to be committed to a permissive attitude towards secession. According to the permissive attitude, other things being equal, groups ought to be permitted to secede voluntarily, since a group is, after all, merely a collection of individuals, whose collective desire for self-government liberalism is bound to uphold. Moreover, because liberalism *encourages* self-government in individuals, it is committed—it may be argued—to the corresponding self-government of groups, where this is practically possible. This view has recently been revived in a modified version by Christopher Wellman, and it has a number of other

[1] Allen Buchanan, (1991), *Secession: the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec,* Boulder: Westview Press, p.11.

advocates as well as enjoying much popularity among the general public.[2] The view is the following:

> *The permissive attitude towards secession:* other things being equal, a group that wishes to secede has a general right to do so; moreover, the exercise of that right should be legally protected.[3]

To assess the permissive attitude, and underscore the importance of the clause "the exercise of that right should be legally protected," it will help to locate it in the space of alternative views of secession. And that space has recently been mapped out by Buchanan.[4] Buchanan distinguishes between "Remedial Right Only Theories" and "Primary Right Theories." A Remedial Right Only Theory says that a group has the general right to secede if and only if it has suffered certain injustices, against which secession is "the appropriate remedy of last resort."[5] What you take to be a relevant injustice may vary depending on your political theory as a whole, but for a liberal the relevant injustices will range from human rights violations through political inequality and/or persecution. A Primary Right Theory, by contrast, asserts that a group has the general right to secede independently of whether it has suffered an injustice of any sort. So Primary Right theorists claim that groups ought generally to be permitted to secede voluntarily from an uncontroversially just state. While a Primary Right theorist may (and typically will) agree that injustices of a particular sort are sufficient justification for a group to secede, she holds, in contrast with the Remedial Right Only theorist, that neither such injustices nor any other

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[2] Christopher H. Wellman, (1995), 'A Defense of Secession and Political Self-Determination' *Philosophy and Public Affairs*, 24 (2): 142-171; also see Harry Beran, (1984), 'A Liberal Theory of Secession' *Political Studies,* 32 (1): 21-31; and David Gauthier, (1994), 'Breaking Up: An Essay on Secession' *Canadian Journal of Philosophy*, 24: 357-372. That the permissive view is supported by the general public I am basing on a fair amount of conversational evidence.

[3] By a 'general right,' I mean simply a right that obtains in the absence of special circumstances such as treaties, negotiations, or other forms of contract.

[4] Allen Buchanan, (1997), 'Theories of Secession' *Philosophy and Public Affairs* 26(1): 31-61.

[5] Ibid., p.36.

special circumstances are necessary to justify secession. Other reasons, ranging from the alleged right of a people to its own self-determination, to the desire of a consenting group to govern itself, are also sufficient to justify a general right to secede.

In what follows I shall use 'primary' as an adjective meaning 'in the absence of injustice,' and 'remedial' as an adjective meaning 'in the presence of injustice.' Also, when I hereafter refer to the primary right to secede I shall, unless otherwise stated, mean the *general* primary right to secede. I am not concerned, then, with *special* cases of the primary right, such as the secession of Norway from Sweden in 1905, which was granted by Sweden. I do not discuss remedial rights to secession at any length in this paper. I assume, however, that any adequate account of secession will include such rights. My concern here is to assess whether there is a primary right to secede that follows from liberalism, and, if there is, what follows from this regarding liberalism's commitment to the permissive attitude towards secession.

The permissive attitude towards secession is a Primary Right Theory of secession. However, the permissive attitude says more: it says that the exercise of the right to secede should be legally protected. I shall take this addition to mean that a primary right to secede would be a reasonable part of international law. A Primary Right Theory of secession does not need to say this. I am thus going to distinguish (mere) Primary Right Theories from permissive theories in terms of their institutional implications: a permissive attitude towards secession indicates a presumption in favor of institutionalizing a right to secession, whereas this cannot be inferred from a primary right to secession.

The distinction between so-called natural or moral rights on the one hand, and legal or institutional rights on the other hand, deserves mention. In this paper, most of the discussion concerns liberalism's commitment to a moral right to secession, and unless otherwise stated the term 'right' will be used in this sense. I shall not say anything in particular about the genesis of moral rights; nor shall I tackle the controversial question of exactly how extensive a moral basis liberalism is committed to. What I am concerned with is the fact that liberalism promotes a political environment (to be spelled out in section 2.1) where certain *values* are protected: certainly the value of freedom, and perhaps other values such as autonomy or self-determination, and an equality of rights and opportunities. Remaining consistent to the values protected by this

political environment, I want to examine to what extent and in which conditions a right to secede appears to be a natural theoretical commitment of liberalism. I am going to argue that liberalism *is* committed to a primary right to secede, but that this right turns out to be a very weak right; I shall argue that it is perfectly compatible with the theoretical admission of this right to say that a liberal should not propose a primary right to secede as a part of international law.

Many writers have argued that liberalism is committed to a primary right to secede, and lodge the following case against liberalism.[6] Liberalism must endorse a primary right to secede. From this we infer a permissive attitude towards secession, and go on to demonstrate that this attitude towards secession is misguided. Thus, liberalism is unable to give a satisfactory account of secession, and will have to be revised or supplemented if it is to be useful as a background theory in international law. I argue that this case against liberalism is flawed. I agree that a permissive attitude towards secession is misguided, but I also maintain that this is not the view of secession that a liberal has to endorse. I shall thus defend from liberal grounds a theory of secession that is not permissive.

Of course, since there is a whole range of liberal views that it is possible to hold regarding the extent and nature of one's entitlements and responsibilities, we should not be surprised to find that views of secession vary a good deal even within the liberal camp. Some liberals, notably John Rawls, stress the natural duty to help establish and maintain just institutions, and this may well yield a different account of secession than, for instance, the voluntarist account of political obligation expounded by Beran. I shall take as my starting point rather a basic liberalism, that has a few specific principles about what rights and liberties there are, and who holds them as regards whom. I shall then try to say what follows from this with regard to secession. The Rawlsian view of natural duty is controversial, for many people do not see why a liberal should be committed to the claim that there are *duties* to uphold any kind of institutions, just or otherwise, unless such duties originate from commitments that are formed

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[6] Such authors include Buchanan, op. cit. (1991) and (1997); Amitai Etzioni, (1992), 'The Evils of Self-Determination' *Foreign Policy* 89: 21-35; Cass Sunstein, (1991), 'Constitutionalism and Secession' *University of Chicago Law Review,* 58 (2): 633-670.

between the individuals participating in these institutions.[7] In any case, I shall not assume that there are any duties to uphold just institutions. If there were such duties, we should have rather a short answer to our problem: if there is a natural duty to uphold just institutions, then secession from a just state is likely to be impermissible—for it to be permissible we should at least require that those wishing to secede be released from their duty to uphold the just institutions they already live under, and so no primary right to secede would ensue.

As I have said, I think a liberal can consistently argue that the primary right to secede is a very weak right, whose exercise it is perfectly permissible to legislate against. I shall argue for this conclusion in the following way. First, I shall discuss what liberalism is and indicate loosely why a general primary right to secession follows, and might be thought to follow permissively, from it. I shall then map out a framework of rights, and locate the primary right to secede in this framework. I locate the primary right to secede as a right of the weakest kind. In the light of this, I shall consider three specific arguments that purport to show that liberalism is committed to a stronger primary right to secede than I have maintained, and in particular that liberalism is committed to a strong enough primary right to secede to support a legal right to secession. These arguments discuss the consent theory of obligation, the liberal right to emigration, and the liberal right to self-determination respectively. I shall conclude by underlining, through considering the practical implications of the permissive attitude towards secession, my argument that the primary right to secede is, from a liberal point of view, plausibly thought of as a weak right that does not have the institutional implications of the permissive attitude towards secession. I offer this account as an explanation of how liberalism can embrace the seemingly inconsistent position of commitment to a primary right to secede, while recommending that international law concerning secession recognize only remedial rights to secession, or specially contracted rights.

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[7] This is compatible with the claim that it would be a *good thing* for people to uphold and preserve just institutions and that, other things being equal, they ought to do so, which is my opinion. But from the fact that one ought to $\emptyset$, we can't infer that one has a duty to $\emptyset$: I ought to give my friend a present on her birthday, but I'm not duty bound to do this.

2. Liberalism, Rights, and Secession

2.1 The Prima Facie Connection Between Liberalism and Secession

Liberalism is centrally defined by a commitment to respect and protect individual liberty. To secure this, liberalism claims that each individual holds certain basic rights and liberties, and gives a high priority to their protection. In order for a person's individual liberty to be meaningful to her, she must be assured an appropriate climate in which to make her most important decisions. For example, a climate in which a person fears persecution for her beliefs or for her speech, or in which she has no particular claims to personal property, is not conducive to the liberal ideal of a life shaped primarily by one's own choices. A liberal state therefore protects through its institutions various basic rights: the right not to be killed, the right to bodily integrity, the right to hold property, the right of due process under the law, the right to political participation, and, under most liberal frameworks, the right to fair equality of opportunity. The liberal state further protects liberty of conscience, of expression, of religion, of association, and the liberty to select and pursue one's own goals and projects.[8] Liberalism also requires that social institutions should give everyone a firm and credible assurance that they will not be subject to any more serious interference with their lives on the part of government agencies, or on the part of other individuals and private corporations, than is necessary to give a similar assurance to everyone else.

We can now present a sketch of how the permissive view of secession arises along with a primary right to secede. Given their commitment to freedom, liberals tend to view the ideal

[8] Exercise of these rights and liberties is, of course, *ceteris paribus*. For instance, it may be permissible to kill another person in certain circumstances, such as self-defense. Moreover, the exact extent of a person's rights and liberties will vary under different forms of liberalism; no attempt is made to give a particularly precise account of them here, where we are considering liberalism in a general form.

society as one which comes "as close as a society can to being a voluntary scheme."[9] Beran notes one consequence of this: "in contemporary liberal democracies one's relationships with adults–marital, work, political–are voluntary."[10] However, he adds that "one area to which the ideal of voluntariness of human relationships has not been applied by liberalism, in theory or in practice, is that of the unity of the state itself."[11] Beran argues that it follows from a liberal commitment to individuals' freedom of choice that secession by part of a state be permitted where it is desired and possible.

> The claim [with regard to secession] is this: liberal political philosophy requires that secession be permitted if it is effectively desired by a territorially concentrated group within a state and is morally and practically possible.[12]

Beran is not alone in reaching such a conclusion. Wellman also argues that liberalism's presumption upon individual liberty makes a *prima facie* case for the permissibility of secession. He then proceeds to defend a version of the harm principle: the liberty to secede is defeated only in those circumstances in which its exercise would lead to harmful conditions.[13]

2.2 A Framework of Rights

If there is a right to secede, what sort of a right is it? In this section I shall draw on a discussion by Judith Jarvis Thomson in her book *The Realm of Rights.*[14] Thomson makes a number of distinctions that are helpful to us. First, she considers rights 'in the strictest sense.' These she calls *claims*. A claim is distinguished in Thomson's account by the facts that claims are held

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[9] John Rawls, (1972), *A Theory of Justice*, Oxford: O.U.P., p. 13.

[10] Beran, (1984), op. cit. p.24.

[11] Ibid., p. 25.

[12] Ibid., p. 23.

[13] Wellman, op. cit. p. 161. The harm principle is most famously argued for in J.S. Mill's *On Liberty,* (1978), ed. Elizabeth Rapaport, Hackett Publishing Co., Inc., Indianapolis / Cambridge, 1978 (*On Liberty* was originally published in 1859).

[14] Judith Jarvis Thomson, (1990), *The Realm of Rights,* Harvard University Press, Cambridge, Mass. Ch. 1. Thomson's discussion draws from Wesley Newcomb Hohfeld's (1913) 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, 23.

against entities, and claims entail a duty that is held by those entities. For example, if I loan you a book for a week, I have a claim against you that you return me my book at or before the end of the week, and it follows from this that you have a duty to return my book to me at or before the end of the week. Thomson is careful to point out, as seems correct, that no part of our concept of claims requires that they should be held by or against persons only. For example, animals might have claims, and claims might be held against non-human institutions, such as universities or governments.

I shall take it that part of the concept of a claim—at least insofar as claims are important in a political context—is that claims deliver a sense of urgency, or priority. If I have a claim against you to do Y, then, other things being equal, you ought go ahead and do Y; Y ought to be prioritized by you. Things may not be equal if, for instance, you are involved in some sort of emergency which demands your full attention; or, perhaps, you recognize that in order to fulfill your duty to me you would have to violate somebody else's rights. But in the absence of any such circumstances, the claim that I hold against you is at best negotiable only with my consent, and thus constitutes something that you ought go ahead and act on.

As alluded to, I think that this latter characteristic of a claim is especially important when we consider what we take to be our claims in a political context. Claims are important politically because many of what we take to be our human rights and our political rights include (I do not say that this is all they are) claims that we take ourselves to hold against our government and fellow citizens; and, with regard to the former, a government's duties are typically thought to be those things that it is most urgent a government perform. Take, for example, the right to life. Let us assume that this right has (among others) the following two components: the right to security of one's person, and the right to subsistence. These claims cash out politically as follows. A government has a duty to provide some measure of protection for our person, in the form of a security force which has special privileges designed to protect us from harm. If our government fails to provide any such security force, we may rightly complain that it has failed to meet a legitimate claim that we hold against it. Similarly with the claim to subsistence. Those governments that fail, through design or mismanagement, to make any provision for those of their citizens who would otherwise lack the means of subsistence, arguably violate claims that the

latter hold against them. I think that these things are a part of what we mean when we speak of the right to life in a political context.

The same may be said of many of what we take to be our political rights in a liberal state. When we speak of the right to vote, we mean not only that we are at liberty to vote, but also that provisions should be made for us to exercise this right: polling booths set up and manned, etc. Similarly with the right to education, and the right to health care. Such rights appear to be claims: claims held against the government (or the relevantly delegated authority) to provide adequate access to education and health care. These rights seem to me also to exhibit the sort of urgency and priority that is characteristic of a claim. I shall now consider the idea that the primary right to secede is a claim.

If the primary right to secede is a claim, this means that there is a duty of high priority held by some entity to enable secession (assuming secession is a viable option). The only plausible bearer of such a duty is, I think, the government of the state from which secession is proposed—we'll call this government X. Obviously, this duty could only plausibly be held in *response* to some activity on the part of would-be secessionists (we'll call them Z)—it could not be assumed irrespective of any such activity, since this would have the implausible implication that just governments should enable secession even when there has been no call for secession, no interest demonstrated in the proposal. So, we have to say which sorts of circumstances could generate the appropriate duty. But, first, let us clarify what this duty would be.

The duty in question is not merely the duty to give *serious consideration* to the preference of those who favor secession; the duty in question is a duty to act in order to give Z the chance to realize its preference. X certainly *does* have the former duty because a liberal state attempts to include its citizens in the political process, and must therefore at least give the political preferences of its citizens fair consideration. We assuredly do need to hear why the call for secession is being made, what improvements over the existing government secession is expected to bring, and why such improvements could not be incorporated within the present order. And it is quite possible that this discussion might prompt X to make some policy changes (less than outright secession) in light of the secessionists' demands. In contrast, the duty to act in order to give Z the chance to realize its preference of secession would mean accepting that those

appealing have a right to secede, and responding promptly and in such a way as to make the secession as economically viable and as politically smooth as possible.

Now that we have some idea as to the duty that would be held by X, if there is a primary *claim* to secede, let's consider which circumstances might appropriately generate such a duty. I shall bracket for the time being arguments which depend crucially on some underlying right that would-be secessionists are said to hold, for instance a right to self-determination (see section 3.3 for discussion of this). Rather, I want to consider whether there is any straightforwardly recognizable set of circumstances in which a liberal government has a duty to enable secession, irrespective of any underlying principles other than a general principle to satisfy the preferences of its citizens so far as this is feasible and morally permissible. The most plausible circumstances, it seems to me, would be those in which a clear majority of inhabitants of the proposed seceding area have demonstrated informed support for secession—this support might be demonstrated by means of a petition, for instance. The duty to enable secession might then be realized by holding a legally binding referendum on the question of secession.

But it is not plausible that the duty to enable secession could be so straightforward as this. Imagine that Z is a group who occupy sixty percent of the territory that constitutes the proposed new state. There is, then, a significant group who are to be a part of the new state but who are not involved with the secessionist movement, and who may even be opposed to it. And they may be opposed to it for good reason: perhaps, for instance, Z wants to achieve secession in order to promote its own ethnic or cultural interests. It seems to me that X certainly does not automatically have a duty to give Z the chance to realize its preference for secession on the sorts of grounds we are considering here—when Z has presented a petition, for example, or otherwise demonstrated a good deal of support for the secessionist cause. Indeed, X has a duty to examine extremely carefully and somewhat skeptically the secessionist proposal at hand, for some proposals will not be considerate of the interests of other groups towards whom X also has duties. (X can afford to be skeptical because, by hypothesis, X is a more or less just government, and so we may suppose that nobody's interests will be seriously harmed if secession is not arranged.) But if X must exercise so much scrutiny when considering the proposal of a secessionist movement, then X does not have any straightforward duty to comply with its demands.

We might, nonetheless, think that X has a duty to enable secession for Z in those cases where Z makes a sound case that the policies of the new state will be sufficiently considerate of the interests of all groups included in it. This is far from obvious, however. For example, perhaps some of those who will be housed in the new state simply do not want to move, or to adopt new citizenship, or to hold citizenship of a state they do not live in. These people appear to have a case against any such requirements, at least as strong as any case that may be made for secession. And should secession bring with it such requirements, it is not at all clear that X has a duty to override the protests of these persons as part of a more stringent duty to Z. To take another case, perhaps X believes that if secession is permitted the previously existing state will suffer economically, which will harm the interests of those remaining there. This is an important consideration, for it is plausible that X has duties not to knowingly enter into agreements which are likely to harm the economy of the state it governs.

Consider the case of Quebec. If the federal government of Canada has a duty to the Quebeckers who favour secession, arising from a claim held by the latter, then the federal government has some reason to prioritize the secessionists' proposal, and, absent any unusual circumstances, to go ahead and prepare the way for secession.[15] This seems to me, however, to misrepresent the role of the federal government. For one thing, the federal government is certainly required to represent the interests of the Anglophone minority in Quebec, and native American communities, most of whom prefer federalism to secession. It seems implausible, then, that is should also have an immediate duty of urgent priority (the duty to enable secession) that appears to negate—or at least hinder—the proper consideration of such interests. Moreover, it is intuitively plausible that the federal government has a responsibility to consider the interests of

[15] I am considering this case absent the fact that the federal government has already openly accepted the principle (in 1980 and in 1995) that the "majority" in Quebec may decide the case of secession. The fact that the federal government has made this concession of course alters the case, and I wish to consider the case absent this alteration.

Canada as a whole, including all of its ten provinces, and in the light of such consideration to view how feasible a plan secession for Quebec is.

But then, since the interests of Canada as a whole are at stake, the federal government's discretion is broad, i.e. it is not simply required to screen the proposal of secession against potential discriminatory or otherwise unjust policy. There will be many interests that compete with the secessionists' interest, and it is the federal government's task to determine which path of action most fully meets its citizens' interests—this may well not be to comply with arrangements for secession. If this is plausible then the case for secession, in the absence of injustice, intuitively lacks the characteristic priority of a claim. Thus we may contend that the primary right to secede is not a claim, according to a liberal framework. [16]

However, as Thomson explains, there is more to rights than claims alone, for not all rights are claims. For one, claims are to be contrasted with *privileges*, but privileges are rights. A privilege is the "mere negation of a duty."[17] I have a privilege as regards you to wear your sweater if I have no duty to you not to wear your sweater. I have a privilege as regards everyone (and everything) to walk across Boston Common just in case there is nobody (and nothing) towards whom I have the duty not to walk across Boston Common. It is my contention that the primary right to secede that liberalism must recognize is a *privilege* to secede: we find, among liberalism's theoretical commitments, no duty to refrain from secession.

But before we can establish this, we need to consider a further possibility. A further category to which Thomson draws our attention, in her discussion of what rights are, is the category of liberty. Perhaps liberalism says that those who wish to secede are at liberty to secede. What exactly does it mean to say that B is at liberty to Ø? We might suppose this means that B has a privilege as regards everyone to Ø; that is, there is nobody (and nothing) as regards whom B has a duty to refrain from Øing. But this is not quite right. Consider my privilege of walking

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[16] Again, as I have mentioned, it is open for the secessionist group to argue that they have some *overriding claim*, such as a claim of self-determination, or a claim arising from the consent theory of political obligation. I shall consider some such arguments in section 3.

[17] Ibid. p. 44.

across Boston common, which I hold as regards everyone. All that we learn from the fact that I have this privilege is that there is nobody towards whom I have the duty to refrain from walking across the common. But this is compatible with your creating obstacles to prevent my getting across the common. You might, for example, call me away on some fabricated errand; or you might pretend to be sick so that in my concern for you I never do get to walk across the common. Do you wrong me, in these cases? Clearly, on the one hand you don't wrong me in the same way that you would if you were to interrupt my walk by setting up explosive land mines; neither, on the other hand, is your role so innocent as if you had, unbeknownst to you, caught my eye so that I decide to follow you rather than to pursue my original plans of walking across the common.

What we want to say about these cases is not exactly to the point here. The point is that, according to Thomson's framework, *if* I am at liberty to walk across the common then you violate my rights when you unreasonably prevent me from doing just that; on the other hand, if it is merely a privilege to walk across the common that I hold, then although I may find your behavior annoying, you violate none of my rights when you try to get in my way. This is because, for B to be at liberty to Ø, both (i) B must have a privilege as regards everyone to Ø, and (ii) B must have claims against all others that they not interfere *in a certain range of ways* with B's Øing.[18]

One thing we can learn from the above example is that it is not always going to be easy to tell which freedoms are liberties and which freedoms are privileges. I suspect that although there is a fairly clear conceptual distinction between privileges and liberties, we will frequently be hard put to classify our freedoms according to it. I think that our difficulty in determining which freedoms are privileges and which are liberties lies with the problem of determining in which ways it is permissible to intervene with the exercise of a particular freedom. This is not a straightforward matter. For instance, take the freedom I have to associate with others and form a political party. We very much want this freedom to turn out to be a liberty, and yet others can

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[18] Ibid., p.53, Thomson's emphasis. We will look more closely at the proviso 'in certain ways' below. However, to get a general idea we may adapt from an example of Thomson's: if you prevent me from waking across the common because you want to tell me (sincerely) that my son has been involved in an accident and I must come right away, you don't violate any claims that I have against you—this is certainly a way in which you may intervene with my walking.

interfere in all sorts of ways with my exercise of this freedom. They can refuse to lend me space to meet, if this is what I need; they can attempt to sabotage my efforts at forming the party, by campaigning against its policies and its leaders effectively enough to ensure that my party never gets off the ground.

But how is it possible, if forming a political party is something I am *at liberty* to do, that it is permissible for others to interfere with my exercise of this freedom to such an extent? Shouldn't they be required not to interfere *at all*? The answer is, of course, that we can categorize intervention or interference in various ways, and that some types of intervention with the exercise of liberties will turn out to be permissible while others will not. For our purposes, the most salient category concerns state intervention. In this regard, those freedoms that are liberties seem to have two features: they are those freedoms that it is impermissible for the state to *deny* us; and they are those freedoms against whose removal by others we may appeal to the state. Privileges, I contend, do not have such features.

When we consider the liberties that are typically protected by a liberal state—liberties of conscience, of expression, of religion, of association—we find that such examples concern liberties as just defined, and not privileges. We are interested, for example, not only in the fact that there is nobody towards whom we have a duty to refrain from expressing our opinions, but we are also very much interested in the fact that this is one freedom that will not justifiably be legislated against, and in the fact that if somebody does try to prevent us from having our fair say, we may take issue with them, complaining that they have violated a claim of ours, and, if the matter is serious enough, appealing the case to a higher authority.

In order to determine that liberalism is not committed to a primary right to secede that is a liberty, we need some criteria from the rubric of liberalism against which to measure the justifiable intervention of government against the exercise of certain freedoms. Obviously, this is a large topic, at the heart of political theory, and the treatment I give to it here is neither comprehensive nor novel. I suggest that we take as given the set of basic rights and liberties that I claimed in section two were protected by liberalism. These, I think, are clear instances of the sorts of freedoms that it is impermissible for the liberal state to *deny* us; and against whose removal by others we may appeal to the state—these are the two criteria that were mentioned above. Then,

when we are looking at any particular instance of state intervention against the freedom to Ø, we should check that the following two conditions are met:

(i) Nobody's basic rights or liberties are violated by the prevention of their *Øing*; nor is any principle that may reasonably be held to underlie those rights or liberties flouted by the prevention of *Øing*;

(ii) There is some significant public benefit to be gained, or greater equality promoted, by the prevention of *Øing*.

When condition (i) is met we may infer that the general freedom to Ø is merely a privilege. I claim that from the theoretical framework of liberalism there is no commitment to protect such freedoms, but nor are there any (theoretical) grounds to deny them. There is, plausibly, a presumption against state interference with privileges unless it can be shown that there is good reason for such, i.e. unless condition (ii) is met.

A common and relatively uncontroversial example of a freedom against whose exercise we might want to introduce legislation is offensive behavior. Consider Feinburg's frequently cited thought experiment concerning which sorts of offensive behavior we would be willing to tolerate on a public bus.[19] One example concerns the freedom to engage in sexual relations on the bus. Now certainly, the freedom to engage in sexual relations may very well be considered a basic right, or a direct implication of one. However, given certain provisos—that there are other, more private (or perhaps specially designated public) areas in which to exercise this freedom—it is arguably the case that the freedom to have sexual relations on a public bus is not by any stretch a basic right. Therefore, according to our *theoretical* liberal framework, it would be a privilege (one has, other things being equal, no duty not to exercise this freedom). But nothing follows from this about what *regulation* a liberal might permit concerning sexual relations on public buses. Given certain considerations about the public good of providing an unobjectionable public transport system, there may very well be good reasons to remove this privilege and to legislate against such practices on public buses, i.e. condition (ii) is met in this case.

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[19] Joel Feinburg, (1985), *Offense to Others: The Moral Limits of the Criminal Law*, New York: O.U.P. pp.

Let's return to what we should say about the primary right to secede. I am considering the hypothesis that this right might be a privilege, rather than a liberty or a claim. However, we have yet to see that groups are not at liberty to secede. I shall now show this, using criteria (i) and (ii) above. The basic rights that I mentioned earlier were the following: the right not to be killed, the right to bodily integrity, the right to hold property, the right of due process under the law, the right to political participation, and, under most liberal frameworks, the right to fair equality of opportunity. Basic liberties included a liberty of conscience, of expression, of religion, of association, and the liberty to select and pursue ones own goals and projects. As they are stated, these rights and liberties clearly do not *include* a primary right to secede. Therefore, in order to answer question (i), whether anybody's basic rights or liberties are in any way encroached by not allowing a primary right to secede, we need to consider whether the primary right to secede is a direct implication of these rights and liberties, or whether it follows from the principles that underlie and justify these rights and liberties.

I shall assume that the primary right to secede is not a direct implication of any of the rights and liberties as just stated; intuitively, one might have any of those and yet lack the primary right to secede. Thus our question is, what principle or principles underlie and justify this list? I have already given some answer to this question, when in section two I spelled out the commitments of liberalism. There, I suggested that the principle that underlies this list is the following: individuals should be free to decide for themselves how their lives are to be arranged, in a manner that, other things being equal, is free from fear and unreasonable coercion. I shall extract from this the following two political principles:

- (A) individuals should be fairly and equally protected from unreasonable coercion that threatens them or that otherwise forces them to live according to codes that they do not endorse (this coercion might be political or otherwise); and

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10-13.

- (B) individuals have a claim to self-determination; space and opportunities for them to pursue their particular goals are to be fairly and equally protected.

I'll now examine whether either of principles (A) or (B) could be thought to underlie a primary right to secede that is a liberty.

3. THREE ARGUMENTS IN SUPPORT OF A LIBERTY TO SECEDE

3.1 LEGITIMACY, CONSENT AND SECESSION

Principle (A) states that individuals should be fairly and equally protected from unreasonable coercion that threatens them or that otherwise forces them to live according to codes they do not endorse. Considering the first half of this principle first: if the separatists' argument is that they require secession to avoid being *threatened* (perhaps because they are a minority group) then we are no longer considering the primary right to secede, but we are considering a claim to secession that results from an injustice, which a liberal will, in most cases, grant. Our question was, however, whether liberalism is committed to a *primary* right to secede that is a claim or a liberty.

The second half of principle (A) ensures protection from coercion to live according to codes that one does not endorse. By a "code" I mean a set of customs, or a set of laws, that promotes certain choices and inhibits others. Now, I shall again assume that a state which enforces a particular moral, religious or cultural code lacks justice. Thus I shall concentrate on the idea, from principle (A), that because a group has political and institutional preferences that systematically differ from those of the state it inhabits, the group should be granted a legal right to secede; the fact of these differing preferences renders any attempts that the original state makes to prevent secession politically illegitimate.

Now, as it stands this idea is rather implausible: a government is surely not illegitimate if it chooses not to satisfy all of the preferences of all of those it governs over, since this would anyway be impossible. So, we need to fine tune this argument a little. I think the most plausible route to take is something like the consent theory of political obligation—if a person does not consent to the principles and resultant policies of her government, then that government lacks authority over her.[20] If "does not consent to" is plausibly a reasonable extension of "does not endorse," then a supporter of the primary liberty to secede could argue that (A) supports the following claim: X has no political authority over Y unless Y has consented to this authority in

X. And if X has no such authority, then for X to require political conformity from Y is for X to behave illegitimately. Thus we obtain, from (A), the precise claim that a government is illegitimate unless it is consented to.

This claim is, I think, at the heart of much of our intuitive support for a primary liberty to secede. However, the claim faces several counter examples. It would have as a consequence, for instance, that simply in virtue of not being consented to by a bigoted, prejudiced portion of its citizens, a government is illegitimate. This can't be right. Thus we must moderate our claim to incorporate a definition of legitimacy that is not wedded *simply* to the notion of consent, and examine this notion to see whether it extends to a case for a primary liberty to secession.

I don't claim to offer a complete account of political legitimacy here, by any means, but I imagine that an adequate account of political legitimacy will make central use of the notion of reasonable grounds for complaint, besides specifying certain governmental procedures. Clearly, this is not the same as saying that a legitimate system is one that everyone must consent to, for people can be unreasonable in their demands and unreasonable in which government they would consent to. Thus we need, I believe, to separate the notions of legitimacy and consent; what appears to be doing the moral work in an account of political legitimacy is not consent as such, but rather what the justificatory bases are for consent or lack thereof.

Consider the following account of political legitimacy, offered by Thomas Nagel:

> If a system is legitimate, those living under it have no grounds for complaint against the way its basic structure accommodates their point of view, and no one is morally justified in withholding his cooperation from the functioning of the system, trying to subvert its results, or trying to overturn it if he has the power to do so. [21]

I disagree with Nagel that the claim "no one is justified in withholding his cooperation from the functioning of the system" should be a part of our account of political legitimacy—certainly it does not follow from the fact that "those living under it have no grounds for complaint against the

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[20] See Beran, (1987), *The Consent Theory of Political Obligation*, Croom Helm: London, New York.
[21] Thomas Nagel, (1993), *Equality and Partiality,* New York: O.U.P. p. 35.

way its basic structure accommodates their point of view." Nonetheless, Nagel's basic idea is plausible: a legitimate system is one under which everybody's point of view is accommodated.[22] This is, in fact, rather a *strong* notion of legitimacy. However, in order to give the case for a strong primary right to secession a fair run for its money, I think that we might require high standards for the legitimacy of government.

I take it that this idea is similar to the one I just mentioned: to complain that one's point of view has not been accommodated is to say that one's point of view has not been given serious consideration, which would provide one with reasonable grounds for complaint on the basis of unfair exclusion from the political process. Conversely, if one's point of view has received serious attention according to the accepted political procedures, then it is counter intuitive to claim that the resulting policy has been illegitimately formed, although one might nonetheless maintain that this policy is unjust.

To illustrate the latter, imagine that my position on the abortion debate is pro-choice. I may reasonably consider that a good and just policy concerning abortion is to legalize it, since in my opinion laws against abortion unfairly restrict the liberty of women, and unfair restriction of liberty is clearly something that it is good and just to avoid. Nonetheless, let's imagine it turns out that in contemporary American society my position is the minority position, and that even though pro-choice arguments and assertions are given due consideration, legislation is passed to criminalize abortion. In this case, I may strongly oppose the policy, on the grounds that it is unjust, and, arguably, I would be justified in protests of a certain nature against it. But it is much less clear that I have grounds for complaint against the *legitimacy* of the government or of its abortion legislation, if the legislation has been decided in a fair and open manner.[23]

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[22] I think it is charitable to read Nagel's "accommodation" as "serious consideration." A stronger notion of accommodation seems implausible: the case of abortion policy, discussed below, demonstrates the difficulty of accommodating all points of view if accommodation is taken to mean something like 'is *satisfied* through public policy.'

[23] The example of abortion is in fact a relatively controversial one, since some people believe that its legislation should be off the democratic agenda, in the same sense that legislation about murder is off the democratic agenda (if a majority in some state voted against the criminalization of murder, this would not legitimate its legality). If you find the example unpersuasive for this reason, simply substitute for it a case

We have found that illegitimacy depends in some way on reasonable grounds for complaint, which has to do with the serious consideration of one's point of view. However, nothing can be inferred from secessionist demands *per se* to reasonable grounds for complaint in this sense. Indeed, we might strongly suspect, since it is a *primary* right to secession that we are considering, which presupposes an absence of injustice, that every effort has been made to give serious consideration to everybody's point of view. It may well be that various attempts to reconcile the separatists' preference for a unitary state have been made. For example, there are many accommodations of linguistic and cultural differences that can be introduced before secession is resorted to. Moreover, there remains the option of federalism, to which we will return in the penultimate section of this paper (section 4).

3.2 Secession and Emigration

Before turning my consideration from principle (A) to principle (B), there is one other interpretation of (A) that I should like to consider. Principle (A) asserted that individuals should be fairly and equally protected from unreasonable coercion that threatens them or that otherwise forces them to live according to codes that they do not endorse. This principle—or perhaps even a weaker principle than this—plausibly underlies a case for the liberty to emigrate. [24]

Now on the face of it, principle (A) appears only to support a restricted liberty to emigration: the liberty to emigrate when, for one reason or another, one does not endorse the codes that one would otherwise have to recognize. But we might wish to support a stronger right to emigration than this, we might want to say that an individual may emigrate *just as she wishes*; we shall have to uncover exactly why there is a temptation to say this and whether the justification for this claim might extend to secession.[25]

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that concerns only the public good, such as directing the allocation of public funds to a car park rather than to a public park.

[24] I shall, again, consider only *primary* rights to emigration; I shall not consider one's right to emigrate as a response to injustice suffered.

[25] Some of the discussion in this section will raise the question as to whether, if the liberal right to emigration might be justified because of a liberal right to self-determination, the latter right might not also

But first, let's return to the alleged connection between secession and emigration. The argument is a simple, additive one. It claims, first, that a liberal state must permit its citizens to emigrate. It then infers a right to secede from this, from the collective exercise of individuals' (the secessionists') rights to emigrate. Thus:

(A1) Any liberal society concedes that its citizens are at liberty to emigrate, since to prohibit this would be to curtail their freedom in an unacceptable way.

(A2) Secession is like emigration *en masse,* and liberalism is committed to grant to a desirous group a strong right to secede.[26]

In order to assess these claims, let us reconsider the right to emigrate. Emigration challenges the state's authority to control exit from its territory and jurisdiction. For the state to exercise such control would be to deny individuals the right to determine whether they wish to remain in a particular place, where their behaviour is restricted by a certain set of laws. But on the face of it, it seems that this is something the individual herself ought have the right to decide. I think that our inclination to give a high priority to individual preference here is derived from the very *personal* nature of many emigration cases. We are not, of course, considering cases in which emigration is selected as a means of avoiding persecution or any other injustice. What is left are, intuitively, the cases of emigration that result from "personal reasons." For instance, somebody might emigrate because of the path her career has taken, or because she wants to marry somebody of another nationality, or, perhaps, simply because she prefers the weather or geography of another country. A person might offer any number of justifications for her choice to emigrate: she may say that it is necessary for her happiness (perhaps the case of the marriage partner would qualify here); she may, more broadly, argue that it does not really matter why she chooses to leave—her reasons are *her business* and nobody else's. I think it is this sort of appeal to a

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support a permissive right to secede. I consider, however, that this question is better put aside until the next section, where we will examine principle (B) and the individual right to self-determination.

[26] This formulation of the argument is adapted from Beran, (1988), 'More Theory of Secession: A Response to Birch', *Political Studies*, XXXVI: 316-323.

person's private business that underlies our inclination to say that an individual may emigrate *just as she wishes*.

Now I do not think, in fact, that this is quite the right way to think about emigration. Minimally, we might defend certain *costs* to emigration; in particular it is surely permissible that one should, in some circumstances, be required to compensate the state that one is leaving. When a person emigrates from a country *V*, this may be very detrimental to *V* if the person possesses particular talents and personal resources that could further the development of *V*. We might well make the case that such a person would owe some compensation to *V*, especially since living in *V* has enabled her to develop her talents and resources—perhaps the people of *V* even paid for such development. Most straightforwardly, when a person owes *negative* compensation to her society, in the form of a prison sentence, for instance, we are not reluctant to say that her liberty to emigrate fails to relieve her of a duty to fulfill this compensation. It does not seem to me to be a huge step to assert that reasonable compensation for *benefits* is similarly owed by a person wishing to emigrate. Nonetheless, I think that compensation rather than prohibition is the appropriate measure in such cases, and am inclined to think that prohibition is negated by a liberal respect for a person to conduct her personal life as she chooses.

If the foregoing was plausible then the liberty to emigrate is not unqualified, and it is the personal nature of emigration that bears the weight of argument in favour of the liberty to emigrate. The more likely a case of emigration is to have public impact, the more subject to scrutiny it becomes.

We must now map these considerations onto the case of secession. I think there are two important disanalogies between the cases that weaken the case for a strictly additive argument from emigration to secession.

First, in the case of emigration little is removed from the country of departure except for the person choosing to emigrate. When a group secedes, however, it usually takes with it the territory that it occupies. We have thus moved from a right to voluntary emigration to a right to land rights according to group desires. This is implausible: it would be a very unusual construal

of property rights to assert a right to own territory springing from a desire to own it! While I don't think that appeal to territorial rights is the only or even the best justification for secession, it remains the case that the additive argument from emigration argument leaves the issue of territory unresolved, and is thus at best incomplete: stronger grounds are required to make a case for secession than for emigration, since the former involves a claim of ownership over the territory the secessionists occupy or wish to occupy.

Second, as we have noted already, the land in question typically does not house all and only secessionist sympathizers. Indeed, it is quite implausible that it should ever do so. Therefore, we must also consider the rights and needs of any who live within the borders of the proposed state (call this Z), but who would prefer to remain citizens of the original state (call this X). Let's suppose that there are three options for such people. They can move out of Z; they can, willingly or not, become citizens of Z, agreeing to live according to its laws and practices; they can remain citizens of X while living in Z. I shall assume that the third option is unsatisfactory as a general solution to this problem. However, the first and second options are not satisfactory either. They require that persons uproot from their homes, or that they be prepared sometimes reluctantly to take up a new citizenship. But, other things being equal, people have the right to remain in their homes and not to adopt an unwanted citizenship. Perhaps things are not equal in the case of secession, but we need to be told why they are not. And this much is clear: any such reason will not be generated from *individuals' rights to emigrate* if they so choose. The fact that several persons wish to exercise their right to emigrate is not sufficient to override other individuals' rights to remain where they are, even when the latter interferes with the exercise of the former. The proponents of secession cannot claim, as was more plausibly claimed in the case of emigration, that it is *their business alone*, for secession, crucially, does not have such a self-contained character.

Nonetheless, the proponent of a liberty to secede arising from an additive case of emigration may press her case further. She made concede that there is no liberty to secede that follows in any *strict* way from a right to emigration; there are, admittedly, large disanalogies between the cases. Nonetheless, perhaps at least part of our motivation to allow individuals to emigrate stems from the strong intuition that it would be *unfair* not to allow individuals this

freedom, irrespective of whether or not such restrictions would also violate their rights. Similarly, perhaps we can press the secessionist cause in this way: to come between secessionist groups and what they want is to treat them *unfairly*.

I think that this point might be granted. There may be occasions on which to prohibit secession seems straightforwardly unfair. Such cases would be those in which secession is economically and ideologically viable, welcomed by those most affected by it, and objected to by very few. However, we should note two things. One, this discussion shifts the subject somewhat: we are now concerned not by what *rights* to secession follow from liberalism, but by what might be *decent behaviour* on the part of a liberal state. We were, however, concerned with the former question. Second, a case such as just described is relatively rare. I concede that in such cases the argument from unfairness may carry a good deal of weight; but since questions of secession do not usually arise over such cases. the more pressing issue concerns what rights are at stake in cases of conflict and contest.

Given the disparities between the liberty to emigrate and the alleged liberty to secession, it looks as though we have no strong argument that moves us directly from the liberty to emigrate to the liberty to secede, and thus no strong argument from the commitment of liberalism to the former to a commitment to the latter.

I conclude that principle (A), the assertion that individuals should be fairly and equally protected from unreasonable coercion that threatens them or that otherwise forces them to live according to codes that they do not endorse or consent to, even though it is a plausible rendering of the underlying justification for some of the rights and liberties that are protected by liberalism, does not justify a primary liberty to secede. I shall now turn to principle (B), which stated that individuals have a claim to self-determination; space and opportunities for them to pursue their particular goals are to be fairly and equally protected.

3.3 Self-Determination and Secession

The right of an individual to be self-determining has a stable place in liberal political theory. Moreover, the notion of a people's right to self-determination is a popular view, whose roots can be traced at least to the American Revolution and the Declaration of Independence, and to the

French Revolution. The United Nations Charter has adopted several endorsements of the right to self-determination. For example, General Assembly Resolution 1514 states that:

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[27]

I construe the argument from self-determination as most plausible when it involves peoples in the sense of groups who have a strong ethnic or cultural allegiance, rather than simply groups of any sort who wish to associate. If we can show that the argument does not work in the case of such peoples, then it is an easy step to say that it cannot work in the case of any other group either; the converse, however, does not hold. When I use the term 'people' in this section, I shall mean simply those groups that share a common ethnic or cultural allegiance.

Now, if principle (B) underlies a primary right to secede that is a claim or a liberty, this right must either follow from, or be strongly supported by (B).[28] Thus I shall first look at how a primary right to secede is supposed to follow from the individual liberty of self-determination. Self-determination, in the case of individuals, means something along the following lines: a person may select, formulate and pursue the goals and projects that are important to her, without objection or interference from others. In this way, she shapes the course of her own life. Thus an argument for a primary right to secession might run as follows:

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[27] In Lea Brilmayer, (1991), 'Secession and Self-Determination: A Territorial Interpretation', *Yale Journal of International Law* 16, p. 177. This paper offers a comprehensive account of the origin and support of the right to secession issuing from a right to self-determination.

[28] While this section has been introduced as a discussion of the *liberty* to self-determination, I shall take the discussion to cover the broader question of how either a liberty or a claim to self-determination might be related to the permissive right to secede. I shall, during this section, speak of whether principle (B) "underlies a primary right to secede." The question I refer to is whether principle (B) underlies a primary right to secede that is a claim or a liberty, but for the sake of style I take 'right' in this section as shorthand for 'right that is either a claim or a liberty.'

(B1) The freedom of each individual is a fundamental value that is protected under liberalism, other things being equal.

(B2) Since persons are agents with interests and goals, it is crucial to their freedom that they are at liberty to pursue these interests and goals (when this is compatible with the like freedom of others).

(B3) For an individual to pursue her interests and goals, she requires a right to self-determination.

(B4) Individuals have a right to self-determination insofar as this is compatible with the like right to self-determination of other individuals (from B1, B2, B3).

(B5) The freedom of a people is an important value that is protected under liberalism, other things being equal.

(B6) Peoples, like individuals, have interests and goals, and it is crucial to their freedom that they are at liberty to pursue their interests and goals.

(B7) In order for a people to be at liberty to pursue its interests and goals, a people requires a right to self-determination.

(B8) Peoples have a right to self-determination insofar as this is compatible with the like right to self-determination of other peoples (from B5, B6, B7).

(BC) Secession is sometimes an important way for a people to be self-determining; thus from a people's right to self-determination follows a presumption in favor of its right to secede.

This argument seems to me rather weak. I shall presently address problems that arise in obtaining (B8), but first let me point out that even if it were the case that group self-determination were granted a similar status to individual self-determination, making (B8) true, this would still not get us to (BC). Self-determination, as we've understood it, involves the freedom to select, formulate, and pursue particular projects and goals that shape one's identity. However, nothing so far entitles us to move from this right of self-determination to a right to political independence, or self-government. It is one thing to grant groups respect, recognition, the freedom to flourish and the right to engage in practices or traditions that are important and meaningful to them; it is quite a different thing to grant such groups the political rights of government. The difference lies in the fact that conferring political rights on a group thereby enables it to legislate more or less

according to its preferences, bringing with it the potential for policy that is inconsiderate, or even oppressive, of other groups.[29] Even in the case of individual self-determination, an individual's right to decree her own laws does not follow; it is thus compatible with a person's self-determination that she is subject to the same laws as everyone else. Given the authority and influence that governments have over those under their jurisdiction, the establishment of a government clearly outstrips what is required for individual self-determination, and thus an argument for primary rights to secession cannot ensue from consideration of what is required for individual self-determination.

But in any case, we cannot even derive (B8). We are told that liberalism is committed to rights of self-determination for peoples because peoples are the sorts of things with interests and are thus protected by liberalism. But not all interests generate rights; indeed, according to liberalism, only those interests or goods that are central to the well-being of individuals generate rights.[30] So, the claim must be made more precise: it must be that the protection of a people is related to the protection of the central interests of its members. But this claim certainly can't be true for all peoples, for some aren't central to the well being of their members. Consider on the one hand peoples that don't consider fairly the interests of all their members; and on the other hand peoples whose treatment of their members, while fair and equal, is nonetheless arguably detrimental to their well being.

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[29] I do not by any means wish to claim that such oppression is bound to be the result of secession, and in particular of those secessions (as we are considering) that are not *caused* by oppression. I am simply making the point that rights to secession do not flow unproblematically from rights to self-determination.

[30] For example, there are many things that have interests–trees, oranges, fish–but we are reluctant to say that such things have rights, or, at least, very many rights. Moreover, not all persons' interests generate rights. I may have an interest in reading *Bleak House*. But it is odd to say that I have a right to do this: perhaps you have the only copy; perhaps the book is out of the library, etc. Nobody is under any obligation to provide me with a copy of *Bleak House*. If I have any right here, it is simply one of a more general kind: that my copy of the book not be stolen; that I not be needlessly disturbed from my reading, etc. Then for it to follow from the interest group X has in having its culture maintained that group X has a right to such, we need to be shown that there is a more general right groups have that their culture be maintained, precisely the question at stake.

In the first instance, Susan Okin argues that "Many of the world's traditions and cultures [...] are distinctly patriarchal. They [too] have elaborate rituals, matrimonial practices, and other cultural practices (as well as systems of property ownership and control of resources) aimed at bringing women's sexuality and reproductive capacities under the control of men."[31] Okin gives several examples of what she has in mind here, from polygamy to clitoridectomy. Such cultures arguably cannot be central to the well being of their members.

In the second instance, I would argue that the Amish are a group who, while not discriminating against any of their members, nonetheless may deny them treatment that furthers their well being: insofar as the well being of a person is a function of the meaningful options she holds in the society she inhabits, the denial of secondary education to a citizen of the United States has a negative impact on her well being, since this severely limits the meaningful options available to her. Thus those Amish who do not want to follow the traditions of their community are placed at a grave disadvantage when secondary education is not made available to them.

Therefore, it cannot be, as a result of argument (B1) - (BC) at least, that the right of self-determination is held by all peoples. Nonetheless, it may still be held by those peoples whose protection is central to the well being of their members, if there are any. We might reformulate the above argument as follows:

(B5') It may be crucial to an individual's self-determination that she identify herself with a people.

(B6') Unless secession is permitted, certain peoples may be unable to survive satisfactorily.

(B7') If a people is unable to survive satisfactorily, this may compromise the self-determination of some individuals (viz. those whose well being depends on the satisfactory survival of the threatened group).

(BC) Secession is to be permitted when both i) secession is required in order to enable a people to survive satisfactorily; and ii) the failure of this people to survive satisfactorily will compromise the self-determination of certain of its members.

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[31] Susan Okin, (1998), 'Feminism and Multiculturalism: Some Tensions' *Ethics*, 108 (4), pp. 668-9.

(B5') is not obvious, but it is plausible. Kymlicka has argued that access to a culture is in fact a prerequisite for leading a good life.[32] Leading a good life, he claims, depends on our being able to conceive what a life according to a certain set of beliefs and values is like, and also to have the opportunity of embracing—or rejecting—some such set. The best way to provide this opportunity is actually to be part of a particular culture that is identified by its characteristic values and beliefs, and to experience first hand the significance and worth of such. For example, imagine that I am raised in the Catholic faith. I gain the opportunity to embrace or reject Catholicism from an informed point of view, and, even more importantly, I experience what it is like to live life within some sort of shared system of values: I appreciate the role of a strongly defined community.

Now, as has frequently been pointed out, nothing so far commits us to the protection of any *particular* group. For all Kymlicka's argument has shown, it may be important for an individual to be a member of some group or another, but it does not appear to matter *which* group or groups she is a member of, and so we have no real argument leading us to protect rights of self-determination with regard to particular groups. Nonetheless, Kymlicka's claims are easily supplemented. An important aspect of self-realization is to identify or disidentify oneself *as* a certain type of person. For example, one may view oneself as an animal rights supporter, as an evangelical Christian, as an athlete, etc. In this way, we categorize ourselves. Since such categorization is integral to self-realization, and cultures offer a particularly robust form of categorization, the opportunity to belong to one is an important means to self-realization. Now, it is crucial to the value of self-identification that it is stable (or at least stable to quite a high degree). This leads us to be concerned with the maintenance of *particular* cultures, for insofar as we want to create an environment in which individuals are self-determining, it is not enough simply to provide wide choice of group membership, we also need to provide stability in group

[32] Will Kymlicka, (1989), *Liberalism, Community, and Culture,* Oxford: O.U.P.

membership, particularly of those groups that are most important to one's self-identification, as I have argued that a cultural or ethnic group is. These considerations vindicate (B5').

(B6') could mean (i) that unless secession is permitted a certain people is threatened with extinction; (ii) that unless secession is permitted a certain people will be unable to gain fair recognition; or (iii) that unless secession is permitted a certain people will be unable to gain or retain dominance in a particular area. I claim that only under interpretations (i) or (ii) does (B6') make (B7') true. The fact that a people is not so dominant or influential in a particular area as its members would like (interpretation (ii)) does not lead to a failure of the members of that people to be self-determining. There are far too many counter examples in the form of persons who (a) identify themselves strongly with a particular people and who take great pride and comfort in this; but who (b) do not belong to a dominant people. Consider, for instance, the importance that being Jewish has to large numbers of Jews, despite their geographical and political diversity.

Turning now to (i), in order to derive (BC'), secession has to be a plausible remedy to the people's threatened extinction. And when this is so, the reason will generally be because the people in peril suffer from some form of external intolerance that prevents its survival. External intolerance may manifest itself in many ways. It may take the form of actual genocide or ethnic cleansing as has happened to the Kurds in Iraq, or it may be a failure to represent sufficiently the interests of a particular people, which has been the source of many breakdowns of colonial rule. When secession is a remedy for such problems, however, it can be justified in a more direct fashion than via the argument from self-determination given above. Generally, external intolerance is going to involve violation of persons' basic rights and liberties (e.g. genocide); or a violation of persons' rights to political equality (e.g. a failure of adequate representation, or discriminating legislation). Such instances *do* yield a liberal case for secession, if secession is a plausible method to address such rights violations. However, these are instances of a remedial right to secede, i.e. a right to secede in the light of certain relevant injustices.

Similar things may be said with regard to (ii). Usually, when groups claim that they lack fair recognition, they have in mind that they are not treated as full equals in a particular political community. They feel that their interests are not weighed fairly with other groups; that their

group voice is somehow judged to be inferior or less important than the majority voice. This might be due to prejudice, ignorance, or a lack of interest on the part of the majority. In the name of protecting the basic interests of all its citizens, a liberal government certainly has a duty to fight against such lack of recognition: it is surely in every person's basic interest to be recognized as a full and equal member of her moral and political community. If secession really is the only plausible way to promote such recognition, then it may be pursued, although as above, for remedial reasons. It seems to me, moreover, that if failure of recognition is rooted in prejudice, ignorance, or lack of interest on the part of the majority, then secession may very well not be the most appropriate means by which to combat it.

We may conclude, then, that a *primary* right to secession does not *follow* from principle (B). Is it even supported by principle (B)? I don't think so. Principle (B) arguably supports claims to provide institutions that permit individuals to live in a free and autonomous manner, and to provide this is in a fashion that is constrained by some considerations of equality. However, nothing in this lends support for a primary right to secession. Indeed, the following consideration suggests quite the opposite.

The typical (not the necessary but the typical) result of secession is increased homogeneity within an area, especially if the secession is viewed as an expression of ethnic self-determination. And most secessions are in fact viewed this way, even if this is not their fundamental cause.[33] But if the homogeneity of an area is increased, it follows that persons living in that area will enjoy fewer options with respect to the kind of life they want to lead. And this is a bad thing if we value the free choice of individuals to shape their own lives, for the fewer options available to a person, the less meaningful such choice becomes. Just as formal education is frequently claimed to be necessary to the proper exercise of one's freedom of thought and

[33] For instance, Etzioni, (1992), op. cit. argues that most secessions have hitherto been movements against remote and unresponsive governments, rather than expressions of national self-determination. This interpretation is supposed to be true even of the relatively recent breakaway of Estonia, Latvia and Lithuania from the former USSR. Nonetheless, Etzioni concedes that secessions tend to be *perceived* as

speech, so experiential education of alternative sets of value from one's own is, I claim, an important part of what it means to understand one's beliefs and practices *as one's own*, and to appreciate them as a part of one's identity. Hence, principle (B)—the principle that individuals have a claim to self-determination; space and opportunities for them to pursue their particular goals are to be fairly and equally protected—arguably undermines rather than underlies a primary right to secede, and thus does not justify a primary right to secede that is a claim or a liberty.

expressions of national self-determination.

4. PRACTICAL CONSIDERATIONS

Let's take stock of our position so far. Following from the discussion of section 2.2, I have argued in support of the following:

(i') Nobody's basic rights or liberties are violated by failing to recognize a primary right to secede; nor is any principle that may reasonably be held to underline the right or liberty flouted by failing to recognize a primary right to secede.

Since this is true, I suggest that the primary right to secede is best conceived, by liberalism, as a *privilege*, and not a liberty. However, I said that there was, other things being equal, a presumption against state interference with privileges unless it can be shown that there is good reason for such, i.e. unless condition (ii) is met. We therefore need to consider whether

(ii') There is some significant public benefit to be gained, or greater equality promoted, by prohibiting a primary right to secede.

I think that this is so.

One consequence of institutionalizing a primary right to secession, noted by a number of authors, is the problem of 'perverse incentives.'[34] Particularly worrisome is that "any state that seeks to avoid its own dissolution (as most states do) would have an incentive to implement policies designed to prevent groups from becoming prosperous enough and politically well-organized enough to [be capable of having a functioning state of their own in the territory they occupy]."[35] Clearly, this is an undesirable result. However, it does seem to be the case that a state that is self-interestedly concerned with its own preservation and integrity (as we can assume most states to be) will not encourage the autonomy and political development of its regions, if such autonomy and political development is likely to lead to their secession. On a more positive note, if secession is to be permitted just when cultures are threatened by intolerant regimes, then such

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[34] This expression is taken from Buchanan, (1997), op. cit., p.43.

[35] Ibid., p. 52.

intolerance may be limited and moves towards integration made, since most states desire to preserve their integrity.

Buchanan also claims that a permissive right to secession would give rise to perverse incentives with respect to immigration policy. If it is in a state's interests to prevent the concentration of ethnic, cultural or political groups who might in time build up the resources to successfully secede, then that state will have an incentive to create immigration and relocation policies preventing such concentration that is pernicious to it. Buchanan argues that there is a general lesson to be learned here:

> Theories according to which majorities in regions of the state are automatically legitimate candidates for a right to secede [...] look more plausible if one assumes that populations are fixed. Once it is seen that acceptance of these theories would create incentives for population shifts and for the state to attempt to prevent them, they look much less plausible.[36]

We should note that if Buchanan is right in his suppositions, as seems likely, then support for a permissive right to secession flies in the face of support for the more fundamental liberal values underlying personal relocation.

Third, it is useful to bear in mind that there are many other ways of providing resolution to the problems that may result in secessionist conflicts. And "conflicts" is the appropriate term here: rarely do separatist claims arise and reach resolution without conflict, struggle and animosity. The preferred course of action is surely to explore various options of resolution without separation. Such options include various forms of decentralization, such as federalism, or local assemblies. These alternatives are preferable not only in that they help to avoid the animosity that tends to build up in a secessionist conflict, but also in that they are, on the whole, more equitable. By this I mean that while a system of federalism allows for a degree of local management, it also permits state-wide regulation concerning matters that are of central concern to the individual, such as education, health care, and a social security system.

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[36] Ibid., p. 54.

In this way some support for local autonomy is honoured, and directed toward the right sort of subject matter, viz. things that are best effected locally, such as the use of local government services, and the provision of community resources. Plausibly, the sorts of resources that are most useful, and the type and frequency of services provided will depend to a large extent on the make-up of the local community under consideration. However, background conditions of equal civil rights that are independent of local government constitute both a checkpoint against corrupt local power, and also a means to fair equality of opportunity, assuming that persons do not always choose to remain in exactly the area they were born.

5. Conclusion

I have argued that liberalism has a theoretical commitment to a primary right to secession in the following sense: the general primary right to secede is a privilege, so that, other things being equal, persons are not duty bound to refrain from secession. This theoretical commitment on the part of liberalism is a weak one, and it does not generate a permissive attitude towards secession. In contrast, liberalism recommends that the general primary right to secede not be written into international law, since there would be grave adverse effects in doing so.

I order to arrive at this conclusion, I first noted that rights come in various forms: in particular, rights might be privileges, liberties, or claims. I claimed that, in a political setting, certain features characterize, or underlie the justification of, the rights that we recognize as claims and liberties. These features, I suggested, are in the case of claims a sense of urgency or priority to bring about certain ends; and in the case of liberties justificatory principles (A) and (B)—a principle against unreasonable coercion and a principle protecting individual self-determination. I argued that a primary right to secede is not plausible characterized by either such feature. This result led me to suppose that the primary right to secede is a privilege. There is, I suggested, a liberal presumption opposing legislation against privileges, but this presumption is overridden if such legislation can be shown to be a public good, or to promote greater equality, as is the case with legislation against primary rights to secession.

I think that this framework of rights may be a useful one in which to consider our political rights; I believe that from it we may be able to accommodate much of the ambivalence that persons sympathetic to liberalism can feel toward other proposed extensions of liberal principles to a more libertarian theory. If we are inclined, *prima facie*, to say that when there is no duty not to $\emptyset$ it follows that there is a liberal right to $\emptyset$, then we shall be inclined to assert an extensive set of rights that map out a broad sphere of personal independence and a general lack of mutual responsibility. This is, I think, characteristic of libertarianism. If, however, we recognize that some in this extensive set of rights are merely privileges, we are able to account for the *attraction* of such an extensive set of rights, while maintaining that various restrictions on this set are justified. Examples of such restrictions might include stricter controls on pollution (including

greater costs associated with the use of cars, for instance), and Samaritan laws designed to foster mutual aid.

I shall not, however, explore this diagnosis any further here, where my aim has been to attempt location of the right to secession in the framework of liberal rights. This right has been located as a privilege, and thus does not support the permissive attitude towards secession.

THE RIGHTS OF FUTURE GENERATIONS

1. INTRODUCTION

In this paper, I want to look at a new issue that challenges liberalism to accommodate normative concerns beyond the present territorial boundaries of the domestic state. This is the problem of what we should say about our obligations to future generations. Intuitively, it is not obvious that there is any *particular* problem regarding our obligations to future generations. Surely, if we believe that people have rights which constrain permissible public policy, then we are, it would seem, likely to say that future generations—since they are people—have rights which constrain permissible public policy. Admittedly, we are not related to future generations in the same way that we are related to members of our own society, or even to our global contemporaries; we cannot, for instance, engage in mutually advantageous contract with future generations. We are not—except mediately—affected by future generations; rather, it is us who affect them. Nonetheless, we may be inclined to think that just as *contemporary* persons who are *geographically* distant *at least* have claims against our harming them, violating their rights, or in any other way interfering with their interests in a grossly unfair fashion, so too do future generations have at least these similar claims concerning *their* respective rights and interests. Perhaps there is a "discount rate" according to which the claims of future generations are assessed; perhaps this is the same discount rate as might be appropriately directed toward those who stand in geographically distant relations to us; perhaps it is a different discount rate. Whatever we say of such matters, it is surely not the case that it is morally permissible for us to *disregard* the interests of future generations, for it appears that such disregard may prove extremely harmful to them. It seems, then, that future generations have legitimate *claims* against us.

Unfortunately, this straightforward account faces philosophical difficulties. Derek Parfit has drawn our attention to what he calls the "Non-Identity Problem."[1] The Non-Identity Problem is best captured through example. Parfit provides us with the example of a "young girl's child," in which we are to imagine that a girl of fourteen (we'll call her Theresa) gives birth to a child (we'll call him Tim). We may agree that it would have been better if Theresa had waited several years before choosing to have a child. But on what grounds do we claim that this would have been better? We cannot, Parfit argues, truly say that it would have been better for *Tim* if his mother had chosen to have children later, because were it not for the fact that Theresa did not make such a choice he, this very child Tim, would—plausibly—never have existed.[2] So it would not have been better for *him* if his mother had made what we think to be the better choice. We are left, then, with the puzzle of how to explain in what sense Theresa's decision to have children early is worse than her decision to have children later would have been. Of course, we might say

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[1] Parfit, (1984), *Reasons and Persons*, Oxford: O.U.P. I also use Parfit (1986) 'Comments,' *Ethics*, 97: 854-862. The latter is a reply to James Woodward, (1986), 'The Non-Identity Problem', *Ethics*, 96: 804-31. I also refer to Woodward, (1987), 'Reply to Parfit,' *Ethics* 97: 800-816.

[2] While this is not the time to provide an detailed account of the metaphysics of personal identity, a few clarifications are necessary. First, the topic here is not personal identity over time (the latter might concern, e.g., competing psychological continuity or physical continuity theories), but personal identity in, as Parfit puts it, 'different possible histories of the world.' Second, the claim—using our case as an example—is not that Tim could not *possibly* have existed had his mother not conceived him when she did, but simply that he would not *in fact* have existed. On any of the plausible accounts of the individuation of persons, whether they appeal to facts about the origin of an individual—the particular ovum and sperm from which he or she grew—or whether they appeal to some set of uniquely identifying descriptions that this individual realizes, it is very plausible (trivial, on the first view) that different sets of ova and sperm produce distinct individuals. Possibly, one might think, there is room to doubt this in the case of different sperm that might have fertilized the same egg. Thus Parfit couches his claim in the following way: "If any particular person had not been conceived within a month of the time when he was in fact conceived, he would never in fact have existed" (1984, p. 352). The only view of personal individuation that might find this unacceptable is what Parfit calls the "Featureless Cartesian View," also coined "Haecceitism" by David Kaplan. (For discussion of Haecceitism, see David Lewis, (1986), *On the Plurality of Worlds*, Oxford: Basil Blackwell, pp. 220-248.) I take it that a) it is not clear whether the haecceitist would in fact reject Parfit's claim just mentioned; and b) that it is not controversial to reject haecceitism, even if haecceitism does indeed reject this claim. In fact, all that is required in order for the following arguments about future generations to be plausible is acceptance of the following claim: if in one possible future of the world people make extensively different choices about who to have children with and when to do this than they do in another

that Theresa's choice is worse *for her*, and perhaps for others such as her parents, but while that is certainly a part of it, it did seem, initially, that there was more to say. It seemed, initially, as though *Tim* was made worse off by his poor start in life, but, as we have noted, this appears not to be true. Thus it seems as though, whatever our objection to Theresa's decision, the objection cannot appeal to the Tim's interests. Cases of this sort—in which present actions affect not only what *happens* to future persons, but also *the identities of those future persons*—raise what Parfit calls the Non-Identity Problem. I shall spell out this problem and its alleged consequences in more detail presently.

The Non-Identity Problem as it arose for Theresa and Tim can be translated, on a broad scale, into a general problem concerning future generations and present public policy. How, if at all, are our obligations to future generations affected in light of the fact that our choice of policies *now* will affect the very *identities* of persons who exist in generations to come? Parfit claims, I think plausibly, that we may suppose a major public policy decision to have sufficiently broad ramifications such that in about two or three hundred years there would be nobody alive who would have been alive had some different policy been selected.[3] Policies aimed specifically at the good of future generations, such as measures to curb population growth or consumption, are, very plausibly, large enough to have this consequence. But if other, less benevolent policies would not, according to the Non-Identity argument, make the future generations who consequently exist *worse off*, then what reason is there not to pursue such policies?

In general, if we now choose policies whose effects will make the quality of life for future generations (whoever they turn out to be) much worse than it would have been had we

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possible future of the world, then the resulting persons who exist in either world will not be the same. This seems very uncontroversial.

[3] Anthony D'Amato argues that applying chaos theory further supports the plausibility of this claim: chaos theory demonstrates how apparently small environmental interventions quickly have global ramification. "An environmental intervention as slight as a butterfly flapping its wings [...] after 1 or 2 years [...] could actually be the cause of a major storm that otherwise would not have taken place." D'Amato, (1990), 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?' *American Journal of International Law*, Vol. 84, 190-198.

chosen otherwise, how are we to articulate the claim that this matters, that these policies may be such as we ought not pursue them; indeed that the rights of future generations may be violated by such policies, while it remains true that those affected by them (viz. the future generations) would not have existed had they not been chosen, and thus can hardly be said to have *themselves* been made worse off by those policies? Finding an answer to this question is the Non-Identity Problem; the problem is to find a *moral reason*—a reason from coherent and plausible moral principles—against pursuit of policies such as those just described,

To exacerbate this problem, Parfit speculates that "[How we affect future generations] is the most important part of our moral theory, since the next few centuries will be the most important in human history."[4] Whether or not Parfit is correct in this claim, it can hardly be denied that a moral theory that has no adequate response as to what our obligations to future generations are is deeply lacking.

Of course, it *may* be that the best liberal response to the Non-Identity Problem is to concede that future generations comprise an area in which we cannot appeal to the rights and interests of those affected by our choices, and to use a framework other than the rights and interests of individuals in which to articulate our obligations to future generations.[5] This would

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[4] Parfit, (1984), p. 351.

[5] For example, a utilitarian account may appear attractive, because it gives a clear and plausible answer to the Non-Identity Problem. It doesn't matter, on the utilitarian account, *who* in particular is affected by certain future-affecting policies and actions. If one possible future X contains a greater amount of a happiness than another possible future Y, then on the utilitarian framework X is preferable to Y. Our moral obligation then would be to bring about that future (including both near and distant future) in which most happiness exists.

Although this straightforward analysis undoubtedly has appeal, problems quickly (and familiarly) arise for the utilitarian treatment of future-affecting action and policy. Whatever its virtues with respect to the Non-Identity Problem, utilitarianism suffers elsewhere. Parfit draws our attention to what he calls 'the Repugnant Conclusion' in which for any possible population of at least ten billion people, all with a very high quality of life, there must be some much larger imaginable population (Z) whose existence, other things being equal, would be better, even though its members have lives that are barely worth living (Parfit, 1984, p.388).

This conclusion appears to be unacceptable. But it is a conclusion that is difficult for the utilitarian to avoid. Admittedly, it is hard for *any* theory to give an adequate account of the balance between the number of persons living and the quality of their lives, assuming that we may sometimes have to make a trade-off in those dimensions. However, at least a rights-based approach has (or appeared to have!) some

mean *departing* from the usual liberal framework in order to give adequate moral consideration to future generations. I think this would be unwelcome, because future generations, whoever they turn out to be, will certainly turn out to be people, and I retain the intuition that they ought thereby to possess whatever basic rights people have, and moreover that these rights might be appealed to as reasons to constrain present activity. Fortunately, I don't think that we need opt to depart from this framework. I shall argue, in fact, that the *only* way in which to give adequate moral consideration to future generations is to appeal to certain rights that they have, and to recognize that those rights constitute claims against us. I shall thus argue, *pace* Parfit, that such appeal is coherent and legitimate.

I should add that I am not committed to the claim that *all* moral questions about future generations may be resolved by an appeal to their rights, just as I do not think that all moral questions about existing persons concern their rights. It seems to me that we may very well need something like Parfit's "Theory X"—a theory using Non Person-Affecting principles of beneficence—in order to give a complete account of our obligations toward future generations. My main point remains, however, that an appeal to the rights of future generations is certainly the most adequate way to resolve some of the most important issues that concern future generations; and that this approach has much greater scope than Parfit gives it credit for.

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resources with which to defeat *pursuit* of (Z): if it is a violation of people's rights to place them in circumstances as depicted in (Z), then we ought not do that.

There are, of course, some responses that a utilitarian might make at this point. She might, most straightforwardly, appeal to a principle of greatest *average* utility. If average utility is what counts, then clearly (Z) scores very poorly against many possible alternatives. But this response appears to have the implausible implication that we should (now) kill off all but the most happy. Or, at least, that *it would be better* if all but the most happy were to drop dead. And in general, a theory of average utility will have the unwelcome implication that lives which are distant—geographically or temporally—are not only related morally in virtue of the mutually good or bad *effects* that they may have on one another, but also *merely* in virtue of their relative quality. For instance, if my life now would, all things considered, bring down the average quality of life held by present and future generations, then the theory of average utility claims that it would have been better if I had never lived. But this seems wrong—the *mere fact* that lives of future generations are of a higher quality than my life is now appears to have no bearing at all on the question whether it would have been better if I had never lived; my life *at least* needs to affect theirs in an adverse fashion for this question to be answered negatively as a result of future-looking considerations.

I shall, at various points in this paper, speak of liberalism as being "rights-based." In this I speak of the rights that individuals have. When I claim that a theory is rights-based I mean that that theory takes such rights to be the foundation of political argument. It follows from this that the justificatory bases of political institutions and public policy will assign a high priority to individuals' rights. The latter will *constrain* what it is permissible to pursue for the sake of some other end; a liberal rights-based theory will also assure to individuals the option to shape their lives, or at least the most important and central aspects of their lives, according to their own choices—in particular, absent any overriding requirement to further a favoured societal goal.[6] I take it that after such constraints and options are realized and assured there is room, according to a rights-based theory, for political argument to concern questions of beneficence and the general good.

A theory such as liberalism does, admittedly, look particularly ill-equipped to respond to the Non-Identity Problem, since it may seem natural for the liberal theorist—focused primarily as she is on the rights, liberties, and interests of individuals—to say that a choice is a worse choice only if people are affected by it for the worse. For it is natural to suppose that the rights that liberalism is concerned to protect correspond in some way with our basic interests. On this account it would seem that when our rights are violated this would adversely affect some central interest of ours.[7] For if our theory is fundamentally concerned with the rights, well being and interests of individuals, then how could something matter according to that theory if nobody is in any way made worse off by it?

But there are, of course, some responses that can be made to this question. These responses would claim that some liberal principles are not aimed crucially at the protection of *individuals' interests* (with the emphasis on either half of that term depending on the response).

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[6] The language of 'constraint' and 'options' is taken from Frances Kamm, (1992), 'Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status,' *Philosophy and Public Affairs*, 21(4):354-389.

[7] Compare Judith Jarvis Thomson's claim: "The stringency of claims (rights) is a function of how badly off someone will be if he is not accorded his claim (this is the aggravation principle)." (Thomson, (1990), *The*

For instance, a Millian liberal might claim that rights are defensible on rule-utilitarian grounds; if this is the case then certain instances of rights violation may be worse for nobody, but should be prohibited nonetheless, for the sake of the more general rule they are instances of. The more general rule facilitates contribution to the general good. Similarly, policies subject to the Non-Identity Problem might be objected to if they are rights violations, despite the fact that these policies can truly be said to make nobody worse off.

A similar line of argument, supporting a different underlying conception of rights and the conception that I favour, is that which has recently been advanced separately by Frances Kamm and Thomas Nagel.[8] On this account, protecting rights—or at least protecting our more fundamental rights—confers a certain status on persons as moral equals and is for this reason crucial. The protection of rights might not always be good for the agent in the ordinary sense, but is nonetheless held to be 'vitally important' (Nagel) in a society that is premised on the status of its members as moral equals. Nagel gives the example in which a choice is offered between a significant increase in the likelihood of one's being murdered, as against the abolition of one's moral or legal right not to be murdered.[9] He claims that the former would be chosen despite there being a clear sense in which one is, very likely, worse off under this choice. The former would be chosen because of the crucial importance one recognizes in ones moral and legal rights against murder.

This account seems to me to be a promising one, and it is one that I shall appeal to at certain points in this paper. The idea is a Kantian one: in a community of moral equals, there are certain ways of treating people that are simply *impermissible*, regardless of the consequences for their own good or for the good of others. Added to this idea is recognition of the status that such impermissibility confers on those who are protected by it, and intuitive acceptance that this status

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Realm of Rights, Cambridge, Mass.: Harvard University Press, p. 161.) I do not think that the aggravation principle is true.

[8] See Nagel, (1991), *Equality and Partiality*, New York: O.U.P. esp. pp. 143-149; and Kamm, (1992), op. cit.

is fundamentally important. It *is* of fundamental importance to us that we recognize ourselves to have quite a different status from, say, plants and animals, and that this status is bound up with the ways in which it is permissible to treat one another. What I hope to show here is that if we take this basic idea seriously it equips us with both a response to the Non-Identity Problem, and a fresh way of regarding our obligations to future generations.

It seems to me crucial that in the case of future generations, because there is inevitably so much uncertainty surrounding their welfare and interests, we recognize their rights and our consequent obligations *simply* in virtue of their (stable) status as our moral equals. Any other basis, would, it seems to me, be contingent on our unreliable predictions about future events, and subject to the rationalization of disregard for future generations.

This paper will proceed as follows. In the next section, I outline Parfit's arguments in more detail, in order to get a firmer grip on the Non-Identity Problem and the questions it raises. In section three, I consider and overcome an obstacle that might be thought to undermine my whole project: this is the problem of attributing rights to so-called 'merely possible entities.' In section four, I consider three arguments which claim that, *pace* Parfit, future generations *are* made worse off by certain policies that have bad future effects. I suggest that these arguments fail: Parfit is right in his claim that future generations are not, in general, themselves made worse off by our choice of future-affecting policies. I then proceed to argue, in section five, that the truth of this claim is not incompatible with some such policies violating the rights of future generations. We thus have rights-based reasons not to pursue such policies. These reasons, moreover, both reinforce and are reinforced by the conception of rights just mentioned, which connects them crucially to the notion of moral status. I claim, therefore, that there is an *asymmetry* between what we might called "welfare or interest based moral arguments," and rights-based moral arguments; in particular, while the fact that some set of future persons S could

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[9] Somebody might object that it is not possible to imagine oneself as lacking the moral right not to be murdered. I don't think this is true. One need only imagine oneself as worth very, very little; to have the moral status of a plant, for instance.

not both have existed and have been better off than they in fact turn out to be argues against the claim that members of S have been *harmed*, the fact that members of S could not both exist and have their rights properly protected does *not* argue against the claim that members of S may have had their rights violated, and thus have been wronged. The last sections of the paper consider some further difficulties which allegedly arise for a rights-based treatment our obligations to future generations, but these considerations in fact turn out to *support* our account, rather than undermine it.

2. The Non-Identity Problem

Parfit's basic argument I take to be the following, which I shall call argument (P). (P) illustrates the Non-Identity Problem; the problem that results from the fact that our decisions now can affect not only the number of future people, and their quality of life, but also the *identities* of those people.

(P)

1. A person's identity depends on when she is conceived, in that if a particular person had not been conceived within a month of the time when she was in fact conceived then that person would never in fact have existed.

2. Regarding two policies that affect future generations, policy X and policy Y, there would, within a few centuries from adoption of policy X, be nobody alive who would have been alive had policy Y been adopted, and vice versa.

3. If someone has a life worth living, having that life is not worse for the person than having no life at all.

4. Given that those alive as a consequence of our choosing policy X are in fact dependent on this choice for their existence, then so long as their lives are worth living they are not made worse off by the choice of policy X.

5. If the lives of future generations under policy X are worth living, and no contemporary persons are made worse off by pursuit of policy X, then it is plausible that nobody at all is made worse off by the adoption of policy X.

6. If nobody is made worse off by a policy, then that policy is permissible.

7. Therefore, any policy that meets the antecedent conditions of (5) is permissible.[10, 11]

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[10] There is also an argument in Parfit along the lines of (P) that claims that not only are future generations—so long as their lives are worth living—not made worse off by our choice of policy, they are in fact *benefited* by this choice. This would follow from the claim that to be born is to be benefited (a claim I do not believe). Although I do not discuss it separately, I take my arguments to apply to this way of

But, of course, there are many policies able to meet the antecedent conditions of (5) that we should object to: any policy pursued for our present gain, that leaves future generations badly off but not so badly off that we can plausibly claim their lives are not worth living, meets the antecedent conditions of (5). For the purposes of this discussion, let us consider three policies adapted from those that Parfit outlines: *Dangerous Policy, Conservation* and *Depletion.*

The Dangerous Policy: As a community, we must choose between two energy policies. Both are completely safe for at least three centuries, but one, requiring the burial of nuclear waste in areas that will, to the best of our predictions, become earth-quake prone in the distant future, involves longer term danger. If we choose this Dangerous Policy, the standard of living will be somewhat higher over the next century. We choose the Dangerous Policy. As a result, there is a catastrophe many centuries later: an earthquake releases radiation that kills thousands of people. The people who will be killed in this catastrophe have lives worth living, and would not have existed had we chosen the other policy.[12]

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putting the case as well. In particular, I do not think that the fact that X benefits Y by performing P rules out the possibility that X also violates Y's rights by performing P, and that X ought thereby not perform P.

[11] We should note that Parfit does not endorse claim (7); rather, he thinks that we should reject (6) and appeal only to "Non Person-Affecting principles" (to be spelled out) when considering which future-affecting policies to adopt. I also think that (6) must be rejected, though for different reasons. Parfit in fact endorses what he calls the "no difference view," the view that, although the Non-Identity Problem raises theoretical questions, it never affects what we ought to do. According to the no difference view, there is an objection to any act that causes a future person to be badly off, even though this act would not be worse for that person. And the objection is as strong as it would have been if that act *had* been worse for that person.

I shall at some points in this paper refer to the "proponents of (P)," meaning those (possible) persons who suppose that (P) indeed sanctions some unscrupulous policies directed toward future generations. That is, they think that the Non-Identity Problem has no adequate answer, and therefore that there is no moral reason based on wronging future people against the pursuit of just about any policy we like. I have not actually met, or read, anybody who does think this. (People do have very different opinions concerning the correct response to the Non-Identity Problem, however.)

[12] *Dangerous Policy* is adapted from Parfit's *Risky Policy*, (1984), op. cit., pp. 371-72. The cases are identical, except that in Parfit's we do not know whether the areas in which we bury the nuclear waste are likely to become earthquake-prone; we simply know that this is possible. I think that this added uncertainty is distracting—uncertainty brings with it its own problems for ethical theory, and there is no need to

Conservation: As a community, we must decide whether to deplete or conserve natural resources. If we choose Conservation, the quality of life for those living over the next 200 years will be marginally lower than it would be under Depletion. The quality of life for those alive after those two centuries have passed would, however, be much higher than if Depletion were adopted, and indeed higher than it is today. [13]

Depletion: If we choose Depletion, the quality of life for those living over the next 200 years will be marginally higher than under Conservation. The quality of life for those alive after those two centuries have passed would, however, be much lower than it would have been under Conservation, and indeed lower than it is today.[14]

Many people think that we ought to choose Conservation over Depletion, and that we ought not choose Dangerous Policy. These people think that Depletion and Dangerous Policy are clearly morally objectionable policies. And, it seems, this is the right way to think. However, as Parfit points out, assuming that lives under Depletion and Dangerous Policy are still worth living, neither Depletion nor Dangerous Policy is worse for anybody. These policies thus meet the antecedent conditions of (5), and, according to (P), are not bad policies.

Of course, the outlines of these policies are artificially simple, but their simplicity will serve to clarify the issues at hand. Moreover, there are easily identifiable realistic problems that match these frameworks. Consider, for instance, the problem of population growth. The following

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complicate the Non-Identity Problem with these further puzzles. I thus take the case in which it is as predictable as these things go that the areas in which we bury the nuclear waste will become earthquake-prone.

[13] This is, or course, rather vague: there is no uniform sense of "the way in which lives are now." When these cases say that things are better or worse than they are now, I take that to mean better or worse than things are now for somebody averagely well off in a developed nation.

[14] The case of Depletion is also altered from Parfit's: Parfit considers the case in which those living two centuries after the adoption of Depletion are, though considerably worse off than those living two centuries subsequent to the adoption of Conservation would have been, still well off, and *better* off than we are today. I think that this case raises different issues than the Depletion case I consider, and though I shall discuss these issues under the topic of *Lesser Depletion* (section 6), I wish also to consider the sort of Depletion case I have outlined, which in any case seems to me to present the more realistic, and pressing, problem.

are widely, if not unanimously, reported to be global aspects of an overly large population. 1) Global warming: there is growing scientific consensus that the early phases of global warming may be upon us now. We do not understand the effects of increasing greenhouse gases in the earth's atmosphere—we do not know whether this effect is reversible. 2) The Ozone Hole: the destruction of ozone in the high atmosphere allows more ultra-violet light to reach the surface of the earth, which may have serious consequences for all forms of life, including humans. 3) Food grain: although per capita food production had grown since the time of Thomas Malthus it has, since the late 1980s, leveled off. Per capita grain production dropped 9.5% between 1984 and 1996. 4) Fisheries: growth in the annual oceanic fish catch stopped in 1989, and since then the available fish per capita has been declining. 5) Fresh water: predictions indicate that by the year 2025 two-thirds of the world's people will suffer from water shortages.[15]

All of these problems are caused by population growth, because population growth has caused the scale of human intervention in the climate and ecosystems to have these deleterious effects. Some people remain, nonetheless, optimistic that future generations will advance technologically at at least the rate we have advanced this century, and will, therefore, be resourceful enough to overcome any such problems as 1)-5). This seems implausibly optimistic to me. In any case, what is I think uncontroversial is that such optimism would be an irresponsible basis for public policy. Amartya Sen: "It took the world population millions of years to reach the first billion, then 123 years to get to the second, 33 years to the third, 14 years to the fourth, 13 years to the fifth, with a sixth billion to come according to one UN projection, in another 11 years. [...] Whatever may be the response to alarmism about the future, complacency based on past success is no response at all."[16]

From this data it would seem fair to say that the failure to implement measures to curb population growth and bring it down to a sustainable level (global growth rate is now about 1.6%

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[15] For various articles and reference material on issues related to population, see http://www.ecofuture.org/ecofuture/pop/info.html.

per year—down from 2% in 1970 but still too high: the world population will, at the present rate, double in less than 50 years) is, to the best of our knowledge, an instance of Depletion. It is worth adding that this is especially true of countries such as the United States: it has been estimated that a person added to the population of the United States will have 30 or more times the impact on global resources than a person added to the population of an underdeveloped nation. In what follows, then, "the failure to adopt measures aimed to stop population growth in the United States" might be substituted for "Depletion." (This is, of course, just one suggested substitution—there are plenty of others.)

Returning to our discussion of the Non-Identity Problem, it will help at this point to make the problem more precise. And this can be done by borrowing from the work of James Woodward. Using Woodward's presentation of a similar case, I invite you to consider *Dangerous Policy**.

*Dangerous Policy**: In Dangerous Policy* events are just the same as in Dangerous Policy, except that facts about the human reproduction are such that the Non-Identity Problem does not arise. That is, it is not the case that were it not for our selection of Dangerous Policy* the people born two hundred years subsequent to that choice would not otherwise have existed; reproductive facts are such that we cannot alter the identities of future persons (this is, as Parfit puts it, a "same person case"). Thus whether we choose Dangerous Policy* or its alternative, the same people exist in either future. (Note that the *likelihood* of the dangerous leakage is exactly the same in Dangerous Policy as it is in Dangerous Policy.* In each case it is extremely likely.)

As Woodward points out, we are inclined to think at least two things in response to the cases of Dangerous Policy and Dangerous Policy*.

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[16] Sen, (1994), 'Population: Delusion and Reality,' *New York Review of Books*, p. 62. According to the International Programs Center, U.S. Bureau of the Census, the total population of the world projected to 7/30/99 is 6,002,451,688. The UN prediction Sen refers to would seem accurate if slightly conservative.

(A) We are inclined to think that the our actions in either case are equally wrong and wrong for the same reasons. Let us, following Parfit, call this the "no difference view"—there is no moral difference between Non-Identity cases and same person cases.

(B) In the case of Dangerous Policy* (in which future persons' identities are not altered as a consequence of our present actions), an appeal to future persons' interests or rights is relevant in the explanation as to why we choose wrongly.

However, in the light of the Non-Identity Problem, we may also be inclined to endorse:

(C) In the case of Dangerous Policy, (in which future persons' identities *are* altered as a consequence of our present actions), no appeal to future persons' interests or rights is relevant in explaining why we choose wrongly, since these persons are not made worse off by our choice. [17]

These three propositions are inconsistent, and thus we must reject at least one of them. The Non-Identity Problem could be thought of as the difficulty we experience determining which to reject. Parfit, Woodward suggests, is inclined to reject (B): even in same person cases we cannot appeal to the interests of those adversely affected by our actions quite so readily as we thought. Instead, we must appeal to an ethical principle that is more *impersonal.* Parfit argues against what he calls the "Person-Affecting View":

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[17] Woodward, (1987), pp. 813-814. The case that Woodward discusses is taken from Parfit (1986), and involves two women, Carla and Paula, and their respective sons, Carl and Paul.

Carla: Carla is pregnant. She learns that she must take some (harmless) medication in order to remove the risk that her son (Carl) will be born handicapped. She fails to take this medication, and Carl is born handicapped.

Paula: Paula is not yet pregnant, and she learns that if she conceives now there will be a risk that her child (Paul) will be handicapped in the same way as Carl. If she waits a month to conceive, and takes some (harmless) medication over that period, she will be able to conceive (a child other than Paul) without the risk of that child being handicapped. Paula nonetheless conceives now, and Paul is born handicapped.

Woodward claims that we are inclined to think the analogue of (A) - (C) in these cases. In fact these cases are perhaps even more compelling with respect to (A) and (B), but I think that our case is compelling enough, and for fear of an excess of cases on the table at once, I shall stick with the comparison of Dangerous Policy and Dangerous Policy I.

The Person-Affecting View, or *V*: It will be worse if people are affected for the worse.[18]

Parfit thinks that most of our 'familiar moral principles' appeal to *V*. According to our familiar moral principles, he says, "it is an objection to someone's choice that this choice will be worse for, or be against the interests of, any other particular person."[19] This claim, and *V*, appear to offer sufficient conditions for a state of affair's being 'worse' (worse, presumably, than if whatever brought about this state of affairs had not occurred), or 'objectionable.' Now although this is not explicit, I think it is reasonable to suppose that since Parfit cannot find among our familiar moral principles a principle that satisfactorily answers the Non-Identity Problem, he believes that something like *V* may be reformulated to state allegedly *necessary* conditions—according to any of our familiar moral principles—for something's being worse or objectionable; that is, we are inclined (though on Parfit's view—and on my own view—mistakenly) to think that such and such a choice is worse *only if* as a result of its selection people are affected for the worse. This is, of course, premise (6) of (P): (6) If nobody is made worse off by a policy, then that policy is permissible.[20]

Thus the soundness of (P) appears to depend on this revised statement of the Person-Affecting View, *V'*: It will be worse (if and) only if people are affected for the worse. Then if it can be shown that there are ways in which choices can be objectionable, or impermissible, even though nobody is affected by them for the worse, (P) fails.

Parfit believes that there *are* principles according to which choices may be impermissible even though nobody is made worse off as a result of these choices. We do not learn, in *Reasons and Persons*, exactly what his favoured principles are—they will constitute the

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[18] Parfit, (1984), p.370. I take it that *V* is not supposed to be a tautology, and thus read "It will be worse" as meaning something along the lines of "It will be more morally objectionable than an alternative available course of action."

[19] Ibid., p. 359.

[20] I shall assume that "is affected for the worse" means the same thing as "is made worse off."

elusive "Theory X." The closest Parfit comes to finding what he believes to be such an ethical principle, and thus a principle which can respond to the Non-Identity Problem, is Q:

> Q: If in either of two outcomes the same number of people would ever live, it would be bad if those who live are worse off, or have a lower quality of life, than those who would have lived.[21]

Q is clearly an impersonal principle: it responds to the Woodward's trilemma (above) by forgoing the appeal to persons' rights and interests even in same person cases—it rejects (B).[22] I shall argue, instead, that we should reject (C). I think that even in Non-Identity cases we can coherently appeal to the rights of future persons. If this is so, then we may retain our intuitions (A) and (B): that in same person cases an appeal to the rights or interests of affected individuals is appropriate; and that our obligations to future generations arise just as strongly and in the same sorts of ways as our obligations to contemporary persons, despite the Non-Identity Problem.

There is a sense in which Parfit's *V* (or *V'*) has two salient parts: first, it appeals to *some people*—if there are some people such that *they* are affected for the worse then this is a bad thing; second, it says that what matters is that these people are "affected for the worse" which is, as I shall take it, the same thing as to say that these people are made worse off. In what follows I shall take the first part of *V* to correspond with the difference between "personal" and "impersonal" principles; and the second part of *V* to correspond with the difference between a "Person-Affecting view" and a "Non Person-Affecting view." My solution to the Non-Identity Problem is similar to Parfit's in that it is Non Person-Affecting: I do not think that somebody's being made

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[21] Ibid., p. 360.

[22] Parfit claims, in fact, that in same person cases Q and *V* coincide and we will thus not need to choose between them. However, it is claimed that only Q gives a satisfactory account of Non-Identity cases. Since Q is formulated specifically to concern only future persons, it is hard to assess whether it in fact yields the same results as *V* in same person cases. As they stand, I think that Q and *V* lack sufficient specificity for us to be able to answer this question.

worse off by a policy is a necessary condition of that policy's impermissibility. In particular, I think that policies—Dangerous Policy and Depletion are among them— may violate people's rights without making them worse off. I thus differ from Parfit in that I do not think we are compelled to answer the Non-Identity Problem in impersonal terms.

Moreover, I think that the Non-Identity Problem *needs* to be answered in personal terms. This is largely because there are certain intuitions regarding Non-Identity cases that are both difficult to give up and that support a personal solution. One such intuition we have already looked at: the apparent moral similarity between Non-Identity cases and their relevant same-person counterparts. Another such intuition is our sense that when policies such as Dangerous Policy or Depletion are pursued, particular persons are wronged. For instance, it seems appropriate, and not misguided, for the future persons who live two hundred years subsequent to Dangerous Policy to complain that *they* have been wronged. And when they make this complaint, they do not, presumably, mean that they have been wronged because there is some more optimal way the world could have been if Dangerous Policy has not been chosen. Of course, it *may* be that this intuition is deeply misguided; nonetheless I think it important, even in Non-Identity cases, to retain the intuition that there are circumstances—such as Dangerous Policy or Depletion—in which *we* wrong *some persons*. I shall thus attempt to explain this intuition.

3. Can Merely Possible Entities be Sources of Claims?

There are some preliminary stages that need to be covered before we can achieve a solution to the Non-Identity Problem. First, some people might experience scepticism at the very project of providing a rights-based response to the Non-Identity Problem. For consider the following problem. If our reasons for not pursuing Dangerous Policy or Depletion are—as I shall argue they are—that they violate the claims that future generations hold against us, then it follows that, if we act morally and other things are equal, we will not pursue Dangerous Policy or Depletion. We have, as I shall maintain, rights-based reasons not to pursue these policies. But if this is the case, then the very reasons we have against pursuing Dangerous Policy or Depletion seem to be self-undermining. This is because they are supposed to be premised on certain rights held by certain individuals; but those individuals—since we act morally and do not pursue Depletion—never exist. But then we seem to be asserting—and acting on the basis that—merely possible entities have rights, but there are assuredly problems with this supposition.

If such scepticism is warranted, our situation is dire: we should have to say that there is room for moral concern, or outrage, at policies such as Depletion when both nobody's rights are violated by Depletion, and, if premises (1)-(5) of (P) are correct, *nobody is made worse off by Depletion.* This, it seems, would rule out any response to the Non-Identity Problem that is based in familiar liberal principles.

This scepticism is, however, unwarranted. To see this, let us attend more closely to what is being claimed. The problem is brought out in the following claim of Jan Narveson's: "If we think that all men have certain rights, then it follows that people living in the year 2469 have them, just as we do now... (t)ime as such would be quite irrelevant to the attribution of fundamental rights."[23] This, at first blush, appears to support my contention that it is perfectly coherent to appeal to the rights of future persons. However, Narveson's proposal is being made in

[23] Narveson, (1973), 'Moral Problems of Population,' *Monist*, 57 pp. 65-66.

the context of distinguishing between two interpretations of the claim that the unborn have rights. One interpretation is that those who are not yet born, but who will be, have rights; the other interpretation is that—along with those just mentioned—those who could have been born and indeed who would have been born, were it not for the use of (say) contraceptives, have rights. It is the first claim that Narveson supports. The latter claim Narveson takes to be the claim that merely possible entities have rights, which in turn is effectively the same as the claim that "non-existent entities" have rights, which Narveson argues, is a false claim, since sentences whose subject terms fail to refer to anything are standardly interpreted as either false or lacking in truth value; in either case not true.

However, it seems to me that there is some confusion in Narveson's argument between the truth conditions of assertions concerning actual states of affairs and the truth conditions of assertions concerning counterfactual states of affairs. I propose a simple-minded account of the latter here. As I propose it we accept that counterfactual statements can be true, and that this is most obvious when counterfactuals are expressed in the form of conditionals. For example, imagine that we are debating whether to leave a piece of grassland as it is, or to build apartment blocks on it. There is no other proposed use for the grassland than to build apartment blocks. Then, calling the option of building *Construction*, we might truly say the following:

(A) The buildings that would be erected here under *Construction*, other things being equal, would be apartment blocks.

Or, if "the buildings that would be erected here under *Construction*" is thought to contain a problematic reference:

(B) If buildings are erected here (if *Construction* is selected), then, other things being equal, those buildings will be apartment blocks.

(B) appears to me to be uncontroversially true.

Similarly, in our case, we might say:

(C) The persons who would be born under *Depletion*, other things being equal, would have their rights violated by this choice.

Or, if "The persons who would be born under *Depletion*" is thought to contain a problematic reference:

(D) If we choose *Depletion* and persons are subsequently born, then, other things being equal, those persons' rights will be violated by this choice.

If the arguments that follow are correct, (D) seems, just as well as (B), to be unproblematically true.

Now, in response to the worry that our arguments may depend on the claim that non-existent entities have rights (a claim which is said not to be true), we may deny needing to make any claims that assert a problematic ontological or a moral status to possible entities or non-existent entities; we need simply point out that it is very common to take the conditional statements we have good reason to believe true as *reasons* for action. For instance, consider:

(E) If those plants are left too long in the sunlight, then, other things being equal, they will die.

(E) provides us with a reason to act, to remove the plants from the sunlight, so long, that is, as we care about the welfare of the plants. Similarly:

(F) If we choose to dig person-size animal traps here then the people who may subsequently walk on them would, other things being equal, have their rights violated by us.

(F) is true whether or not it turns out that anybody *does* in fact walk over these traps. Indeed, (F) seems to me to be true even if it is fairly unlikely that somebody would walk over the traps, and if those digging them have no malevolent motive, but are simply getting in some digging practice. The fact that we believe (F), and find other things to be equal (there is no special emergency that requires the construction of these traps, for example), gives us a *rights-based reason* not to dig these traps. And in a similar fashion, I shall maintain, (D) provides us with a *rights-based reason* against choosing Depletion.

With this discussion in mind, I return to our pursuit of a rights-based response to the Non-Identity Problem. There are, I think, two main such responses. First, one might reject (P) (4), claiming that future generations *are* made worse off by the policies under discussion, despite the facts that they would not have existed had it not been for the choice of such policies, and that their lives are worth living. This would be a *Person-Affecting* response in the sense outlined

above: there *are* persons who are affected for the worse by the choice of policies such as Dangerous Policy or Depletion. If this is so, then it is easy to see how the rights of future generations might be violated by the policies we're investigating: these policies make people worse off, and so it is unsurprising to learn that that they also violate people's rights—such is a common conjunction.

On a second line of argument, one might reject (6), claiming that the fact that nobody is made worse off by a policy does not have the consequence that this policy is not a bad policy. This is because a policy might violate somebody's rights without having the effect that she is made worse off. This is my preferred solution: it is Non-Person-*Affecting* because it concedes that persons are not affected for the worse under the policies in question (they are not made worse off). It is, nonetheless, not *impersonal*: there are, I claim, specific persons whose rights are violated when we choose policies such as Dangerous Policy or Depletion. I shall now consider these two responses in turn.

4. Are Future Generations Made Worse Off Under Dangerous Policy or Depletion?

Claim (4) of argument (P) was that since those alive as a consequence of our choosing a particular future-affecting policy are in fact dependent on this choice for their existence, then so long as their lives are worth living they are not made worse off by the choice of policy. I shall consider this claim with respect to Dangerous Policy, and, following Woodward, I shall call those people who die from the radiation leakage the "nuclear people." We need to explore whether it is true that the nuclear people are not made worse off by our choice of Dangerous Policy; and, even if this is true, what the ethical importance of this is. We need to investigate this matter because there is, clearly, a sense in which the nuclear people are very badly affected by our choice: they die from radiation poisoning. The unreflective response to cases such as Dangerous Policy is that *of course* they make the future generations who suffer them worse off—the nuclear people are killed, after all—and there is something highly suspect about any argument to the contrary. I shall consider three arguments that attempt to support this common sense intuition.

But before looking at these arguments, let us try to make the claim of (4) in a more precise way. First, I take is that being well or badly off is some sort of fact about one's welfare. One has, let us suppose, a certain set of resources, preferences, interests, and desires. Loosely, the better these mesh coherently, the better off one is.[24] And generally, the greater access a person has to an adequate set of resources, the better able she is to realize her preferences, interests, and desires. This is a "loose" account because there are several competing accounts as to how one's preferences, interests, and desires are to be understood and ranked—should they be understood objectively or subjectively; should they be counted in the long or the short-term, etc.? I don't think however that any such distinctions matter for our purposes. Second, when we say that

[24] I leave aside the worry that one's preferences may sometime be a function of one's low self-regard, in which case satisfaction thereof may not always track how well off one is.

somebody is "made worse off" we mean of course that she fares worse than she would have relative to some alternative. I think (4) is best understood as making the following two claims:

(a) The nuclear people are not made worse off by our choice of the Dangerous Policy than they would have been had we made any other choice; and

(b) How well off the nuclear people are relative to any other choice we could have made is the relevant comparison because we are trying to decide what it is permissible for us, now, to do. We need to know who would be made worse off by this future-affecting choice, and thus we need to compare the lot of future generations under this choice with their lot under other choices.

4.1 Relevant Comparisons

The first argument I shall consider objects that the comparison of how well off the nuclear people are relative to any other choice we could have made is not the ethically relevant comparison.

Let us suppose that, if we had not chosen Dangerous Policy, we would have chosen, at some inconvenience to ourselves, Safe Policy, in which there is no nuclear disaster in three hundred years' time. Now, relative to the people who live under Safe Policy (the safe people), the nuclear people *are* worse off. And it is this state of affairs, our argument claims, that enables us to say that Dangerous Policy makes the nuclear people worse off: it makes them worse off relative to the safe people.

The proponent of (P) has, of course, a clear rejoinder to this (and ultimately, I think, the right rejoinder): what does it matter if, relative to some *other people* the nuclear people are worse off? What is important is that *they* are not worse off than they otherwise would have been. Of course, the rejoinder continues, you can say that the circumstances of the safe people is the right comparison if you wish. And, in fact, we agree with you that it is. But you must concede that when you say this you are no longer saying that it is not the case that *the nuclear people* are not worse off under Dangerous Policy; you are saying simply that things would somehow be *better*, though *better for no one*, if Safe Policy had been chosen rather than Dangerous Policy. And it is precisely this that we need an account of.

Perhaps, nonetheless, we can respond to this rejoinder. The proponent of (P) has, we might say, characterized our argument wrongly by setting it firmly within his own consequentialist framework. This leaves us, the actors, out of the picture! But what we were concerned with was the particular *act* of choosing Dangerous Policy. This act places us in a particular relation with the nuclear people, and an objectionable relation to boot. The act of choosing Safe Policy places us in quite a different relation with the safe people, and an unobjectionable relation to boot. The states of affairs comprising these relations are what need to be taken into consideration when comparing one choice with the other. It is in this way that we are able to say that the nuclear people are made worse off by the choice of Dangerous Policy: the relation in which we stand to them is, on any ethical view, a worse relation than the relation in which we stand to the safe people.

I think there is a sense in which this argument is headed in the right direction. In particular, as my diagnosis of the cases at hand is that the rights of the nuclear people are violated by the choice of Dangerous Policy, while the rights of the safe people are not violated by the choice of Safe Policy, I think it is clearly important that we correctly characterize the relation in which we stand to these respective groups, since the violation of a right is a relation that obtains between violator and right-holder. Nonetheless, to claim that a comparison of these relations supports the claim that the nuclear people are made worse off by the choice of Dangerous Policy seems to me to be a mistake.

In saying this we would be appealing to an implausible moral principle. The principle would be something like the following:

(C) A comparison of the relation in which X stands to Y as a result of X's Y-directed action P, and the relation in which X would have stood to Z as a result of X's Z-directed action Q, is relevant to an assessment of whether Y is well or badly affected by P.

But this is very counter intuitive. If I spend three hours helping Mary it does not seem right to say that because I could have spent four hours helping Molly (and benefited her more) I have consequently made Mary worse off. We should have, at best, to argue that the case of future

generations is different, and generates instances of (C). But recall our comparison of Dangerous Policy with Dangerous Policy.* I think the intuition that these policies are wrong and wrong for the same reasons is a strong one. I do not think that we should abandon our attempt to accommodate this intuition without good reason. It does not seem to me that (C) provides a sufficiently compelling reason for such.

4.2 Direct Intention and Causal Proximity

The second argument that I shall consider—to the effect that it is not true that the nuclear people are not made worse off by the choice of Dangerous Policy—recalls part (b) of my interpretation of (4):

(b) How well off the nuclear people are relative to any other choice we could have made is the relevant comparison because we are trying to decide what it is permissible for us, now, to do. We need to know who would be made worse off by this future-affecting choice, and thus we need to compare the lot of future generations under this choice with their lot under other choices.

But this, the argument proceeds, should be enough to alert us to the fact that any sense in which the nuclear people are "not made worse off" by our choice of Dangerous Policy is a red herring—it is, in fact, a misinterpretation of these words as they are ordinarily used. Granted, the reason we are interested in whether or not the nuclear people are worse off is because we want to know which actions it is morally permissible for us to perform. But this is just to say that we want to know which actions we can be held morally responsible for: which actions we might be blamed for, and which actions we might be praised for. However, there are only certain ways in which moral responsibility arises. In particular, it does *not* follow from the fact that but for some person's action θ a certain event P would not have occurred, that this person is morally responsible for P. If Jones had not been in line at the post office perhaps the man behind, sending his late payments, would have avoided a visit from the bailiffs, but Jones is hardly to blame for this unfortunate event.

Usually, when the fact that we fail to make somebody worse off has any moral relevance, this is because there is a particular, identifiable action (or omission) directed toward the end of ensuring that this person is not made worse off.[25] Suppose that I am a farmer and I wish to close off a local path so that the field it passes through might once again be used to grow crops. I have, however, a strong sense of community, and I do not wish to make my neighbours—who use this path frequently—any worse off, so I generously construct another path that serves the same purpose equally well. In this case, we might say, it was praiseworthy of me to act so that my neighbours were not made worse off. And it is *this* sort of situation that we have in mind when we refer, in a context of moral evaluation, to the fact that somebody or some group of persons is not made worse off.

But, the argument continues, this is not how things are in the case of Dangerous Policy. In Dangerous Policy a policy decision is made by a community—or on behalf of a community—and as a result of that decision certain persons are born. But, of course, the *real* decisions about who is born have little to do with this policy decision. The real decisions about who is born are made by individuals, through their choices regarding partners and parentage. Perhaps one might credit one's *parents* with not having made one worse off—with having made a life worth living a possibility—but it seems a stretch to say that, in the usual sense in which "making somebody no worse off" has any relevance to ethical analysis, the decisions made by one's politically influential predecessors have made one no worse off. Thus, while we can agree with (P) (3) that if someone has a life worth living, having that life is not worse for the person than having no life at all, we may deny, *pace* (P) (4), that the nuclear people's lives are *made* no worse off by the choice of Dangerous Policy; the choice of Dangerous Policy, due to the extended causal chain between it and the existence of the nuclear people, cannot be said to make the nuclear people's lives no worse simply because they should not have existed were it not for this choice.

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[25] I shall assume that there is no moral distinction between acts and omissions, or failures to act, that relevantly bears on the case at hand, and hereafter in this section shall use "acts" to mean "acts or omissions."

I think there are serious problems with this approach. First, we should note that its conclusion is not at all what we had hoped for. It seems to me that if we cannot be said to make the nuclear people *no worse off* because our intentions towards them are insufficiently direct, or the causal chain relating out actions to their births too remote, then the very same reasons tell against our making them *worse* off (or better off). But then we cannot affect the nuclear people in a morally relevant sense at all, and nor can we affect any other comparable set of future people in a morally relevant sense. If we are to make *any* claims at all about the moral status of our actions that affect future generations, then these claims will have to be made in terms that do not appeal either to the interests, or to the rights, of future persons (Parfit's Q was formulated in such terms). But this is precisely the result we were trying to avoid. Are we now driven to such claims?[26]

I don't think so. The argument against (P) just given does illustrate nicely the consequentialist framework in which (P) is set, however. According to (P), it does not matter whether the effect of not making future generations worse off is intended or not. The mere fact that they *are not made worse off* is sufficient, according to (P), to classify any policy with this result as "permissible." This, many would agree, is not quite right. Presumably, if this were right, then any act that happened to bring about good results, irrespective of the intent of its executor, would be a morally good act. But, as we know, this faces an abundance of counterexamples, in the familiar form of "X saves Y while intending to kill him," etc. We should, therefore, distinguish good effects from morally commendable actions. And we should accept, I think, that it is the latter that concerns us here. When determining whether somebody behaved wrongly or

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[26] Woodward, (1986), op. cit., and Matthew Hanser (1990), 'Harming Future People,' *Philosophy and Public Affairs*, 19(1): 47-70 both put some weight on this sort of argument, though Hanser uses it against the claim that our choice of (e.g.) Dangerous Policy *benefits* future generations, and is thus something we are to be praised for. And Woodward says, on p.812: "The fact that the planners' choice of the Risky Policy is a necessary condition for a certain couple deciding to marry and to have a child and to bring up that child in such as way that it has a worthwhile life does not mean that the character of the life is properly credited to the planners' choices. We thus cannot appeal to the worthwhile character of that life as somehow canceling the wrongfulness of the planners' choice of Risky Policy." While I agree with this sentiment, I

rightly, we do, and reasonably so, attend to the *justification* under which they act, and not only the act and its consequences. (P) might be modified to reflect this change. Instead of:

(6) If nobody is made worse off by a policy, then that policy is permissible;

we might claim:

(6') If nobody is made worse off by a policy, and this is also its justificatory basis, then that policy is permissible.

This seems to me to be a welcome revision. Nonetheless, it looks as though it is a revision that proponents of (P) can handle with aplomb. Proponents of (P) can accept that what has been shown is the following: those persons who, unaware of or unreflective about the Non-Identity Problem, believe that in pursuing policies such as Dangerous Policy they are gravely harming the interests of future generations, behave wrongly when they pursue such a policy in the same way that I behave wrongly when, in intending to poison you, I give you a placebo—the justificatory bases of one's acts *do* matter. However, the proponents of (P) continue, that is no reason to think that *we* behave wrongly. We are aware of the Non-Identity Problem, and we understand its implications. Its implications reliably predict that there is no future person who will be made worse off by our choices of Dangerous Policy, or Depletion. We are, of course, in a sense "let off the hook" with regard to future generations, but this, while it certainly makes our lives easier, can hardly be held against us.[27] We simply alter argument (P) to argument (P'), which uses (6') instead of (6), and we thereby accommodate your concerns.

I think that this is a good response on the part of the proponents of (P) (and I shall, accordingly, speak of argument (P') in the remainder of this paper). Clearly, we are quite well able to predict that our choice, of, say, Depletion, will not make the future generations alive two

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don't think the remote causal chain has much to do with why the wrong of the planners' choice fails to be 'canceled.'

[27] Compare Parfit: "It may be better [if we cannot find Theory X] if we conceal the Non-Identity Problem from those who will decide whether we increase our use of nuclear energy. It may be better if these people believe falsely that such a policy may, by causing a catastrophe, be greatly against the interests of some of

or three hundred years from now worse off, because we are quite well able to predict that were it not for this choice, these people would never have existed. And, we assume, existence is not worse for people—or not worse for these people at any rate—than non-existence. This means that any force of the 'direct intention and remote causal chain' argument must result from the complicated causal chain that obtains between our choice of Depletion and the existence of a particular set of people three hundred years later. True enough, for the most part the following claim is true: (i) When X makes Y no worse off in an ethically relevant sense, then (given the unpredictable nature of the world) the causal chain between X's action and its intended result is fairly short (it may be direct). That is, usually when I want to make you no worse off, I have to do things more or less directly: I have to monitor or supervise the proceedings. But (i) is certainly not always true, and, indeed, the case of future generations seems to me to provide a plausible counter-example to it. But there are other examples. For instance, perhaps I want to benefit a particular child but for some reason or another I cannot approach this child directly. I thus donate a large sum of money to the child's school with the reasonable hope that, somehow, he will benefit. And let's say he does benefit. It seems to me that the complicated causal chain according to which such benefiting took place does not matter, and there is still a morally relevant sense in which I have benefited the child.

If this is right, then the direct intent and causal proximity argument does not cut any ice with (P'). And in a way this is a good result, because, as we saw, if considerations from direct intent and causal proximity plausibly negate the claim that, e.g., the nuclear people are not made worse off by our choice of the Dangerous Policy in any ethically relevant sense, then it seems to me that they also negate the claim that the nuclear people might be made *worse off*, in an ethically relevant sense, by our choice of Dangerous Policy.

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those who will live in the distant future. If these people have this false belief, they may be more likely to reach the right conclusions." (1984, p. 373.)

4.3 The Argument from Specific Interests

I turn now to the third argument according to which it is not true to say that the nuclear people are not made worse off by our choice of Dangerous Policy. I shall, however, deal with this argument briefly, because I think that it in fact collapses into a rejection of (6'), i.e. its plausibility results not from the claim that the nuclear people are not made worse off, but from the claim that the fact that nobody is made worse off by a policy does not have the consequence that this policy is not a bad policy.

The third approach is perhaps best put forth by Woodward. Woodward makes what seems to me to be a very plausible claim:

> People have relatively specific interests (e.g. in having promises kept, in avoiding bodily injury, in getting their fair share) that are not simply reducible to some general interest in maintaining a high overall level of well-being [...] That an action will cause an increase in someone's general level of well-being is not always an adequate response to the claim that such a specific interest has been violated.[28]

What Woodward has in mind is the following. When we claim that future generations born under Dangerous Policy or Depletion are not made worse off by these policies, what we have in mind is some "overall" conception of their well-being. That is, though we accept that there are aspects of their lives that go badly, we reason that they are not overall worse off than they would have been had they not existed. But this is not, Woodward argues, how we tend to think of things when we consider the question whether somebody has made us worse off or not. For example, if you promise, but fail, to pick me up at 5pm and I am required to walk the five miles home, it will not do for you to claim that you have not made me any worse off (since the walk was good for me, a fact I might reluctantly acknowledge)—it does not matter that there is an "overall" sense in which I am not worse off for your action; what concerns us are specific interests, and I am (allegedly) made worse off because you have negated a specific interest of mine, viz. that you should keep

your promise to me. Similarly, Woodward contends, the nuclear people are made worse off because a specific interest of theirs is violated—this is clear; they are killed by radiation poisoning; any "overall" sense in which they are not made worse off is not ethically relevant.

To my mind this is not the right message to take from Woodward's remarks concerning specific interests. I think the right message is that our specific interests are protected by rights, and we are wronged when our rights are violated, even though this turns out not to make us any worse off.[29] This is why the fact "that an action will cause an increase in someone's general level of well-being" is not always an "adequate response" to the violation of a "specific interest."

When we ask the question whether some event has made us better or worse off we are simply comparing how things are with how things would have been for us in a world in which this event did not occur. Of course, we might consider this in the short term (which makes perfect sense), or in the long term (which also makes perfect sense). For instance, if I fail a test I might think that this has made me worse off in the short run (I am depressed), but better off in the long run (failure in this subject makes me realize that my real interests lie elsewhere). If the consideration of an "overall level of well-being" simply amounts to looking at things in this long-term sense, then I am not at all sure that Woodward is correct in suggesting that we aren't interested in such comparisons. But anyway, this point is relatively moot in the case of the nuclear people. However we look at it, relative to the baseline of non-existence, the nuclear people are not, we suppose, worse off in either the long term or the short term.

It seems to me that Woodward's framework as to how the nuclear people are allegedly made worse off has something in common with the previous argument we looked at, the argument from direct intention and causal proximity. Consider again the case in which you renege on your promise to pick me up and I am required to walk five miles home. And let us

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[28] Woodward, (1986), p. 809.

[29] Woodward does, in much of his paper, appear to think that this *is* the take home message of his attention to special interests: "special interests" are rights, and when one's rights are violated it does not matter whether or not this makes one worse off, it still ought not happen. At other points, however, he appears to think that future generations—in particular the nuclear people—are made worse off by our choice of

suppose that you did this not out of concern for my health, but simply because you were too lazy to do what you had said you would do. In this case, while it is nonetheless true that your actions do not make me any worse off, we might still press the point that you ought not have acted as you did because you *thought* your actions would make me worse off. This would be a *Person-Affecting reason* (albeit a mistaken one) against your failing to collect me. However, as argued above, even such a reason is absent in the Non-Identity cases that concern us. Still, just as in the case of the promise there is a Non Person-Affecting reason against your course of action readily available in the fact that, other things being equal, one ought not break promises because promisees have claims that promises be kept; so similarly, in our Non-Identity cases, one may appeal to the relevant claims of future generations.

I should like, then, to close this section by conceding that the nuclear people are not made worse off by our choice of Dangerous Policy. The only argument that goes some way toward plausibly suggesting otherwise is, I think, the argument just discussed, which points out that Dangerous Policy damages specific interests that the nuclear people have. But this does not mean that the choice of Dangerous Policy has made them worse off; it means simply that the nuclear people's rights are violated by the pursuit of Dangerous Policy. It is this thesis that I shall now explore.

Dangerous Policy; they are made worse off *because* their specific interests (against being harmed) are adversely affected.

5. THE VIOLATION OF RIGHTS

The line of response I now pursue challenges the temptation to think that if nobody is made worse off by a certain policy, then nobody's rights can be violated by that policy. If this is not so we may reject (6'), on the grounds that while policies such as Depletion and Dangerous Policy do not make anybody worse off, still they violate the rights of future generations and can on those grounds be rejected.

The thesis I am attempting to demonstrate is the following:

(T) A policy X can be wrong even though nobody is made worse off by X because X violates the rights of some group of persons S.

I shall now give examples to illustrate (T), and then turn to some specific difficulties that arise for the application of this thesis to the case of future generations. The first examples are designed not to be decisive in their own right, but serve to hone in more precisely on the sort of case that is needed. The first cases also concern individuals, whereas what we really want is a case of public policy.

Consider the case in which, unbeknownst to me, you imprison me in my home. Perhaps I have no need to go out, and so I do not make the attempt. There is a clear sense in which I am not made worse off by your actions: I am simply carrying on about my business as I choose, and what you have done has not interfered with my plans at all. Nonetheless, I think that you violate my rights by imprisoning me in my home; I think that this matters and you ought not do it. You violate my right to move freely from that place, should I choose to.

This case seems, unproblematically enough, to illustrate a rights violation. What is somewhat less clear is whether it is true that I am not made worse off by your actions as described. Personally, I am inclined to think that I am not made worse off. However, this is controversial. Some people are inclined to think that because my options are reduced, I am, objectively speaking, made worse off, even though this does not affect my subjective appreciation

of my state. My capabilities are fewer when you imprison me than when you don't, and this is, arguably, bad for me, despite the fact that, given my preferences, my subjective welfare remains constant.

This example shows that if we are to make a persuasive case for thesis (T) we will need to make the case in an objective setting, where the facts about whether or not somebody is made worse off do not depend on what she notices about her surroundings or options.

The second case is a case described by Woodward. Suppose that Smith, who is black, is denied an airline ticket on racial grounds. The flight Smith had attempted to board subsequently crashes, killing all aboard. There is a clear sense in which Smith is not made worse off by the racist treatment he suffered, but he did nonetheless suffer a violation of his rights.[30]

Again, this case seems to me to support (T). However, this cases shares with the argument from 'direct intent and causal proximity,' discussed above, the feature that those who violated Smith's rights *aimed* at harming him, or making him worse off. The fact that Smith's welfare was improved as a result of their actions is nothing that they can be credited for: they ought not have done what they did. But we are not concerned with such intentions: those who select Depletion or Dangerous Policy do not aim at harming future generations. Aware of the Non-Identity Problem, they perfectly well understand that their choices do not leave those who live later worse off than they would otherwise have been. This may make their case relevantly different from the case of Smith.

This example shows that if (T) is to be persuasive as regards the cases under consideration we will need to argue from a case in which those who violate the rights of group S do not have the malevolent aim of making S worse off. For if the our example case depends for its plausibility on such features, it may as a result be less persuasive to proponents of (P'). They may plausibly (though I think incorrectly) maintain the following: the violating of a right is a relation that holds between right-holder and right-violator; and in order for the correct kind of

[30] Woodward, (1986), pp. 810-11.

relation to obtain, right-violator must intend to make her victim worse off; in particular, a right is not violated when the alleged right-violator intends *not* to make her alleged victim any worse off. If this contention were true, it would have the consequence that a rights violation occurs in the case of Smith, but that no rights violation occurs in the case of Dangerous Policy.

I think this contention is false. But in any case, even this much is progress. The argument just mentioned—to the effect that a right is not violated when the alleged right-violator intends not to make her alleged victim any worse off—concedes (T). But, this does not defeat (P') yet. It was for precisely this sort of reason that we amended (6) to (6')—we noted a requirement to attend to the *justification* under which an act is committed. Defenders of (P') must now commit to the conjunctive claim that it is not possible for somebody both (a) to have good reason to believe that a policy X will make nobody worse off; and (b) to violate somebody's rights in the exercise of X. (The person from whom Smith sought an airline ticket did not meet the relevant equivalent of (a).) We should amend (T) to reflect this result:

(T') A policy X can be wrong even though nobody is made worse off by X, and this is recognized with good reason to be the likely result of X, because X violates the rights of some group of persons S.

To illustrate (T'), consider the following case. Amelia is the governor of a city where religious tension is high. In particular, the Muslim religion is vilified by the majority. The Muslims appeal to Amelia for help. Amelia perceives that the main problem results from the public expression of religion. She therefore considers issuing a ban on any public displays of religious affiliation. However, she wants to do what is best for her city, and wants nobody to be worse off under the policy she chooses, so she decides to impose that ban unequally—those groups that are in no danger may openly express their religion, since otherwise they would be made worse off (and they would probably riot, making everybody else worse off too). The policy is, then, that *Muslims* are prevented from the expression of their religious convictions. Muslims are not made worse off because they are persecuted much less frequently; non-Muslims are not made worse off because nothing is taken from them—and, for what this is worth, they have the

satisfaction of seeing their adversaries lose out. Nonetheless, I think we may say that this policy certainly violates the Muslims' rights—not only is religious expression denied them, but it is denied *only* them. I think, therefore, that this policy illustrates (T').

Somebody might respond, however, that whether or not the Muslim's rights are violated in this case depends on what *they* think about the matter. This is, after all, a case of paternalism, but, perhaps, when paternalistic measures are self-imposed this constitutes no rights violation (the majority of people agree with seat-belt laws, for instance, and do not claim that they constitute a rights violation). Therefore, it might be argued, the Muslims' rights are violated only if they object to this policy.

I think that this is not the right response to this example. It seems to me that the Muslims suffer a rights violation whether or not they embrace Amelia's policy. Persons can impose on themselves, or accept, all sorts of things for bad reasons; such imposition does not automatically cancel a violation of rights. It seems to me that if a case of paternalistic policy were ever to be justified with regard to the denial of so fundamental a right as the expression of one's religious convictions, then there are certain conditions (beyond one's consent) that the proposed policy must meet—in particular the policy must be administered only in cases of extreme urgency and must be administered far more equitably than was described above.

However, let us simply bear this consideration in mind and move on to the cases we are really interested in: the cases that concern future generations. It is important to note that the most plausible illustrations of (T') (that I can think of, at any rate) are cases of benevolent but unjustified paternalism; as we shall see, such cases become yet more problematic when the persons concerned are not around to be consulted.

5.1 Which Rights Could Be Violated?

Before considering whether Depletion and Dangerous Policy are instances of (T'), however, I should like to say a little about *which* rights appear to be violated under these proposals. It is important to be clear about this, because as it turns out the argument that Depletion constitutes rights violation may be rather harder to make than the argument that Dangerous Policy constitutes rights violation. However, in many ways Depletion seems to me to present the more pressing

worry. Depletion may be nothing so concrete as the burial of toxic waste; Depletion may simply be the *failure* to make certain compromises for the sake of future generations. As I have already claimed, if we fail to limit and then stop population growth this constitutes an instance of Depletion.

In the case of Dangerous Policy, I take it that if any right of the nuclear people is violated then this is their right not to be killed. Of course, the right not to be killed is not *entirely* straightforward: plausibly, one does not have a right against being killed when the killing is a case of self-defense, for instance. But it is difficult to see that the burial of nuclear waste could be an act of self-defense, on our part, against the "threat" of future generations. The only way in which they could pose such a threat would be under circumstances of extreme scarcity, in which the preservation of the lives of future generations can be undertaken only at great (life-threatening) cost to ourselves. This hardly describes Dangerous Policy. Dangerous Policy is pursued for our convenience. I shall assume that killings for convenience are unjust killings.

The case of Depletion is harder. I propose that the right of future generations that is violated here is the right to decent life prospects. But it is not clear what to make of this alleged right. In particular, unlike the right against being killed unjustly, the right to decent life prospects might be construed "negatively" or "positively." Such construals would correspond respectively to the claim that decent life prospects should not be *taken away* from a person, and the claim that decent life prospects should be *provided* for a person. Here, I shall focus on the negative construal. I propose that we understand violation of the right to decent life prospects in the following way: if X causes Y's life prospects to be bleak, impoverished, and lacking in opportunity, and this could be avoided at not unreasonable cost or foresight on X's part, then X violates Y's right to a decent life prospects.[31]

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[31] This is simply *a* sufficient condition for the violation of Y's right to decent life prospects; I do not deny that there may be others. I use the vague terms "bleak, impoverished, and lacking in opportunity," and "not unreasonable cost and foresight" to avoid the problem of specifying any exact thresholds of such; while this

The right to decent life prospects is strongly supported on the liberal framework. As we have noted before, liberalism is centrally defined by a commitment to respect and protect individual liberty. To secure this, liberalism claims that each individual holds certain basic rights and liberties, and gives a high priority to their protection. Basic rights thus include the right not to be killed, the right to bodily integrity, the right to hold property, the right of due process under the law, the right to political participation, and, under most liberal frameworks, the right to fair equality of opportunity. Basic liberties include liberty of conscience, of expression, of religion, of association, and the liberty to select and pursue one's own goals and projects.

If the underlying principle that supports these rights and liberties is a commitment to equal personal freedom, then it seems plausible that an equal right to decent life prospects—at very least in the minimal sense described above—should also be supported by the same underlying principle. For one's life prospects greatly affect the worth of one's rights and liberties—if resources and conditions are such that survival rather than development is one's overriding priority, then there is a sense in which the worth of one's rights and liberties is low. I shall thus take liberalism to support a right of each person to decent life prospects. And as indicated, when X causes Y's life prospects to be bleak, impoverished, and lacking in opportunity, and this was avoidable at not unreasonable cost and foresight on X's part, then X violates Y's right to decent life prospects.

Now that we have a picture of which rights, if any, Dangerous Policy and Depletion can be said to violate, we may proceed with the question of whether they do indeed violate such rights. Our procedure is the following. We have seen that there are plausible instances of (T'), and have some idea of the characteristics of such instances. I shall try to show that the best characterization of Dangerous Policy and Depletion is that they are also instances of (T').

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leaves my account incomplete, I take it that the difficulties with locating these thresholds are not peculiar to the ethics of future generations, and in this paper I want to focus on what is or appears to be peculiar in this respect.

5.2 Are the Rights of Future Generations Violated?

Let us concentrate first on Dangerous Policy. Might the nuclear people rightly claim that their rights not to be killed were violated by their ancestors? In a sense, it seems obvious that they might. Presumably, the nuclear people, like any other people, have rights not to be killed unjustly. And Dangerous Policy does something that causes them to be killed unjustly, for Dangerous Policy was in no way necessary as a form of self-defense on the part of our generation, nor was it even a measure taken to protect some very important interests of ours; it was simply a measure of convenience.

We might therefore claim the following:

(S) If the nuclear people exist, then they have rights against being unjustly killed. They hold these rights as regards anyone who can affect them in such a way as to kill them unjustly.

Now, suppose that we are deliberating about what to do. We do not want to choose a policy that violates people's rights. And we know that if we choose Dangerous Policy, then the nuclear people will exist, and they will be killed because of something we did to convenience ourselves. They will therefore have been killed unjustly. But we know (S). And so we realize that in choosing Dangerous Policy, we will violate the rights of the nuclear people. I am inclined to think that, in this case, we might leave matters here. We have articulated the right that the nuclear people have—it is not an obscure sort of right by any stretch—and we have seen which course of action can be taken in order that we not violate this right. We ought to take that course of action. We ought not choose Dangerous Policy. From the above considerations I propose that Dangerous Policy is an instance of (T'):

(T'(DP)) Dangerous Policy is wrong even though nobody is made worse off by Dangerous Policy, and this is recognized with good reason to be the likely result of Dangerous Policy, because Dangerous Policy violates the rights of the nuclear people.

5.3 The Symmetry Problem

At this point, however, some people think that the Non-Identity Problem digs in again. These people would assert that there is in fact a direct symmetry in the way in which the Non-Identity Problem causes problems both for welfare or interest based arguments, and for rights-based arguments. This alleged symmetry may be spelled out as follows.

We have seen that the nuclear people are not well off, because they are killed as a result of radiation poisoning. However, it remains the case that the nuclear people couldn't both exist and be better off. We might extract from this a general fact (F): As a result of certain of our present actions, certain future persons who are badly off could not both exist and be better off than this. (F), as I have argued, is an important consideration *against* the claim that any welfare or interest based moral principle will adequately respond to the Non-Identity Problem.

However, we should also note a further fact, namely that the nuclear people couldn't both exist and have their rights (in particular their rights against being killed for convenience) fulfilled. Parfit: "even if [these persons] have [these] right[s], [they] could not have been fulfilled."[32] We might extract from this a general fact (G): As a result of certain of our present actions, certain future persons whose rights are violated could not both exist and have their rights fulfilled.

The question now arises: don't (F) and (G) cause symmetrical difficulties for welfare-interest theories and rights-based theories respectively? To put it another way, doesn't (G) tell against providing a rights-based response to the Non-Identity Problem just as well as (F) tells against providing a welfare or interest based response?

I think that to answer these questions affirmatively is to misconstrue the nature of rights, in the following sense. (F) supported the claim that a welfare-interest theory could not satisfactorily respond to the Non-Identity Problem because whether or not one's welfare has been diminished is a calculation relative to a particular comparison; in the case at hand namely the comparison between level of welfare that the nuclear people have and the level of welfare that

[32] Parfit, (1984), p. 364.

they would have had if Dangerous Policy has not been chosen. There are no personal welfare-based reasons that can be appealed to against the choice of Dangerous Policy. Whether or not one's rights have been violated is not, however, a question that is similarly comparative. The fact that one's actions violate another person's rights always counts as a reason (though possibly not always an overriding reason) against them, no matter the alternatives one faces. Thus there are, despite (G), rights-based reasons against the choice of Dangerous Policy. The fact is that pursuit of Dangerous Policy puts us in a certain relation with the nuclear people; (G), which implies the fact that were it not for that relation the nuclear people would not be alive, does nothing, so far as I can see, to alter that relation itself. And the relation is one causing the nuclear people to be killed for our convenience, which is, if anything is, a violation of their rights.

However, somebody who is struck by (G), and in particular struck by the fact that the nuclear people couldn't both exist and have their rights (in particular their rights against being killed for convenience) fulfilled, might press her case further. She might say that we should deny (S).[33] (S) said that if the nuclear people exist, then they have rights against being unjustly killed, and that they hold these rights as regards anyone who can affect them in such a way as to kill them unjustly. I also claimed that killings for convenience are unjust killings. But, as is evident, if the nuclear people exist, then they are going to be killed for our present convenience. Thus there is a sense in which, if the nuclear people exist, it is *impossible* that they should avoid death for the sake of our convenience. But as a general rule, when the realization of some state of affairs is *impossible*, we do not think that anybody has an obligation to bring it about: 'ought,' we tend to think, implies 'can.' Thus since the nuclear people, if they exist, are going to be killed for our

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[33] I think there may be some confusion here as to what exactly it is that allegedly cannot be fulfilled. The state of affairs in which the nuclear people exist and are not killed unjustly cannot be fulfilled, that is true. But it would be rather strange to assert—and I have not asserted—that the nuclear people have a right to this unobtainable state of affairs. This would not be the right not to be killed unjustly; this would be the right to exist and then not be killed unjustly. This is not what the nuclear people—nor any of us—have. What appears to be true of each of us is the following: if we exist, then we have the right not to be killed unjustly. It is, I have contended, quite possible not to violate this right on the part of the nuclear people: we do not choose Dangerous Policy. And in this way we certainly do not violate the nuclear people's rights not to be killed unjustly.

earlier convenience, it might be argued that there is no obligation on our part to avoid this. And if there is no obligation on our part to avoid this, then it cannot be that the nuclear people have claims against us that we *should* avoid it. *This* is why there is no adequate rights-based response to (G).

On this line of reasoning, we should say that since *these persons*' rights not to be killed unjustly *cannot* be fulfilled (by us), then they simply lack this right (as regards us), and *a fortiori* we cannot violate that right.[34] If this is the case, (S) is questionable: if they exist, the nuclear people in fact lack the right not to be unjustly killed by all who have the capacity to do that to them, since they lack that right as regards us. As it stands, this is a odd state of affairs. Why should the nuclear people lack the rights that the rest of us have simply in virtue of certain historical facts surrounding their conception? But perhaps this is not so very odd. The impossibility just mentioned lends it some credence. Perhaps it is plausible that the nuclear people could hold attenuated rights against being killed unjustly, so that when we kill them this is not impermissible.

But does this consideration make the choice of Dangerous Policy any more palatable, or mean that we have no personal rights-based reasons against its pursuit? The idea is that in choosing Dangerous Policy we do not violate the rights of the nuclear people because of the general principle that the set of possibilities one has is reflected in the rights that one possesses: if it is simply not possible for me have a certain right fulfilled, then I don't have that right, or at any rate it can't be that anybody violates that right. It is not possible for the nuclear people not to be killed due to an earlier convenience of others, and so perhaps they do not have a right as regards us against this type of unjust killing.

This is, however, far from satisfactory. Whatever one thinks about the relation between one's set of possibilities and the rights or [illegible]es, we must further consider the fact that it is *we* who

[34] If you think it simply *analytic* that an unjust killing is the violation of a right, then this argument can be made not by questioning (S), but by claiming that some cases of killing for convenience are not unjust killings.

caused this state of affairs: when it was perfectly avoidable we chose Dangerous Policy, and thus caused the existence of persons with seriously attenuated rights. *This*, surely, is something we ought not have done, other things being equal (and other things *are* equal *before* we have made our choice concerning Dangerous Policy). Thus even if our first argument against Dangerous Policy—the argument that appealed simply to (S)—is questionable, we still have a rights-based reason to think that the choice of Dangerous Policy is wrong: we ought not place people, when this perfectly avoidable, in situations that cause their rights to be seriously abridged.

And this is a strong reason. For to place people in situations that cause their rights to be seriously abridged is, in fact, to negate the status of persons as rights holders at all. As was mentioned in my introduction, it is intuitively compelling to believe that to attribute rights to a person is to confer upon her a sphere of inviolability, and along with this a certain status. It is wholly antithetical to this conception of rights to then say that it is permissible to *disregard* such a status, and place persons in positions that seriously compromise their rights. So, I think, we must agree that whether or not the denial of (S) follows from (G), it is still not the case that (G) tells against our providing personal rights-based reasons against the choice of Dangerous Policy.

5.4 The Waiving of Rights

However, there is a further difficulty that we must consider. We have been considering rights-based responses to the Non-Identity Problem, and I have argued that (G) does not preclude such responses. But, somebody might think, this is to take *personal* reasons—a focus on how specific individuals are wronged—and *then* to fail to credit these individuals with any sort of autonomy! This is demonstrated by the fact that we have, so far, failed to consider that the nuclear people would—plausibly—have *wanted* us to pursue Dangerous Policy. Parfit in fact discusses the consideration I outlined in the previous paragraph—the consideration that there are rights-based reasons against placing individuals in situations in which their rights must be seriously compromised—and says that "it is not clear that [the objection that we cause people to exist with rights that cannot be fulfilled] is a good objection." For it is quite plausible that these persons,

born such that their right not to be killed cannot be fulfilled by a certain set of their predecessors, would nonetheless be glad to be alive despite this. They might, Parfit suggests, *waive* this right.[35] The argument appears to be that in choosing Dangerous Policy we would not *merely* place people in a situation that seriously compromises their rights; we would, importantly, do so *presuming the corroboration* of these people themselves.

Parfit invites us to reconsider the fourteen year old girl who has a child to whom she is unable to give a decent start in life—the case of Theresa and Tim. Tim would, perhaps, be born either lacking the rights of other children, or with a right that cannot possibly be fulfilled (let us assume that there is a right to a decent start in life, and that a fourteen year old girl is unable to give such a start in life to her child). Nonetheless, if we ask him, when he has grown up, whether he perceives his rights to have been violated, Tim may well feel puzzled by the suggestion. And, upon understanding what it is that we have in mind, he may well say that if there is a right of his that has been denied him, then he concedes this right. With respect to his mother, he *waives* the right to be given a decent start in life. If this is the case, then whatever our objections to Theresa's actions (if we have any), perhaps these objections are not best posed by claiming that she has violated a right of her child. Rather, perhaps these objections are best posed in an *impersonal* way—by claiming that things would in general have been better if she had waited longer before having children (effectively, if she had chosen to have a different child).

Analogously, or so the argument would appear to go, whether our choice of Dangerous Policy can be objected to by a rights-based theory will perhaps depend on how plausible it is for us to assume that people would waive their rights not to be killed for another's convenience. Parfit: "since we cannot assume that [waiving this right] is how they would all react, an appeal to their rights may provide some objection to our choice."[36]

But in the case of Dangerous Policy this is surely absurd. Whether one can sensibly be said to waive one's right not to be killed at all is a very contentious matter. The fact that somebody claims to waive their right against being killed does not usually, we tend to think, in

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[35] Parfit, (1984), p. 365.

fact give anybody the permission to go ahead and kill her. Circumstances would have to meet very stringent constraints in order for an even halfway plausible argument to be made this effect (cases of voluntary euthanasia might provide an instance). But in particular, I think there are very few who would hold that when X waives his right not to have Y kill him on the grounds that this is more convenient for Y, Y thereby gains moral permission to kill X. And so it cannot be permissible for *us* to kill the nuclear people in this way.

We might be inclined, however, to think that things are slightly different in the case of Depletion: the right to decent life prospects is a right that one can more plausibly be held to waive than the right not to be killed for another's convenience. So let us consider this case. We should consider:

(S1) If people exist three hundred years subsequent to our choice of Depletion, then they have rights to decent life prospects. They hold these rights as regards anyone who can affect them in such a way as to deprive them of decent life prospects.

And, *mutatis mutandis* the case of Dangerous Policy, we come to the question whether it is permissible to cause people to exist with seriously attenuated life prospects, on the basis that they would anyway have agreed to waive such rights. The right to decent life prospects was described as follows: if X causes Y's life prospects to be bleak, impoverished, and lacking in opportunity, and this could be avoided at not unreasonable cost or foresight on X's part, then X violates Y's right to a decent life prospects. But consider the case in which Bill chooses to care for his sick brother, Ben. Ben is concerned that his care will occupy much of Bill's time, and cause Bill considerable expense. It will mean, in effect, that Bill's life is consequently impoverished, and Ben recognizes that his brother has a right not to undergo such a sacrifice on his behalf. There are, after all, acceptable alternatives available. Bill insists, however, that while he recognizes that he has a right not to undertake the care of Ben, he waives that right. It seems to me perfectly sensible to think that Bill might waive this right. And so we should consider whether

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[36] Ibid.

the people who live centuries later under Depletion might also be presumed to waive *their* rights to decent life prospects.

We should note at the outset that there is something rather strange about this consideration. In general, the fact that somebody *would* have waived a right does not give one permission to act as though they *have* waived that right: what we need are actual waivings, rather than counterfactual.[37] Nonetheless, we might let this pass. (If you do not think this can pass, and the fact that we *cannot* obtain the relevant waiving of rights precludes our acting as though we *had* obtained this permission, then all well and good; you already think that we have a sufficiently good rights-based objection to the policies of Dangerous Policy and Depletion.) For in the present case we *cannot*, of course, secure the sort of actual waiver that would be ideal. And perhaps in cases where actual waivings are impossible, counterfactual waivings will do. The only thing we can do is to imagine what, given the circumstances, the future people born subsequent to Depletion might think about the matter. And, admittedly, there is *some* precedent for this course of action. When I am unable to obtain your permission to drive your car, but face a situation in which I am sure you would have waived your right to exclude me from the use of your vehicle, perhaps I am justified in taking the car. And perhaps things are similar in the case of Depletion.

My initial response to this suggestion is the following. It seems clear to me that, so long as their lives are worth living, future generations under Depletion would almost certainly *give up* their rights to decent life prospects, whatever this amounts to. But that does not lead me to think that they have not suffered any rights violations, and nor does it lead me to suppose that they can be presumed to *waive* such rights. There are other ways of giving up, or losing, a right apart from waiving it. Let us look, then, more closely at the ways in which a person and her rights may part company.

Waiving: To waive a right is to surrender one's claims, liberties and privileges as regards those against whom one holds the right. There are certain features that characterize the waiving of

[37] Particular thanks to Josh Cohen here.

rights. When one waives one's rights one is giving them up voluntarily, in sound mind, and absent any coercive pressures. We might say that when one waives one's rights one is *autonomously inclined* to do so. Also, it is often (though I think not always) the case that one may *reclaim* the rights one has waived as one wishes. If you are my chosen partner, I may waive some of my rights to privacy as regards you. But this state of affairs is subject to my revision. I think that when we say that that somebody has waived a right we imply that circumstances were fairly optimal when this event took place; the person freely chose to give up his rights, absent any external pressures either from another agent, or from circumstances beyond anyone's control. We can give content to such "optimality" by saying that the agent had *viable alternatives* other than to waive her right, alternatives that could have been pursued had he wished. By a "viable alternative" I mean simply an alternative that is feasible and reasonably attractive (even if the agent does not care to pursue it). When we say that "X would have waived his right to P," I think we mean that such circumstances did obtain, and that we had very good reason to believe that under such circumstances X would nonetheless have chosen to give up his right to P.

Aggression: It is commonly thought that when X aggresses against Y, X thereby forfeits rights that she otherwise would have; for instance, she may forfeit the right not to be physically harmed. I don't think that anything in this paper rides on what exactly one thinks about such cases, so I will assume what seems plausible: that it is correct to say that aggressors forfeit some of their rights; to what extent they forfeit their rights may vary more or less according to the gravity of the aggression.

Coercion: There are times when circumstances have been arranged so that one feels compelled to give up one's rights. For instance, if I tell you that unless you allow me use of your car for a week I will punch you, you may decide to give up your right to exclude me from using your car. Similarly, let us suppose that there is a universal right to a decent wage for a fair day's work. But you know there are no other jobs available, and offer me work for less than a decent wage. I may still opt to give up my right to a decent wage in order to gain enough simply to survive. We can think of the relinquishing of rights under *Coercion* as heteronomously determined; that is, determined as a result of external factors. Somebody is

coerced into accepting a position, or relinquishing a claim, when circumstances have been arranged so that she faces no viable alternative other than to concede this (it is worth noting that this does not mean that a person cannot be coerced into doing something that is good for her or even attractive to her). If it is a case of *Coercion* that an agent faces, we might say that she does not so much "give up" her rights, as have them forced from her by somebody else. I take it as given that cases of *Coercion*, except perhaps in the instance of children or persons who might otherwise reasonably be considered to have impaired judgment, are impermissible. The case of Amelia's policy toward her Muslim population was, I think, an instance of *Coercion*: even if the Muslim population had claimed to embrace Amelia's policy and relinquish their rights to religious freedom, they could not be considered to have *waived* these rights, so much as to have given them up as a result of coercive pressure.

Desperation: *Desperation* is similar to *Coercion* in that one faces a situation absent any viable alternatives, but it is different from *Coercion* because circumstances cannot be said to have been "arranged." (This is not to say that circumstances of Desperation arise only from "natural" causes; the circumstances may be the product of human action, but are not brought about to cajole somebody into accepting a particular position.) If it is a case of *Desperation* that an agent faces, we might say that she does not so much "give up" her rights, as have them rid her by circumstances beyond her control. (Again, it is not always the case that the agent will not embrace this situation.)

Clearly, there will be cases in which it is difficult—or impossible—to determine whether a right is waived or is a case of *Coercion* or *Desperation*. However, I take it that there are nonetheless plenty of clear cases of each. Consider again the circumstances under which I claim that you "would have waived your right against my using your car." In order for this to be true, I should think it would have to be the case that I have some special relationship with you, probably such that I have borrowed the car in the past and you have quite happily allowed me to do that. And then, perhaps, it is permissible for me to take the car. Alternatively, perhaps I came to your house with some embarrassing photographs of you by means of which I was going to blackmail you into letting me use your car. As it turned out, you weren't there and so I didn't need to make

the threat, but I take the car anyway, reasoning that you would have conceded (and hanging on to those photos in case you think about pressing charges). In another situation, let us suppose that an emergency has arisen such that I require a car. I once again take the car, reasoning that there is no reasonable alternative to your lending it to me and so my taking it is quite permissible. In neither of the last two cases do I truly claim that you would have *waived* your right against my using your car.

Now, we are considering whether it is feasible to say that future generations may choose to *waive* their rights as regards us to a decent life prospects. We should thus look at the circumstances under which they would—as I assume they would—give up this right. And we need to see whether these circumstances characterize a true waiving of rights, and not something else, such as *Aggression*, *Coercion*, or *Desperation.*

It is clear that we are not confronted with an instance of *Aggression.* There is no sense in which future generations can be said to aggress against us, most straightforwardly because when nothing Y does can directly affect X, it scarcely makes sense to speak of Y as an aggressor. But future generations stand in such a relationship to us: they are not able to affect us directly since they do not yet exist. But neither does the sense in which future generations might be said to relinquish their rights as regards us seem properly characterized as an instance of *Waiving.* It does not seem correct to say that future generations would be *autonomously inclined* to permit us to pursue Depletion thus causing their rights—in particular their right to decent life prospects as it was outlined in section 5.1—to be seriously abridged simply for our convenience. If they *are* (retrospectively) inclined to have us do this, this is because they face the peculiar position of existing contingent on such an abridgment. The question being posed to those future generations who survive Depletion is essentially the following: would you choose non-existence over existence with an abridged set of rights? But non-existence is not a viable alternative, or so it seems to me. Which of our rights would we not relinquish under such circumstances? And so the situation in which these future persons can be presumed to give up their rights is not a case of *Waiving*; it must be a case of *Coercion* or *Desperation.*

Coercion, it seems to me, fits the situation at hand very well. People are coerced into accepting a position when circumstances have been arranged such that there are no viable alternatives for them. It was characteristic of *Desperation*, on the other hand, that the desperate circumstances under which there are no viable alternatives could not have been reasonably prevented by anybody. In the case of Depletion, by contrast, these circumstances are clearly foreseen, and are avoidable. Indeed, the proponents of (P') have taken great pains to *assure* us that they are more than aware of the consequences of their actions. We must now take such foresight seriously.

We were considering the possibility that it may not be morally objectionable to cause the existence, when this is avoidable, of persons with a severely abridged set of rights. One argument to the effect that this would not be morally objectionable depended on the idea that such persons might retroactively collaborate in this decision: they might be presumed to *waive* these rights. I take it, however, that this suggestion becomes less plausible once we consider that these persons can hardly be presumed to *waive* their rights, but *merely* presumed to relinquish them under coercive conditions. Coercive conditions are, however, conditions it is not permissible to place people—this has, once again, to do with the status of individuals as moral agents. Thus while it is plausible to think that there might be instances in which the right to decent life prospects is waived, Depletion is not such an instance. Under Depletion, the retroactive relinquishing of future generations' rights to decent life prospects is extracted under coercive conditions.

Is it nonetheless relevant that future generations under Depletion may show a decided *preference* for that policy, once they consider the facts? That is, even if this is a case of *Coercion*, future generations would not, all things considered, begrudge the coercion. Consider the following case. I am a store owner and in my store I sell lottery tickets. You frequent my store, but I know that you never buy tickets. Nonetheless, I have a strong hunch that the winning ticket is among my pile, and, for whatever reason, I want to you have that ticket. I form a plan. And, knowing that if I were to tell you of my plan you would never set foot in my store again, I reason that I *can't possibly* both ask your permission to carry out my plan and carry out my plan. My plan is the following. Knowing that you won't listen to me if I simply tell you of my hunch, or make any other attempt to persuade you, I produce a gun, stick it to your head, and command that

you buy every ticket in my store. Of course, you do just that. And as it turns out, you do purchase that winning ticket, and benefit greatly. You benefit so much, in fact, that you claim you would not have had things any other way. When asked whether you require compensation from me for my actions you claim that no, you waive that right you held against me not to coerce you in the fashion that I did—as far as you are concerned I have violated no right of yours. It seems clear, however, that whatever your retrospective judgment, and whatever your gain, I had no right to behave in the manner that I did and that I do violate a right that you hold against me when I act in this way.

I take it, then, that even when we supplement (G)— the fact that as a result of certain of our present actions, certain future persons whose rights are violated could not both exist and have their rights fulfilled—with the presumed *corroboration* of such people to their existence along with their attenuated or unfulfilable rights, this amounts neither to their *waiving* their rights, nor to the permissibility of our acting as though they had.

5.5 Paula and Petra

There is one final case of Parfit's that I wish to consider. (The case is an extension of that already referred to in footnote fifteen.) We are to consider two women, Petra and Paula. Paula is not yet pregnant, and she learns that if she conceives now her child (Paul) will be handicapped in a certain way. This handicap, while not insignificant, does not by any stretch make life not worth living. If Paula waits a month to conceive, and takes some (harmless) medication over that period, she will be able to conceive (a child other than Paul) without any risk of that child being handicapped. Paula nonetheless conceives now, and Paul is born handicapped. Petra, on the other hand, learns that any child she conceives will be born with this same handicap. She nonetheless decides to have a child, and he is, as predicted, born handicapped in the same way as Paul.

Parfit claims that if our objection to either act is based on concern for the *children* Paul and Peter, then our objections to what each of these women do, if we have any, must be the same. And yet, as he rightly points out, it certainly seems as though if Petra's act is objectionable at all, Paula's act is much more so, because she faced an alternative; Paula could have waited to conceive, waited just a month, and given birth to a child who did not suffer from the handicap in

question. Parfit concludes that the greater wrongness of Paula's act cannot be accounted for unless we appeal to the possible child that Paula could have had, instead of having Paul. Appealing only to Paul's rights, or to what would have been good for Paul, is not sufficient because we shall, allegedly, have to say that if Paul is wronged then so is Peter, for the same reasons and to an equal extent. By contrast, Parfit argues, we need a principle like Q to accommodate this case.

I think, however, that the case of Petra and Paula can be accounted for well within the framework I have outlined. Indeed, Paula's case simply represents at a micro level the sorts of choices we have been considering all along. Let us suppose that the handicap Paul and Peter experience is such that to inflict this handicap upon a person, when this could have been easily avoided, is a severe violation of their rights; thus Janet, whose child John will develop the handicap unless he is given prescribed medication, violates John's rights when she fails to administer his medicine. Now, our question is: are Paul and Peter wronged by their mothers' actions, and if they are wronged, are they wronged in the same way? By hypothesis, neither Paul nor Peter is made worse off by his mother's actions, since were it not for such he would not have existed. Thus our central question is whether or not either or both of these cases constitutes a rights violation.

It seems to me that no right of Peter's is violated. People do not have a right to be able-bodied *per se*; what people have are rights against being handicapped as a result of the intent or negligence of others. Peter is brought into a situation that might be categorized under *Desperation*: while Petra does indeed cause her child to lack resources that are available to other children, the only alternative to her doing this is to have no children at all. And perhaps this is too heavy of a burden to ask Petra to bear, so that Peter's circumstances are, in a sense, unavoidable. (Note that on my account it is not *obvious* that Petra does nothing wrong; it seems to me that there is plenty of room for us to say that she does act wrongly, especially if there are alternatives available to her such as the adoption of a child.) Paula, on the other hand, brings about *Coercion*: there is no good reason for her to place Paul in the situation in which she in fact places him.

We might be inclined to object: *Paul and Peter*, nonetheless, face the same "alternatives" in either case; those alternatives are non-existence or existence of an impoverished sort. This is of

course true. However, recall that in cases of *Desperation* and *Coercion* people compelled to give up their rights may very well face exactly the same alternatives. What is important is the *origin* of these alternatives; upon inspection of the origin of the alternatives we can determine whether the case is indeed a case of a rights violation. The fact that Paul himself might not care (and might prefer that we not care) about such distinctions is, I take it, irrelevant—recall the case of your purchasing the winning lottery ticket.

If this account is along the right lines, then it seems to me that Parfit is incorrect in his claim that the greater wrongness of Paula's act as compared with Petra's cannot be accounted for unless we appeal to the possible child that Paula could have had, instead of having Paul. On the contrary, we may, in fact, appeal to the way in which *Paula* has wronged *Paul.*

There is, admittedly, something of an air of paradox in the idea that we may ensure against rights violations by prohibiting the very existence of those whose rights would be violated. But what, really, is paradoxical about that? It mirrors a very common fact, which is that we very often take pains to ensure that we, or other people, will not be placed in a situation in which we risk rights violations, or in which we will, for one reason or another, be compelled to compromise our rights. I suggest, moreover, that such tendencies are, in fact, an important part of what it is to recognize oneself, and others, as a source of rights—as having that status. My contention is that our behaviour toward future generations may, in light of the Non-Identity Problem, be an instance of this fairly common sort of phenomena.

6. LESSER DEPLETION

It is worth discussing one final worry that Parfit raises with respect to how well a rights-based theory might account for our obligations to future generations. He invites us to consider the case of *Lesser Depletion*:

Lesser Depletion: In Lesser Depletion, those who live more than two centuries later have a higher quality of life than we do now. However, if we had chosen Conservation, which we might have done at a small cost of inconvenience to ourselves, those who live more than two centuries later would have had an even higher quality of life.

Can a rights-based theory give us any reason to choose Conservation over Lesser Depletion? For, Parfit claims, we *ought* to choose Conservation over Lesser Depletion, and we need an account as to why this is so.

I do not think Parfit is correct in this claim. To my mind it is not at all obvious, and indeed perhaps not true, that we have any moral obligation to choose Conservation over Lesser Depletion.[38] I think it is true that the people who live two centuries later under Lesser Depletion cannot plausibly be said to have had their rights violated by our choice of Lesser Depletion. But this is well explained on our story so far. Our story with regard to Depletion has been founded on the premise that people have a right to decent life prospects, in the sense that it would be a violation of rights for somebody to inflict on another the conditions in which her life would consist of struggle and hardship, rather than years of opportunity and development. Nothing so far has been said about persons having the right to the best possible life prospects, or to better life

[38] Don Locke in fact compares this to the claim that persons in third world countries should now make small sacrifices for our benefit if those sacrifices would result in greater gains for us. While I don't think this comparison wholly apposite, the general principle to which Parfit would seem to be appealing does strike me as very unfair. (See Locke, (1987), 'The Parfit Population Problem,' *Philosophy*, 62: 131-157.)

prospects than they have, when what they have is good. Thus it seems to me that future generations suffer no rights violations when we select Lesser Depletion over Conservation.

What I want to emphasize, however, is that this is exactly the answer we should welcome. There is a clear sense—in the framework of liberalism, at least—in which the choice of Lesser Depletion over Conservation is vastly different than the choice of Depletion over Lesser Depletion (or Conservation). While there seems to be a moral requirement *not* to choose Depletion when one could choose Lesser Depletion or Conservation, there is no symmetric requirement to choose Conservation over Lesser Depletion. This is so even assuming that the sacrifices required of us in the two choices are similarly discrepant, or even that the discrepancy is somewhat smaller in the choice between Lesser Depletion and Conservation (i.e. the sacrifice demanded of us by Lesser Depletion compared with Conservation is really not very much at all) than it is in the choice between Lesser Depletion and Depletion.

Why is the choice of Lesser Depletion over Conservation clearly less bad—in the framework of liberalism, at least—than the choice of Depletion over Lesser Depletion (or Conservation)? This claim is, I think, supported by the familiar and well-accepted notion that the enabling of one's basic rights and liberties is more fundamental and more crucial than the fine-tuning of one's abilities and opportunities. There is a level (admittedly a rough level, which may not be exactly the same for each person) of welfare beyond which one is able to focus on and develop projects and plans that are not merely directed at one's subsistence. And we may take Lesser Depletion to imply that future generations attain at least this level. In Lesser Depletion the lives of future generations are better than they are now.

The idea that the enabling of one's basic rights and liberties is more fundamental and more crucial than the fine-tuning of one's abilities and opportunities is supported, I think, by the difficulty one experiences in trying to explain how exactly it is that lives "go better" once the level is attained at which one is able to focus on and develop projects and plans that are not merely directed at one's subsistence. Do we say that lives go better when more options are available? Are lives better the more challenging they are or when the more peaceful they are? Does money—or a lot of money—enable one's life to go better? Do technological developments that enhance the convenience of life make it go better? While we may go some way toward

answering these questions, it is clearly true any (non perfectionist) answers are going to be such that 'one size does not fit all.'

Having acknowledged that there *is* a clear sense—in the framework of liberalism, at least—in which it may not be morally impermissible to choose Lesser Depletion over Conservation while it *would* be morally impermissible to choose Depletion over Lesser Depletion (or Conservation), and having given some reasons as to why this is so, we must consider whether this is a problem for our account. I have already said that I think this result is "welcome" rather than otherwise. It seems to me right to say that certain ways in which we may do the morally wrong thing by future generations are much worse than others; and it seems to me attractive if this degree of injury tracks rights violations.

I am inclined to think, moreover, that an impersonal principle such as Parfit's Q will have a hard time accommodating these disparities; since it is specifically designed not to appeal to anybody's rights or interests, I do not think it will track a moral difference between the violation of rights and the harming of interests. But if this is so this undermines the status of future generations as our moral equals. This gives us all the more reason to retain the conviction that our obligations to future generation are not satisfactorily accounted for in impersonal terms. As it stands, Q tracks no moral distinction between the choice of Depletion over Lesser Depletion, and the choice of Lesser Depletion over Conservation. Parfit appears to think that this is how it should be, but I maintain that such a result is very counter-intuitive.

Such is our framework. We are left, nonetheless, with the problem of what to say about cases similar to Lesser Depletion, but in which it would cost us *nothing* to pursue Conservation instead. Consider *Lesser Depletion**:

*Lesser Depletion**: In Lesser Depletion,* those who live more than two centuries later have a higher quality of life than we do now. However, if we had chosen Conservation, which we might have done *at no inconvenience to ourselves*, those who live more than two centuries later would have had an even higher quality of life.

I confess that I am not entirely sure of what to say about Lesser Depletion.* But it does not seem obvious to me that there is, even in these circumstances, a moral requirement to pursue Conservation.

I arrive at this conclusion from consideration of what it would mean to act on our obligation to avoid Depletion. For this is our first concern. One suggestion that many people have found plausible, and that would presumably satisfy the obligation to avoid Depletion, is some sort of principle of just savings, in which each generation is obliged to leave for succeeding generations a total range of resources and opportunities at least equal to its own range of such.[39] Since resources are depleted proportional to the number of people alive and their per capita impact, such a principle would, I think, plausibly have the consequence that our generation has no right to double itself in less than 50 years and thus must bring concerns of population growth to its political fore. And the results of this might, I think, appear to many people to demand too great a sacrifice—many people feel that they have the unabridged right, at no penalty, to have as many children as they like. I do not think this is true. These people would not, in my view, be taking seriously enough the status of future generations as the holders of moral claims.

At any rate, once we have met our obligations to avoid Depletion according to some principle such as that just mentioned, I am inclined to think that the question of whether to realize Conservation or whether to realize Lesser Depletion, irrespective of whether or not there is any noticeable cost to ourselves between the two, is not going to be taken as an important moral question. Of course, it will be responded, the fact that people may not *consider* it an important moral question does not *prevent* its being legitimate moral concern. However, I think that there may be something to the idea that the question is not morally important. Once the constraints of Depletion have been met, people will have made considerable sacrifices. They will be inclined to think that this is enough, and there is reason to respect this. Of Conservation or Lesser Depletion—even if these can be satisfactorily calculated—they will choose which they prefer.

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[39] See B. Barry, (1983), 'Intergenerational Justice and Energy Policy,' in D. Maclean and P. Brown, eds., *Energy and the Future*, Totowa, NJ: Rowman & Littlefield.

Our account was, after all, premised on the idea that as rights holders people qualify for at least this much room to choose.

7. CONCLUSION

In conclusion I survey the main points of my argument. I have contended that there is a clear personal solution to some instances of the Non-Identity Problem to be found in the fact that those instances would violate the rights of future generations. In reaching this conclusion, I argued that the violation of rights does not correspond in any exact fashion with the deterioration of people's interests. In particular, it is perfectly possible to experience a violation of one's rights without a setback to one's interests. Since this is so, there is no difficulty on my account in the fact that certain Non-Identity choices violate the rights of future individuals but fail to make them worse off.

I considered various ways in which it might be responded that the fact that as a result of certain of our present actions, certain future persons whose rights are violated could not both exist and have their rights fulfilled (fact (G)), causes trouble for my account, in just the same way that the fact that as a result of certain of our present actions, certain future persons who are badly off could not both exist and be better off than this (fact (F)) causes trouble for an account that appeals to the welfare or interests of future generations. I argued that according to the structure of rights claims a person can be wronged when she is put in a situation in which her rights are violated (or compromised), even if she couldn't have existed and otherwise have had her rights fulfilled. The rights violation itself is unaffected by these surrounding facts. I further considered the arguments that (G) might incline us to think it permissible either to cause people to exist with a seriously attenuated set of rights, or to presume that future generations would in any case be *waivė* whichever of their rights are allegedly violated. I countered that either argument would rest on objectionable, coercive bases, bases which undermine the very idea that future generations are rights holders—beings of equal moral status with ourselves—that I have sought to uphold.

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