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WASHINGTON UNIVERSITY IN ST. LOUIS

Department of Philosophy

Dissertation Examination Committee:

Christopher H. Wellman, Chair

Thomas Christiano

Marilyn Friedman

Frank Lovett

Larry May

Andrew Rehfeld

THE ETHICS OF FORCIBLE DEMOCRATIZATION

by

David D. Speetzen

A dissertation presented to the Graduate School of Arts and Sciences of  
Washington University in partial fulfillment of the requirements for the degree of  
Doctor of Philosophy

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## INTRODUCTION TO THE DISSERTATION

### 1. THE NEED FOR A THEORY

In late December 1989, the United States began *Operation Just Cause*, an invasion of Panama by 27,000 American troops aimed at deposing Manuel Noriega. Noriega had been the de facto ruler of the country since 1983, heading a military dictatorship that routinely engaged in the arrest, kidnapping, torture, and assassination of political dissidents, and manipulated and ignored, respectively, the two nationwide elections held during his reign that would otherwise have removed him from power. In the run up to the invasion, the United States imposed economic sanctions on Panama and demanded that Noriega respect the results of the May 1989 elections, which had overwhelmingly favored Guillermo Endara. In response, Noriega had Endara publicly beaten, ordered the legislature to recognize a state of war between Panama and the United States, and had the army harass US civilians and military personnel within the country (one American marine was shot and killed).

On the eve of the invasion, President Ronald Reagan addressed the people of the United States and offered four justifications for taking military action against Panama: to protect US nationals, to halt drug trafficking, to uphold the neutrality of the Panama canal, and, most strikingly, to defend Panamanian democracy. The operation was successful in meeting these goals, and Panama remains a stable, though economically troubled, democracy today. Approximately 200-300 Panamanian soldiers and 23 American soldiers were killed in the invasion, as were between several hundred and several thousand Panamanian civilians. An estimated 15-20,000 civilians were displaced

as a direct result of the invasion, and lasting harm was done to Panama's economy by the pre-invasion sanctions, the damage done to infrastructure in the invasion, and the looting and vandalism which occurred during the several weeks of lawlessness that followed.

Democratic ideals had been used to justify military actions before, in cases ranging from the annexation of Hawaii, the post-World War II reconstruction of Germany, Italy, and Japan, during the Vietnam War, and in the US invasion of Grenada in 1983, but in these cases the goal of democratization was either downplayed in preference to other political goals, or understood to be a euphemism for strictly anti-communist intervention. That President Reagan invoked the defense of democracy among his Administration's rationales for invading Panama is striking, because it publicly and explicitly claimed democracy as a just cause of the use of international military force. Since then, democracy has played a prominent role in public justifications for many other US interventions around the world—some of them authorized by the United Nations, and some of them not—including those in Bosnia, Somalia, Haiti, and most recently, Afghanistan and Iraq.<sup>1</sup>

Critics of US foreign policy are often quick to argue that these justifications are cynical and hypocritical, and that they fail to express the United States' actual motivations for engaging in armed interventions. Be that as it may, the use of democratic ideals to justify the international use of military force warrants serious philosophical attention, for two reasons. First, democracy is, or is at least believed to be, a great human good; governments would not attempt to justify foreign wars by reference to democratic

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<sup>1</sup> For a brief introduction to Cold War and pre-Cold War forcible democratization, and a more lengthy treatment of post-Cold War attempts, see Karin Von Hippel, *Democracy by Force: US Military Intervention in the Post-Cold War World*. Cambridge University Press (2000).



ideals if it were not. Given the likelihood that democracy will be used to justify armed interventions in the future, and given the death and destruction such interventions generally entail, we need to know whether, and if so, under what conditions the imposition of democratic political institutions on a foreign country could be morally justified, so as to know whether and when to accept democratization as an acceptable just cause for war. Second, even if motives are relevant to moral evaluations of warfare, they are only part of the story. As the intervention of Panama shows, governments can *intend* to democratize a target of intervention irrespective of whether they are motivated by democratic ideals, and the benefits of democracy could easily outweigh less worthy motivations in the final evaluation of the act.<sup>2</sup>

Pro-democratic intervention, democratic regime change, or as I will typically refer to it, *forcible democratization*, is the use of armed force to establish or restore democratic political institutions in a foreign country. There are two kinds of forcible democratization. In *ad bellum* democratization, democratic ideals are taken to provide a positive rationale for armed intervention. This contrasts with *post bellum* democratization, in which armed force is used to democratize a foreign country following an intervention justified on other grounds.<sup>3</sup> My primary aim in this dissertation is to defend a normative account of *ad bellum* forcible democratization, although I do discuss

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<sup>2</sup> For a discussion of the differential moral relevance of motivations and intentions in the context of armed intervention, see the exchange between Fernando Tesón and Terry Nardin in *Ethics & International Affairs* 19/2 (Summer 2005), pp. 1-30: Tesón, “Ending Tyranny in Iraq,” pp. 1-20, Nardin, “Humanitarian Imperialism: Response to ‘Ending Tyranny in Iraq,’” pp. 21-26, and Tesón, “Of Tyrants and Empires: Reply to Terry Nardin,” pp. 27-30.

<sup>3</sup> On this distinction, see Alyssa Berstein, “A Human Right to Democracy? Legitimacy and Intervention,” in *Rawls’s Law of Peoples: A Realistic Utopia*, Rex Martin & David A. Reidy, eds. Malden, MA: Blackwell Publishing, 2007, pp. 278-98, at 92.

the *post bellum* variety in the last two chapters. In short, I argue that while *ad bellum* forcible democratization may be morally unjustified under most conditions today, if and when the international legal system acquires a greater ability to influence state behavior, it should gradually come to recognize democratization as a just cause for armed intervention, at least when that is the only way to secure democracy in a given country, and when it is unlikely to result in disproportionate harm. In the remainder of this introduction, I make some brief preliminary remarks to set the stage for the rest of the dissertation. First, I discuss neoconservatism—the political ideology most responsible for moving forcible democratization to the forefront of American public discourse—and explain where I agree and disagree with its fundamental precepts. Second, I call attention to some major themes that underwrite much of my argument but are not always made explicit, and state some qualifications to make clear what it is I am *not* doing in the dissertation. Finally, I offer a précis of the argument to follow by summarizing the main conclusions of each chapter.

## 2. THE NEOCONSERVATIVE CONNECTION

Neoconservatism as it exists today is not so much a single, comprehensive philosophical approach to global politics as it is a collection of particular foreign policy positions on a range of international issues that have confronted the United States over the past several decades. On matters of policy, neoconservatives have tended to reject both isolationism and internationalism, preferring to emphasize the primacy of American

military and economic power and advocating an independent and highly active, even aggressive role for the United States in world affairs.<sup>4</sup>

Inasmuch as the fundamental principles of neoconservatism can be distilled from the various policy positions neoconservatives have taken over the years and divorced from their decidedly American perspective, three basic tenets emerge:

Universalism - Human rights and democracy are moral norms applicable to all human societies.

Interventionism - Armed intervention may be used in pursuit of universal moral norms.

Exceptionalism - Not all political actors should be equally constrained by international legal institutions.

I accept all of these tenets, and each of them plays an important role in the dissertation to follow. However, first, the devil is in the details: my interpretation of the nature and value of human rights and democracy, my qualifications on how and when armed intervention ought to be used in their support, and my views on the extent to which political actors may justifiably break the law all diverge considerably from mainstream neoconservative thinking about these issues. In short, I argue for a more cautious and progressive form of universalism, a more legally bounded and morally demanding form of interventionism, and a more constructive approach to international institutions than most neoconservatives would allow.

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<sup>4</sup> For various expressions of neoconservative policy positions, see *Present Dangers: Crisis and Opportunity in America's Foreign and Defense Policy*, Kagan and Kristol (eds.), San Francisco, CA: Encounter Books (2000), and *The Right War? The Conservative Debate on Iraq*. Gary Rosen (ed), Cambridge University Press (2005).

Second, where neoconservatives are especially interested in how these tenets relate to and can be justified by reference to the national interests of the United States, I adopt a cosmopolitan perspective, from which the particular interests of any given state have no priority over those of other states. What matters, from a cosmopolitan perspective, is the equal moral value of all individual human beings regardless of their country of origin. Thus, while it might be true that American interests could be better secured, say, by promoting democracy abroad or by breaking international law, I do take those facts as neither necessary nor sufficient conditions on the circumstances under which democracy ought to be promoted or international law broken.

Finally, neoconservatives have been closely associated with the ongoing wars in Iraq and Afghanistan, and were among their most fervent supporters from the very beginning. The view for which I argue in this dissertation should not be understood as a defense of these wars, or indeed, for any of the other specific policy proposals neoconservatives advance. What I offer here amounts to a philosophical account of the possibility of justified forcible democratization and a discussion of the kinds of circumstances and institutions that would need to exist for such a justification to succeed. The only exception to the generality of my approach occurs in Chapter V, where I argue for a view concerning how political reconstruction under military occupation ought to proceed, and then apply my conclusions to the American occupation of Iraq. As will become apparent, those conclusions would almost certainly be vehemently rejected by most neoconservatives. In the end, I think it would be fair to say that the argument I defend here has one foot squarely within neoconservatism, and one foot outside it entirely.

### 3. THEMES AND QUALIFICATIONS

There are two dominant themes in my approach to forcible democratization that deserve special emphasis here, because their role is not always apparent. First, my approach is firmly grounded in the moral value of human welfare, and in connecting various actions and institutions to this value through instrumental justifications. However, while I do tend to lean towards consequentialist, rather than deontological, forms of moral reasoning, I have not made my underlying ethical commitments explicit, both because spelling out a suitable account of consequentialism would have limited the space I had left to address matters more directly relevant to political theory, and because many of my arguments can be presented in both consequentialist and deontological terms. Some readers might have preferred me to start a bit further upstream, and I hope to tackle the more fundamental normative ethical issues that pertain to forcible democratization in the future, but for the time being, allowing myself a broader base of justification seemed to be a more fruitful approach.

Second, much of my argument is underwritten by my attraction to moral continuums and progressive institutional standards. In my view, a large swath of moral and political issues are best understood as matters of degree rather than kind. I am skeptical, for many reasons, about drawing bright lines between, for instance, basic and non-basic interests, between self-determining and non-self-determining groups, between democratic and non-democratic systems of government, and so on. The source of my skepticism is not that I think we cannot draw those lines, but that our reasons for drawing them are almost always purely practical. In my view, it is not as if the nature of democracy itself contains specific guidelines about *how much* free speech and free

association a government's subjects need to have in order for the regime to be considered genuinely democratic, or *how well* its electoral system needs to function—the truth is that there are more and less democratic systems, and the reason we need specific guidance about “how much” and “how well” is that we need to know when to take corrective action. But as I explain in several places throughout the dissertation, when we ought to take corrective action has as much to do with external matters of social, epistemic, and institutional context as it has to do with the conceptual boundaries and moral categories of interests, self-determination, and democracy. As I try to make clear in what follows, I believe keeping these two parts of practical moral reasoning distinct, and their proper relation in view, leads to some interesting conclusions.

As for qualifications, I make several. First, as I have already suggested, this dissertation should be understood as a work of political theory and philosophy, rather than as an exercise in legal reasoning, foreign policy, or descriptive social science. I do present a broad overview of how I think international institutions should be developed in the future, but drawing inferences about specific ways to reform state practice and the international legal system would require premises that I do not argue for here. Second, even at that more abstract level of theory, this dissertation does not pretend or aim to answer all of the philosophically interesting questions about forcible democratization. For instance, I largely neglect questions about the comparable relevance of intentions and motivations, about the ethics of aiding democratic revolutionaries and about democratic revolutions themselves, and about whom, of a range of plausible candidates, ought to intervene in cases where forcible democratization would be permissible. I raise each of these and other questions, and in some cases point towards how I think they should be

answered, but have not tried to give a fully satisfactory philosophical response to them. Finally, I do not take myself to be offering a novel philosophical account of the value of democracy. The account I adopt, a largely instrumental view, is only one of several to be found in the literature. My primary interest is in exploring the practical implications of valuing democracy in this way, rather than in democratic theory itself.

#### 4. SUMMARY OF THE ARGUMENT

In Chapter I, I set out a theory of moral and legal human rights. I begin by presenting a general account of ordinary moral rights, based on Joseph Raz's influential interest theory, and argue for what I call the Responsibility Principle: the view that the content and stringency of a duty, grounded on a given rightholder's interest, is proportional to both the importance of that interest to the rightholder's well-being, and the ease with which the duty-bearer can protect or promote it. Next, I use this account to motivate a very simple, and to some extent deflationary account of moral human rights according to which they are rights grounded on shared human interests. I call this the Flourishing Life Approach, to highlight the differences between it and a prominent view in the human rights literature sometimes called the Decent Life Approach. Proponents of the latter require that human rights and their grounds must satisfy an Urgency Condition: on their view, only the most important, basic, or urgent shared human interests can ground a human right. I argue that the Urgency Condition must be rejected because there are no good in-principle reason to accept it, and because the practical reasons for restricting the grounds of human rights apply only to legal, and not to moral rights.

Finally, I argue that legal instrumentalism—the view that the purpose of a legal system is to promote justice by securing individual moral rights—combined with considerations about the rule of law and the limits of enforceability, support the view that the international legal system should only recognize the rights it can enforce, and that it should place priority on enforcing rights grounded on our *most* basic interests (while acknowledging that there is no absolute line distinguishing basic from non-basic interests). But since a legal system’s limits of enforceability change from time to time and from place to place, the human rights it recognizes should also change. So long as the extent to which international law can influence state behavior increases, and so long as consensus about the list of shared human interests grows, the limits of enforceability, and so, too, the scope of recognized legal human rights, should expand, gradually approaching the ideal of complete legal protection for all moral human rights.

In Chapter II, I present an account of the conceptual and normative relationships between political self-determination, representative government, and democracy. I argue that political self-determination is best understood as a group’s capacity to make and implement collective political decisions. After canvassing several alternative theories of the value of political self-determination, I settle on an instrumental view, arguing that external parties have *prima facie* reasons to refrain from interfering with a group’s self-determination because doing so will prevent those most familiar with and most motivated to pursue the relevant interests—the group members themselves—from making and implementing the decisions that affect them the most. I go on to offer an account of representative government: representative governments are those whose actions, decisions, and policies reflect or accord with the collective political will of the people to



whom those actions, decisions, and policies apply. I then argue that, so understood, representative government is either a conceptually or a practically necessary condition on political self-determination. Finally, using Robert Dahl's list of the political institutions needed for large-scale democracy, I argue that democratic governments are better able to represent the collective political will of the people they govern than non-democracies are, and that therefore the political self-determination of democratic societies presents outside parties with stronger *prima facie* reasons against interference.

The views presented in the first two chapters play an important role in Chapter III, where I argue that, under certain conditions, the goal of democratization can justify the international use of armed force, including the occupation and political reconstruction of another state. I begin by distinguishing the two most important components of the so-called "right to rule," political legitimacy and political authority. I then develop an account of political legitimacy borrowed from Arthur Appelbaum, which holds that a government's right to non-intervention should hinge on whether it (1) adequately secures its subjects' human rights, and (2) adequately represents their collective political will. I place special emphasis on the notion of adequacy at work in these conditions, arguing that the standards of adequate human right security and adequate representation are context sensitive in the same way that standards of adequate parenting are: as knowledge, social conditions, and enforcement capabilities improve, the relevant standards of adequacy should rise. Because of the empirical and conceptual relationships between democracy on the one hand and human rights security and representation on the other, I argue that democracies are superior to non-democracies along both dimensions of political legitimacy. Therefore, since the standards of adequate security and

representation should continue to rise over time, we can expect that now or at some point in the future, governments' rights to non-intervention will depend on their maintenance of democratic political institutions. Failure to do so will, at that time, provide a just cause for intervention by relevantly situated external parties, up to and including the use of armed force. I close by addressing the serious but surmountable objections that forcible democratization is either practically infeasible or internally inconsistent—I argue that these claims are false.

Chapters IV and V offer some elaborations on the basic view presented in the first three chapters. In Chapter IV, I address the question of obedience to international law, and more specifically, whether international actors have a general, *prima facie* duty to obey international laws surrounding humanitarian intervention and regime change. In effect, I argue that it does not matter. If there is no duty to obey international law, then contrary to many critics of the war in Iraq, the illegality of humanitarian intervention (and *ipso facto*, of forcible democratization) is not in itself a moral reason to abstain from them. On the other hand, if there is a duty to obey international law, then even if we assume a drastically more just and legitimate international legal system than the one we now possess, there is little reason to suspect that it carries enough moral force to override the positive case for humanitarian interventions which are justifiable on independent moral grounds. In other words, if there is a duty to obey the law, that duty is so weak as to be practically irrelevant to moral deliberation about whether to launch a humanitarian intervention. The relevance of such a duty to democratic regime change is less clear, since *ad bellum* regime change need not aim to halt or prevent *urgent* human rights abuses, and since *post bellum* regime change is not straightforwardly illegal.

Nevertheless, laws against regime change could still plausibly be thought liable to justified disobedience for the same reasons as are laws against humanitarian intervention.

Finally, in Chapter V, I argue for a very controversial view about *jus post bellum*, the aspect of just war theory that deals with the aftermath of military conflict. I argue that the traditional model of occupation is unacceptably democratic, because it fails to satisfy the Principle of Affected Interests. In its most plausible form, that principle holds that everyone whose most important interests are certainly and significantly affected by a government's decisions have a right to participate in that government. After clarifying the relationship between political participation and political representation, I use the Principle of Affected Interests to argue that an occupied people has a right to effective representation in the occupying government. Such a right would reduce the risks inherent to traditional models of occupation—risks of unjustified paternalism, a lack of institutional accountability, and of a failure to attenuate the indeterminacy of an occupied people's collective political will. In addition, I argue that effective representation for occupied peoples would undermine the actual and perceived legitimacy of insurgency movements, disincentivize wars aimed at the long-term subjugation of foreign populations, and foster a spirit of cooperation, self-ownership, and responsibility in the occupied people.

## CHAPTER I

### A PROGRESSIVE THEORY OF MORAL AND LEGAL HUMAN RIGHTS

Human rights are the common currency of moral evaluation in contemporary international affairs. For activists, policy-makers, and international lawyers, human rights discourse proceeds without explicit reference to, and without any real need for, philosophical justification. The practice of human rights is largely autonomous from the theory, in part because the moral importance of the things human rights are usually thought to protect is so obvious that for practical purposes it hardly makes any difference how they are justified. Nevertheless, when human rights conflict, either with each other or with other values, or when there are doubts about whether this or that right really is or should be considered a human right, then there needs to be some moral foundation from which to trace (or not) a line of justification back to the right or rights in question. For that, we need a theory of human rights, and in this chapter I present and defend just such a theory.

Central to my exposition will be three interrelated themes. The first is the difference between moral and legal human rights, a distinction that many authors acknowledge but quickly forget in the course of developing their own views. My theory exploits that distinction to motivate a division of labor in which the complete protection of moral human rights represents the ideal or goal towards which domestic and legal systems ought to progress, by gradually expanding the scope of the legal human rights they recognize as their capacity for enforcement increases. I frame my discussion of moral human rights against the backdrop of a more general analysis of rights, one based

on Joseph Raz's influential interest-based account. After distinguishing between a right's justification, or ground, and its content, I argue for the controversial view that any interest, no matter how trivial, is a potential ground for a right, so long as the costs of promoting or protecting that interest for potential duty-bearers is sufficiently low. This conclusion underwrites much the argument for a progressive theory of human rights.

The second theme concerns a prominent theory of human rights I will call the Decent Life Approach. According to this view, human rights protect only our most basic or urgent interests—those whose satisfaction is a practically necessary condition for living a minimally decent human life. I argue that there is no good, in-principle reason to restrict the grounds of moral human rights in this way, and that while there are good practical reasons to restrict the grounds of legal human rights, those grounds depend on the extent to which a legal system can enforce the law, not on some antecedent standard of decency. This leads me to adopt a view of moral human rights I refer to as the Flourishing Life Approach.

The third theme I address is the ubiquitous claim that human rights are universal and transhistorical. On my view, it is true by stipulation that the *grounds* of moral human rights are universal and transhistorical, because they are defined by reference to the class of shared human interests. But from this nothing follows about the contents of moral human rights, since the content of a given right depends on what relevantly situated moral agents can do to promote or protect the grounding interest and the cost they would incur by doing so. Nor does anything follow about what human rights a legal system should recognize, or about how demanding those rights should be because, again, a detailed articulation of the human rights a legal system should recognize will depend on

the extent to which it can enforce them, and that capacity varies from time to time and place to place.

The chapter unfolds roughly along the lines laid out above, although as I said, these three themes are closely interrelated and so not entirely separable in exposition. In the first section, I focus on the nature and justification of rights *simpliciter*, and then use my analysis to develop the Flourishing Life Approach to moral human rights mentioned above. In the second section, I argue that there is no good reason to believe that moral human rights must be matters of urgent moral concern, and that the Decent Life Approach is therefore burdened by an unnecessary and independently problematic restriction on the potential grounds for human rights. In the third section, I develop the legal aspect of my theory, arguing that the limits of a given legal system's capacity for enforcement should constraint the list of human rights that system should recognize. I go on to argue that this counts in favor of a progressive theory of legal human rights—one in which the scope of those rights should expand as domestic and international legal systems gain a greater capacity to influence the behavior of their respective subjects.

### 1. INTERESTS, RIGHTS, AND THE RESPONSIBILITY PRINCIPLE

If human rights are rights at all, we must find their foundations in a more general theory. But even the most preliminary assertions about rights are controversial. Much of this controversy stems from a dispute between will theorists and interest theorists.<sup>1</sup> Will

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<sup>1</sup> For discussion, see Jeremy Waldron, "Introduction," in *Theories of Rights*, Waldron (ed.), Oxford University Press (1984), pp. 1-20, at pp. 9-12; Christopher H. Wellman, "Feinberg's Two Concepts of Rights," *Legal Theory* 11/3, pp. 213-226; Leif Wenar, "The Nature of Rights," *Philosophy & Public Affairs* 33/3 (2005), pp. 223-252.

theorists believe that rights to protect the rightholder's will, and hold that to have a right is to have a kind of discretionary normative control, or power, over other agents' duties—those agents must respect the rightholder's will within some specific domain of choice.<sup>2</sup> Interest theorists, on the other hand, believe that rights protect the rightholder's interests: to have a right is to have a valid claim against others such that they have duties to protect or promote some specific aspect of the rightholder's well-being.<sup>3</sup>

Though I do not have the space to mount a full defense here, I adopt an interest theory of rights because I believe, first, that a theory of human rights must begin somewhere, and the interest theory is one of only two generally plausible alternatives; second, I believe that interest theories better accommodate our intuitions about the rights of animals, children, and the mentally disabled, since will theories render the possession of a rational will a necessary condition on being even a potential rightholder; and third, I believe that interest theories can subsume will theories by showing that many rightholders have a strong *interest* in having other agents respect their choices, especially their self-regarding choices. To some extent, this debate is simply a matter of terminology—about the definition of the word 'right,' and to that extent much of what I say may be transposed into the language of the reader's preferred theory of rights. But to some extent the debate is also about normative principles, and any attempt to resolve the question of whether respect for a moral agent's will or choice has moral value

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<sup>2</sup> For examples, see H.L.A. Hart, *The Concept of Law*, Oxford University Press (1961), and "Are there Any Natural Rights?" in Waldron, *Theories of Rights*, pp. 77-90; Carl Wellman, *Real Rights*, Oxford University Press (1995).

<sup>3</sup> For examples, see Joseph Raz, *The Morality of Freedom*, Oxford University Press (1986), esp. Ch. 7-8; David Lyons, "Rights, Claimants and Beneficiaries," *American Philosophical Quarterly* 6/3 (July 1969), pp. 173-185.

independent of its instrumental value to her well-being would take us far beyond the scope of this chapter. I will proceed on the assumption that an interest theory of rights is a plausible starting point for a theory of moral human rights.

The interest theory I adopt is loosely based on an influential account originally developed by Joseph Raz.<sup>4</sup> Raz defines rights in the following way: “‘X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”<sup>5</sup> In other words, we can say that a right exists just when a rightholder’s interest justifies, or as I will say, *grounds* a duty for one or more other agents. While this provides truth conditions for assertions of the form ‘X has a right,’ it leaves unclear precisely what the referent of the term ‘right’ is supposed to be. Commentators often gloss Raz’s definition by claiming that on his view rights simply *are* duty-grounding interests, and Raz himself sometimes speaks as if that were the case.<sup>6</sup> But this formula is incomplete. It fails to capture the sense in which rights are rights *to* something, some substance or activity not necessarily identical with the full satisfaction of the grounding interest.

To take an example, the so-called ‘right to life’ is grounded on the rightholder’s interest in remaining alive. But the interest in life cannot be identical to the right itself, not even when it grounds some duty to protect or promote it: these duties are an essential component of the right to life even though they are not an essential component of the grounding interest. Call the duties grounded on the rightholder’s interest—what a right is

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<sup>4</sup> Raz, *The Morality of Freedom*, pp. pp. 165-192

<sup>5</sup> Raz, *The Morality of Freedom*, p. 166.

<sup>6</sup> My purpose here is not exegetical, so I will forego a discussion of how to best understand Raz’s theory.



a right *to*—the right’s *content*. It is also worthwhile to note that the right is not identical to the set of duties that the interest grounds. Conceptually, duties need not arise out of the moral claims that others have on us by virtue of their interests—actions commanded by God, for instance, would presumably be obligatory because of God’s authority, rather than because of God’s interests, since it is difficult to see how human agents could protect or promote God’s well-being—so an interest theory need not be implicitly committed to the reducibility of rights to duties. That a set of duties is grounded on someone’s interest is a fact over and above the existence of the duties themselves.<sup>7</sup> It is also important to make clear that the successful discharge of the duties grounded on an interest need not result in the satisfaction of that interest. Having one’s right to life respected does not guarantee that one will remain alive. Under some circumstances, a rightholder’s interest in life may only ground duties for others to refrain from intentionally killing her, to protect her from lethal harms insofar as they can, and so on; her death may simply be the result of an unavoidable accident, as sometimes even our best efforts to protect others are not enough. Thus, we cannot understand a right fully without an understanding of both its grounding interest *and* the array of duties that it grounds.

I assume that interests can ground both positive and negative duties—both duties to act and duties to refrain from acting.<sup>8</sup> Much of what I say in the remainder of the chapter concerns positive duties, so we need to dwell for a moment on how such duties

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<sup>7</sup> That the interest theory reduces rights to duties is a common objection to the view.

<sup>8</sup> The distinction is conceptual, not necessarily normative; many recent authors have argued that there is no morally relevant difference between duties to act and duties to refrain from acting. For a classic expression of this objection see Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2<sup>nd</sup> Ed. Princeton University Press (1980, 1996), pp. 35-64.

are to be justified. A persistent worry about any theory that allows interests to ground positive duties is the suspicion that there is no upper bound to what the theory will require, in other words, that it will demand that we give “ceaseless assistance” to those whose interests we can protect or promote, at the expense of our own plans and projects. I believe Christopher H. Wellman’s response provides a good starting point for responding to the Ceaseless Assistance Objection.<sup>9</sup> Wellman argues for Samaritanism, the view that “one’s failure to benefit another is wrong when the other is in [extreme] peril and one can rescue her at no unreasonable cost to oneself.”<sup>10</sup> Since the costs of rescue *can* be unreasonable, it follows that there are times when it is not required, even to save another from extreme peril, and this seems to disarm the Ceaseless Assistance Objection.

All the same, Samaritanism is not as general an account as it could be, for as stated, it neglects the fact that both peril and cost come in degrees. To deepen the Samaritan view of positive duties, I propose what I call the Responsibility Principle. The Responsibility Principle holds that the content and stringency of the duty grounded by a particular rightholder’s interest for a particular duty-bearer is proportional to (1) the importance of the interest to the rightholder’s well-being, and inversely proportional to (2) the cost to the duty-bearer of protecting or promoting that interest. So, in general, the

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<sup>9</sup> Christopher H. Wellman, *A Theory of Secession: The Case for Political Self-Determination*. Cambridge University Press (2005), p. 13. I borrow the phrase “ceaseless assistance” from Wellman’s discussion.

<sup>10</sup> Wellman, *A Theory of Secession*, p. 13, n. 11. Wellman is quick to point out that this view is “neither novel nor controversial,” citing John Stuart Mill’s claim that “[t]o make anyone answerable for doing evil to others is the rule; to make him answerable for not preventing evils is, comparatively speaking, the exception. Yet there are many cases clear enough and grave enough to justify that exception.” (*On Liberty*. Ed. Elizabeth Rappaport. Indianapolis: Hackett [1859, 1978], p. 11). My aim in what follows is to generalize the operative principle to account for changes in the relative difference between the threatened degree of peril to the subject and the costs an agent would incur by preventing some or all of that peril from befalling the subject.

more important the interest, and the lower the cost to the duty-bearer of promoting that interest, the more stringent and robust the duty it grounds. The *stringency* of a duty is essentially the duty's relative moral importance: to say that one duty is more stringent than another is to say that it is worse to violate the former than the latter. The *robustness* of a duty, as I will use the term, is essentially the demandingness of the required action: to say that one duty is more robust than another is to say that the former requires more, more complex, or more strenuous actions than the latter. To clarify both the foregoing theory of rights and how Samaritanism and the Responsibility operate in the context of actual cases, I will develop a series of examples that illustrate the various concepts in play. Towards the end of the series, I will use one example to illustrate what I call 'restricted' and 'unrestricted' versions of the Responsibility Principle. Consider the following cases.

Case 1: Ishmael is drowning in a swimming pool. No one who could do anything to save Ishmael knows that he is drowning.

I accept the Kantian principle that 'ought implies can,' which holds that in order for an agent to have a duty to perform some action, she must be able to perform that action. Since an agent's ability to discharge a duty presupposes that she is aware of the duty, and since being aware of that duty presupposes that she is aware of the interest at stake, ignorance of another's interests renders one unable to discharge duties that those interests would otherwise ground. In this case, Ishmael is morally isolated in the sense that his interest fails to ground any duties, because there is no moral agent able to do anything to protect or promote his interest in not drowning. For this reason it seems correct to say

that, strictly speaking, Ishmael has no right to be saved from drowning, because there is no one against whom such a right could be claimed.

Case 2: Ishmael is drowning in a swimming pool. Jose cannot swim, but he could throw Ishmael a life preserver.

According to Samaritanism, Jose has a duty to throw Ishmael a life preserver, because by doing so he can save Ishmael from extreme peril at little or no cost to himself. Now, Ishmael might miss the life preserver and drown anyway—clearly a strong swimmer would be more likely to save Ishmael by diving into the water and pulling him out. However, since Jose cannot swim, he has no duty to get into the pool to try and grab Ishmael’s arm with one hand while clinging to the side of the pool with the other, because he would risk his own life by doing so.

Case 3: Ishmael is drowning in a swimming pool. Kalia has training as a lifeguard. She could throw Ishmael a life preserver or she could dive in and pull him out.

In this case, Samaritanism claims only that Kalia would wrong Ishmael by failing to rescue him from peril at little or no cost to himself. So, according to Samaritanism, Kalia only needs to perform one of the two actions: it is compatible with Samaritanism to say that whether she throws the life preserver to Ishmael or dives in to pull him out is a matter of discretion. She can choose to throw him the life preserver *even though she would be far more likely to save him from drowning if she jumped in and pulled him out*. The Responsibility Principle, however, maintains that even though Kalia would incur slightly more cost to herself from jumping into the pool (after all, she had not planned on getting wet), she still has a duty to do so, because that cost is still slight, and the benefit to

Ishmael is very great. The most important thing to see here is that Kalia's duties differ from Jose's duties as a direct result of Kalia's training as a lifeguard. The greater her ability, and the lower the costs to her for exercising that ability, the greater the responsibility she bears for Ishmael's safety.

Case 4: Ishmael is about to fall into the shallow end of the pool. Lamar can save Ishmael by speaking a word of warning to him.

In Cases (1)-(3), the interest at stake was of great importance: rescuing Ishmael saved him from extreme, indeed, mortal peril. Here, the interest at stake is trivial: Ishmael will not drown if he falls into the pool, but he will get an uncomfortable dousing. The difference is important for distinguishing restricted and unrestricted versions of the Responsibility Principle. According to the restricted principle, an interest must reach a threshold of importance or urgency before it can ground a duty, regardless of how easy it would be for a given agent to promote that interest. The unrestricted principle, on the other hand, holds that any interest, no matter how trivial, could potentially ground a duty, so long as the costs for a given agent of promoting that interest are small enough.

Now, it seems clear that Lamar *ought* to warn Ishmael of his impending plunge, if only because Lamar knows Ishmael does not want to get wet, and because it is such a simple, small thing to say to him "Stop!" or "Look out behind you!" I should think that this is enough for us to say that Lamar would *wrong* Ishmael by failing to warn him; if Ishmael fell into the pool and knew that Lamar could have warned him but chose not to—he—and I think anyone else—would certainly *feel* wronged. At first glance it seems unproblematic to say that Ishmael's interest in not getting wet grounds a duty for Lamar to warn him, and so to claim that Ishmael, in this particular instance, has a right to be

warned. The unrestricted Responsibility Principle supports this conclusion, because so long as Ishmael has an interest, even a trivial interest, that it could ground a duty for another moral agent if the cost to that agent is even more trivial (I set aside questions about the relative degrees of triviality needed to trigger a duty.) But the restricted version of the Responsibility Principle would say that Ishmael has no right to be warned because his interest is too trivial to ground a duty for Lamar. While we may correctly judge that Lamar is acting unkindly, we should not think that he has *wronged* Ishmael or violated some right of his to be warned.

It is difficult to see how one might argue for the restricted Responsibility Principle without begging the question. For, first, the difference between Ishmael's interest in not drowning and his interest in not getting wet seems to be a matter not of kind, but of degree. Some interests are more central to human welfare than others, but any attempt to draw a principled line between central and non-central interests, or as we shall say below, between basic and non-basic interests, is bound to fail. Appeals to what constitutes "peril" will be similarly vague—there seems to be nothing wrong with saying that Ishmael came "perilously" close to falling into the pool, and attempting to stipulate this usage away would beg the question. Second, a proponent of the restricted Responsibility Principle might think that claiming that Ishmael has rights both to be saved from drowning and to be warned before falling into the pool equates them in a way that it should not. But there is nothing wrong with conceding that some rights and duties are more stringent than others, that is, that it is *worse* to violate some rights than others, and *worse* to fail at discharging some duties than to fail at discharging others. For these

reasons, I will take the unrestricted version of the Responsibility Principle for granted in what follows.

## 2. MORAL HUMAN RIGHTS

With the foregoing interest-based account of rights in hand, we are a surprisingly short step away from a simple and plausible theory of human rights. While there are few uncontroversial claims to be made about human rights, it is at least generally agreed that human rights are rights that human beings possess solely by virtue of their humanity, or in other words, solely by being the kind of creatures that they are. Now, on the account just presented, this claim needs to be qualified, since the existence of an actual right depends on factors other than the rightholder's humanity, primarily the presence of a relevantly situated moral agent capable of protecting or promoting the rightholder's interests without incurring unreasonable costs. Nevertheless, the grounding interests themselves are not dependent in this way. Since human beings possess a class of shared interests, it remains sensible to delineate a class of rights by reference to those interests, and in a very straightforward and obvious way, the class of rights those interests ground are for that reason *human* rights.<sup>11</sup> While the content of these rights will vary from one human being to the next, because each person stands in different relations to relevantly situated moral agents, we can say with only slight exaggeration that the grounds of these rights are both universal and transhistorical, at least to the extent that human nature

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<sup>11</sup> Some might argue that human rights are inherently institutional, that is, that their function is not to protect private individuals against each other, but to protect them against "official disrespect"—abuses by the state or other political organizations. For such a view, see Thomas Pogge, *World Poverty and Human Rights*, Polity Press (2002).

remains constant across space and time.<sup>12</sup> A list of all shared human interests—a list of everything that contributes to human welfare—would not only constitute a complete list of the grounds of human rights, on this simple theory, but would also constitute a complete account of the human good. Of course, there will always be disagreement about the nature of the human good, and so too, on this theory, about which interests ground human rights; but we can adopt a theory of human rights while leaving open precisely which rights it supports. I will refer to this basic view the Flourishing Life Approach to human rights.

Two more points must be made about the Flourishing Life Approach. First, since there may be trivial shared human interests, and since an unrestricted Responsibility Principle allows for trivial duty-grounding interests, the Flourishing Life Approach will support many equally trivial human rights. On this approach, interests do not need to meet some threshold of urgency before they're taken to be a potential ground for a human right; nor must the correlative duties meet some threshold of stringency. Any interest that contributes to human welfare could conceivably ground a human right. The Flourishing Life Approach is deflationary in this respect, because it is so inclusive: most philosophers believe that human rights must protect matters of urgent moral concern. I will address this issue momentarily.

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<sup>12</sup> There probably needs to be some flexibility here in moving from *general* claims about human beings and their interests to strictly *universal* and *transhistorical* claims about them. This is because the boundaries of any species are vague; minor variations in physiology and psychology across the human species will of necessity produce more or less slight variations in what things are *good* for creatures of that composition. It would perhaps be more accurate to label the grounds of human rights as “species-typical” interests, but I will not pursue this matter here. For ease of exposition I will retain the ‘universal’ and ‘transhistorical’ terminology. See, e.g., Allen Buchanan, “Moral Status and Human Enhancement,” *Philosophy & Public Affairs* 37/4 (Fall 2009), pp. 346-381.



Second, other philosophers may worry that the Flourishing Life Approach is too inclusive for another reason. Specifically, they might object that it is *so* inclusive that it expands to fill the domain of ordinary moral rights, or of well-being itself, and so fails to distinguish between the two.<sup>13</sup> This is not really the case, for two reasons. The first reason is that, on my view, not all rights are grounded on *human* interests. So long as we accept the very plausible conclusion that the interests of non-human animals (including the possibility of intelligent extraterrestrial life) can ground moral duties, it follows from the general interest theory sketched above that animals can have rights.<sup>14</sup> The second reason is that not all human interests are *shared* human interests. Many rights might depend instead on subject-specific interests—the interests that arise, in part, out of our participation in particular agreements, contracts and associations, or the interests that arise as a result of abnormal biological or psychological conditions. It is true that at a high level of abstraction, many of these particular interests may collapse into more general categories of interest, since, for example, my particular interest in your following through on your end of an agreement is an instance of the general interest all human beings have in making agreements and having them kept. But the problem of individuating interests along the continuum from general to particular is orthogonal to the proposed objection, because all theories of human rights must face the same problem on their own terms: how to square the concrete and highly specific claims that individuals have against one another, on the one hand, with the necessarily abstract and generalized

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<sup>13</sup> James Griffin, *On Human Rights*, Oxford University Press (2008), pp. 51-56.

<sup>14</sup> See, e.g., Tom Regan, “The Case for Animal Rights,” in *In Defense of Animals*, Peter Singer (ed.) Oxford: Basil Blackwell, Inc. (1985), pp. 13-26.

rights suited to universalization. At any rate, on the hunch that there is some sensible way to navigate between the general and the particular for the purposes of human rights claims, and on the fairly standard view that non-human animals have duty-grounding interests, it should be clear that the Flourishing Life Approach does not fill the entire domain of moral rights.

I believe that the Flourishing Life Approach offers a simple and plausible theory of moral human rights. But as I said, its support for relatively trivial rights will be unappealing to some, because both popular media and the philosophical literature tend to treat human rights violations as among the most serious injustices that can be visited upon human beings. Human rights, it is claimed, must be matters of high moral priority. Call this demand on a theory of human rights the Urgency Condition.<sup>15</sup> Notwithstanding its failure to satisfy the Urgency Condition, the Flourishing Life Approach can be easily modified, in an *ad hoc* way, to meet this objection. By simply restricting the class of interests that serve as the potential grounds of human rights to those most central to human welfare, we can ensure that the duties and rights they ground are matters of great moral importance. The ‘Decent Life Approach’ to human rights, as I will call it, holds that human rights are grounded on a class of *basic* interests.<sup>16</sup> Basic interests are those whose satisfaction is a necessary condition for living a *minimally decent human life*, where ‘minimal decency’ is defined so as to track whatever threshold of moral

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<sup>15</sup> There are other ways to constrain the class of grounding interests; Griffin, for instance, restricts human rights to those which protect the interests human beings must have satisfied in order to constitute moral agents—this is the crux of his ‘Personhood’ account of human rights. See Griffin, *On Human Rights*.

<sup>16</sup> The most prominent versions of the Decent Life Approach to human rights can be found in Shue, *Basic Rights*; James Nickel, *Making Sense of Human Rights*, 2<sup>nd</sup> Ed. Blackwell Publishing, (2007); and Allen Buchanan, *Justice, Legitimacy, and Self-Determination*, Oxford University Press (2004), esp. Ch. 3.

importance is needed to satisfy the Urgency Condition. In contrast to the Flourishing Life Approach, proponents of the Decent Life Approach, such as Allen Buchanan, argue that “Human rights discourse does not require a specification of what the *best* sort of human life is. It only requires that we have a grasp of what the necessary conditions for a minimally good or decent human life are.” “Put negatively,” Buchanan writes, “human rights are such that their violation makes it very difficult if not impossible for individuals to enjoy a decent human life.”<sup>17</sup>

Aside from satisfying the Urgency Condition, the Decent Life Approach offers an epistemic advantage over the Flourishing Life Approach. As Buchanan suggests, while there is (and always has been) considerable disagreement over the requirements of the *best* or *flourishing* human life, the interests whose satisfaction is necessary for living a merely decent life are much less controversial. Everyone agrees, for example, that our interests in subsistence and physical security are absolutely crucial for human well-being; most people agree that a modicum of personal autonomy is also important. But as we move away from these fundamental interests, reasonable disagreement crops up quickly. Of course, reasonable disagreement about morality does not mean that we should be skeptics about the possibility of an objective human good—it is not as if disagreement about what constitutes a flourishing life means that there is no such thing, or that the Flourishing Life Approach is incoherent. However, as I explain below, deep disagreement about what constitutes a flourishing life does act as one of several practical constraints on the extent to which the Flourishing Life Approach can be institutionalized. The Decent Life Approach quarantines itself from much of this disagreement by simply

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<sup>17</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 128.

excluding controversial non-basic interests as potential grounds for human rights—here disagreement acts as a theoretical, rather than a practical, constraint. Nevertheless, the Decent Life Approach to human rights faces two problems, at least insofar as it is offered up as a theory of *moral* human rights. First, while distinguishing between basic and non-basic interests protects the Decent Life Approach from (some) disagreements about moral ideals, it introduces a serious problem of vagueness. “Decency,” it turns out, is an enormously elastic concept, and so relying on it produces a wide range of borderline cases. Second, while the Urgency Condition underwriting the reliance on decency serves a clear practical function, it is not clear why should limit the theory in addition to the institutionalized practice.

That the concept of ‘decency’ is vague should not be an especially controversial point, although I think philosophers who adopt the view are prone to underestimating the danger here. Bare survival probably falls too low to be an adequate threshold for what constitutes a decent life, and living in the lap of luxury, having our each and every whim catered too immediately is certainly too high. However, between these two kinds of life lies a continuum of lives of varying quality, and there does not appear to be any principled—nor even intuitively appealing—way to decide where, amidst this wide range of borderline cases, the line between decent and indecent lives should be drawn. Moreover, our intuitions about decency seem highly sensitive to context. The standards we use to assess the decency of our own lives tend to include much that depends on the technological developments of the modern world, and seem grossly out of place when applied, for instance, to the ancient world, and the same holds true in reverse. Squatters living in an abandoned building and scavenging for food from dumpsters do not seem to

be living decent lives by the standards to which most philosophers are accustomed. But in many times and places such a life might not only have been thought to be not especially miserable, but positively comfortable. The Decent Life Approach, as commonly understood, presupposes that some determinate sense can be given to the notion of a decent human life, and that this sense will remain good for all times and places.

Perhaps the Decent Life Approach should be contextualized to particular societies. But even if close attention to social and historical context can pare down much of the vagueness surrounding some plausible threshold of decency—and it is not clear that it can—that very concession will force a proponent of the Decent Life Approach to deny that the grounds of human rights are universal and transhistorical, which most philosophers take to be an intolerable result, at least for a theory of *moral* human rights. On the other hand, rejecting contextualism and adopting an absolute threshold reopens the concept of decency to an enormous range of borderline cases. Now, even this degree of vagueness is not necessarily intolerable; a proponent of the Decent Life Approach can certainly bite that bullet in order to satisfy the Urgency Condition. The question I want to pose is why the Urgency Condition needs to be satisfied in the first place. If there is no good reason to think that human rights are matters of urgent moral concern, then there is no reason an interest-based theory of human rights needs to satisfy the Urgency Condition, and therefore, no reason to prefer the Decent Life Approach to the simpler and more inclusive Flourishing Life Approach sketched above. I will consider three reasons for thinking that satisfying the Urgency Condition is one desiderata for a theory of human

rights: the authority of ordinary usage, the problem of ceaseless assistance, and a view called Functionalism.

Perhaps the most straightforward way to defend the Decent Life Approach's reliance on the Urgency Condition is by appeal to ordinary usage; a proponent might simply claim that the term 'human right,' as it is used by the majority of competent English speakers, just *is* tied to especially high-priority norms.<sup>18</sup> If, in practice, human rights discourse generally does presuppose this sense of urgency, then a descriptively adequate theory of human rights should attempt to capture that sense even if doing so inevitably involves chalking-in some extremely blurry lines. There are several compelling lines of objection to this argument. First, the empirical claim that human rights discourse is usually confined only to matters of urgent moral concern is open to doubt. On one hand, prominent lists of human rights have always included relatively trivial items. The Universal Declaration's infamous inclusion of a human right to paid holidays, its rights to the enjoyment of culture and the arts, and similar rights in other documents, seem to cut against the thought that the Urgency Condition is an integral part of some shared conception of human rights.<sup>19</sup> On the other hand, the allegedly

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<sup>18</sup> A similar argumentative strategy used to delimit the class of human rights attempts to fix the meaning of the term by reference to its intellectual-historical development out of the idea of *natural* rights; e.g., Griffin, *On Human Rights* and Pogge, *World Poverty and Human Rights*. To my knowledge, this strategy has not been used to argue for the particular restriction on human rights theory I am calling the Urgency Condition, so I will not address it here.

<sup>19</sup> Article 24 of the Universal Declaration stipulates that "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." Most philosophers believe that this item should not be included in the list of human rights, and they reject it *because* they believe that holidays with pay, and perhaps the other aspects of the right, are not morally important enough. I happen to think that Article 24 would stand a good chance of satisfying a plausible Urgency Condition, but my point here is only that, on the assumption that the Universal Declaration is a canonical expression of ordinary usage, to the extent that philosophers are engaged in striking items off that list because they are not important enough, they can no longer use the 'ordinary usage' argument as a justification for the Urgency Condition.

unchecked “inflation” of human rights discourse—much lamented in the philosophical literature—would point to a lack of respect for any such condition among activists, practitioners, and other popular sources of human rights claims.<sup>20</sup> Even if this inflation were in part motivated by a desire to capitalize on the perceived urgency of human rights, the ordinary usage argument’s own descriptivism would lead it to the conclusion that empirical support for the Urgency Condition it is attempting to establish is quickly eroding.

Second, if ordinary usage did support the notion that the term ‘human rights’ represents an especially urgent class of rights, it is not clear whether that fact would actually support the Urgency Condition. While human rights discourse is becoming a more familiar feature of our shared moral vocabulary, it lacks the pervasiveness and centrality that lead people to develop discernible views about its content and implications. The concept of human rights found among the ‘folk’ remains very thin: asking people their opinions about such matters is as likely to lead to invention, confabulation, and blank stares as it is to discover pre-theoretical convictions. Moreover, to the extent that such convictions can be discovered, it is not clear whether they will even be internally consistent, let alone consistent with the best philosophical theories of human nature, normative ethics, and moral and legal rights. Thus, at the same time that ordinary usage is likely to be underdeveloped, to the extent that it *is* developed, it is also likely to harbor serious mistakes. In short, while folk views may provide a point

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<sup>20</sup> Various expressions of this worry can be found in Maurice Cranston, “Human Rights, Real and Supposed,” in *Political Theory and the Rights of Man*, D. Raphael (ed.) London: MacMillan (1967); Michael Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press (2001), Joseph Raz, “Human Rights Without Foundations,” *Ragion Practica* 29 (2007), p. 449 *ff.* available online at [[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999874](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999874)]; and Carl Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* Boulder, CO: Westview Press (1999).

of reference for theorizing about human rights, they are too indeterminate and too incomplete to provide much support for any specific theses, the Urgency Condition included. Finally, any empirical examination of the question would need to find out not just *whether* the folk viewed human rights as matters of moral urgency; it would also need to find out whether the folk thought this urgency attaches to moral human rights, to legal human rights, or to both. If it turned out, for instance, that human rights were thought to be urgent merely because legal recognition and enforcement of non-urgent rights would have negative practical consequences, it might be more reasonable to view the ‘folk’ conception of human rights as tracking concerns relevant to institutional legal rights, rather than to moral rights themselves.<sup>21</sup>

Another possible line of justification for the Urgency Condition’s place in a theory of moral human rights relies on familiar worries about over-demandingness—a version of what I referred to above as the Ceaseless Assistance Objection. A theory of human rights that rejected any sort of Urgency Condition, the objection runs, would demand that agents continually sacrifice their own projects and resources in order to secure more and more trivial human rights. So long as their duties are only to protect and promote the interests necessary for living minimally decent human lives, rather than the wider class of interests shared by all human beings, these agents might seem to bear

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<sup>21</sup> An additional problem for the Ordinary Usage Argument is how to specify the relevant class of language users; I have assumed that ordinary usage refers to usage of the term ‘human rights’ by non-specialists. But if we open the argument to specialists, it is important to see that different specialties—political philosophers, international relations theorists, international lawyers, state leaders and policy-makers, and activist organizations—adopt noticeably different conceptions of human rights. Should these different conceptions be averaged into the predominant folk views? Should they be granted a kind of prescriptive authority? Should some specialties’ conceptions of human rights be given more weight than others? Different answers to these questions will lead the Ordinary Usage Argument to significantly different conclusions.



limitless responsibilities to others. James Griffin, for instance, argues that the claims resulting from the grounds of human rights require an upper bound in order to be “effective” and “socially manageable.”<sup>22</sup> He therefore introduces a range of considerations he calls “practicalities,” which function as a limitation or ‘cap’ on the content of human rights claims. These practicalities are taken to be transhistorical and geographically universal considerations that include “empirical information about...human nature and human societies, prominently about the limits of human understanding and motivation.”<sup>23</sup> For the same reason, a proponent of the Decent Life Approach may insist that restricting the grounds for human rights to a class of basic interests is the best or only way to establish this upper bound.

The first thing to note here is that the unadorned interest theory of rights presented above is perfectly capable of recognizing human epistemic and motivational constraints; it is not as if the theory claims that for each right there must be some agent capable of fully satisfying the grounding interest. Instead, the content of the duties these interests ground is heavily contextualized, because it depends, in large part, on the varied abilities of relevantly situated moral agents to influence the satisfaction of the interest—to promote or protect it, perhaps only by making it more likely to be satisfied, or by attempting to convince or compel other, more competent agents to satisfy it. This is simply a restatement of the Responsibility Principle, to which any plausible version of Samaritanism is committed. Second, and more to the point, as I argued in my defense of the *unrestricted* Responsibility Principle, there is no reason to suppose that there *is* a

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<sup>22</sup> Griffin, *On Human Rights*, 38.

<sup>23</sup> Griffin, *On Human Rights*, 38.

single, absolute upper bound on the content of correlative duties. As the ease with which an agent can promote or protect the rightholder's interest increases, and as her risk of incurring morally relevant costs in doing so decreases, her duties to protect and promote that interest become more stringent and more robust even when the interest is relatively trivial. Still, this does not imply that the interest theory of rights presented above is committed to an uncompromisingly maximizing view of interest-satisfying correlative duties. As I said above, where potentially duty-grounding interests are very trivial, the need to sacrifice one's own projects and resources becomes very unlikely. And even when we are called to set aside trivial projects to protect or promote only slightly less trivial interests, the stringency of our duties is considerably less than that of the duties we bear to protect another person's more basic interests.

Finally, an advocate of the Decent Life Approach can defend the Urgency Condition and the resulting distinction between basic and non-basic interests by adopting Human Rights Functionalism (hereafter, Functionalism): the view that the content of human rights is determined, in part, by the role those rights should or do play in international affairs.<sup>24</sup> Most commonly, human rights are thought to be rights whose violation by a government provides a (defeasible) justification for coercive intervention by external parties. The scope of the term 'intervention' here may vary over a range of coercive measures. John Rawls, for instance, argues that human rights articulate a threshold for *military* intervention.<sup>25</sup> Others have reacted negatively to tying human

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<sup>24</sup> See Charles Beitz, *The Idea of Human Rights*, Oxford University Press (2009); John Rawls, *The Law of Peoples*, Harvard University Press (1999), and Raz, "Human Rights Without Foundations."

<sup>25</sup> Rawls, *Law of Peoples*, pp. 78-81.

rights discourse so closely with this specific form of intervention, and have sought to broaden the range of actions human rights violations may justify, while simultaneously minimizing the role military intervention should play in a theory of human rights.<sup>26</sup> For Raz human rights are those “whose violation can justify *any* international action against violators: making conformity to rights a condition of aid, calling on states to report on their conduct re [sic] protection of human rights, condemning violation, refusing to provide landing or over-flight rights, trade boycotts, and others.”<sup>27</sup> The fundamental thought unifying these positions is that since coercive intervention—whether armed or not—generally imposes a risk of serious harm on the subjects of the target government, the rights whose violation intervention is supposed to secure must be matter of great importance. The concern is one of proportionality between the harms of intervention and the benefits it can secure; the more significant the threat posed by intervention, the more urgent the class of human rights must be to justify it.

One might argue against Functionalism by claiming that it is just as unmotivated as the Urgency Condition, that is, that there is little reason to suppose there is some kind of analytic connection between human rights violations on the one hand, and the justifiability of coercive intervention on the other. But the larger problem is that there is simply no consistent way to correlate specific kinds and scales of intervention with specific levels of harm. This is because how much harm a particular intervention is likely to cause under a given set of circumstance depends on a wide range of contextual factors.

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<sup>26</sup> Charles Beitz, “Human Rights as a Common Concern,” *American Political Science Review* 95/2 (June 2001), pp. 269-82; Nickel, *Making Sense of Human Rights*, pp. 98-103 and “Are Human Rights Mainly Implemented by Intervention?” in *Rawls’s Law of Peoples: A Realistic Utopia?* Martin and Reidy (eds.), pp. 263-277; Raz, “Human Rights Without Foundations.”

<sup>27</sup> Raz, “Human Rights without Foundations,” n. 14.

Suppose, for example, that we adopt the Rawlsian view, and make the list of human rights depend on which rights violations could justify armed intervention. The harm threatened by a given intervention will depend on, among other things, the scale of the intervention, the tactical competence, technological resources, and strategic positioning of the armed forces on either side, the location of crucial infrastructure and military objectives, the target government's ability and willingness to resist, the disposition of the civilian population, the disposition of other regional powers. Armed interventions that differ significantly along any one of these dimensions impose drastically different levels of harm on the affected parties. The same holds true for non-military forms of intervention, including economic sanctions and other restrictions on sovereignty: though they may threaten serious harms for the populations of the target country, whether and to what extent they do depends, as above, on many factors specific to particular cases. It is therefore very difficult to see how Functionalism, justified by reference to the proportionality condition on coercive intervention, will enable the proponent of the Decent Life Approach to delineate a stable class of moral rights whose violation is consistently harmful enough to justify any specific kind of intervention.

To be clear, I do not claim that stable generalizations cannot be made about correlations between given forms of intervention on the one hand and expected levels of risk and harm on the other. In fact, I believe that such generalizations play a crucial role in specifying rules to guide the application of legal sanctions under international law. Instead, my claim is only that these generalizations have far too many exceptions to support the kind of in-principle restriction proponents of the Urgency Condition attempt to impose on the class of moral human rights. I do believe, however, that the costs of

intervention and of legal enforcement more generally, provide *practical* reasons for limiting the range of rights a given legal system recognizes and attempts to enforce. I now turn to questions about how to institutionalize moral human rights, that is, about how we ought to translate the Flourishing Life Approach to moral human rights into a normative account of legal human rights.

### 3. HUMAN RIGHTS AND INTERNATIONAL LAW

In this section, I set out the case for a progressive theory of human rights—a theory in which the scope and content of internationally recognized legal human rights changes over time, becoming more demanding as the international legal system acquires greater enforcement capabilities. I first articulate a legal ideal, the two main components of which are legal instrumentalism and the rule of law. After explaining the relationship I think holds between legal recognition and legal enforcement, and after briefly comparing domestic and international legal systems, I use this ideal to motivate the basic argument for a progressive theory of human rights, and then offer three supplementary arguments to illustrate its advantages.

Legal instrumentalism is the view that law and legal systems are a means to an end.<sup>28</sup> While legal scholars often use the term to describe a view about how judges should decide particular cases, I use it here primarily to emphasize my belief that legal norms, like all political institutions, are human creations whose content and effects are

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<sup>28</sup> See Robert S. Summers, *Instrumentalism and American Legal Theory*. Ithaca N.Y. and London: Cornell University Press (1982), and Andrew Altman, “Legal Realism, Critical Legal Studies, and Dworkin,” *Philosophy & Public Affairs* 15/3 (Summer 1986), pp. 205-235, at n. 4. Altman writes that instrumentalism is the theme in legal realism “according to which law should be understood and evaluated as animated by social purposes and policies.”

more or less under our control, and that it is therefore a sensible question to ask how the law *ought* to be used. I assume from the outset that the purpose of law—what it *ought* to do—is to promote justice by protecting individual moral rights. Given that purpose, it is easy to see why the existence of any particular moral right provides a *prima facie* justification for a legal analogue, that is, a legal right which protects the same interests as a corresponding moral right, and places moral agents who bear moral duties to the rightholder under a corresponding legal obligation to do the same thing. Ideally, a legal system and its body of laws would protect *all* individual moral rights. (Perhaps under such a system not all moral rights would need to have a direct legal analogue, but could instead be protected by a confluence of other legal rights.) The human rights recognized and enforced under an such a legal system would exhaustively protect the moral rights human beings possess as such. Non-ideal legal systems may be evaluated by how closely they approximate this ideal.

I also assume from the outset that a legal system should respect the rule of law. According to Lon Fuller, the rule of law consists in eight requirements: (1) generality – they treat like cases alike (2) promulgation – its laws must be made known where they are to be enforced, (3) non-retroactivity – its laws may only be applied prospectively (4) clarity – its laws must be stated in ways that can be understood by the general population, (5) consistency – its laws must not contradict each other (6) feasibility – its laws cannot require the impossible, (7) immutability – its laws should not be changed too frequently, and (8) congruence between official action and the law – its state officials must comply with the laws they are enforcing.<sup>29</sup> These requirements may be viewed, as Fuller views

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<sup>29</sup> Lon L. Fuller, *The Morality of Law*, Yale University Press (1964, 1969), Ch. 2.

them, as internal constraints of the very concept of law, that is, as conditions which must be satisfied in order that law should exist at all, or they may be viewed instead as external and independently justifiable normative criteria for evaluating laws and legal systems. Presumably, an ideal legal system satisfies each of these conditions to the highest extent. In any case, legal reform should aim to move actual legal systems closer to this ideal, both in terms of the rights it protects, and in terms of the rule of law.

The purpose of a legal system is to promote justice by protecting individual moral rights, and the primary way for it to do so is through coercive enforcement, that is, by inducing compliance from its subjects by the threat and use of sanctions. Moreover, the rule of law requires that these sanctions be made public and explicit, and so the prior question facing a normative theory of legal rights is which individual moral rights a given legal system ought to formally recognize. It is at least possible that a legal system might recognize all individual moral rights, supposing a list of these rights were available. However, there are limits to how much enforcement a legal system can actually accomplish. These limits are largely set by two factors: the quantity and quality of resources the legal system has at its disposal, and its subjects' willingness to comply with its commands. All things being equal, the more money, police, lawyers, courts, jails the system has at its disposal, and the more effectively and successfully it uses these resources, the more it will be able to induce compliance from its subjects. Conversely, all things being equal, the more the subjects of the legal system are inclined to view it as weak, unreliable, or unjust, the less inclined they will be to comply with its commands (thus the practical importance of some degree of congruence between the moral rights protected by a legal system and the moral sentiments of its subjects). The limits of a

legal system's enforcement capacity is important for a normative theory of legal rights because there are good reasons to think that legal systems ought not to establish laws they cannot enforce.

First, a legal system's inability to enforce a given law to the point of general compliance leads to arbitrary and unfair treatment of its subjects, for several reasons. Since many non-compliant subjects will be caught and punished while many others will not, partial enforcement violates the condition of generality. Moreover, since subjects will often be unable to predict whether and how likely their behavior will be to incur sanction, it violates the requirement that laws be accurately and clearly promulgated. Finally, since, *ex hypothesi*, it will be impossible for officials to enforce the law uniformly, they will necessarily act incongruently with its demands. Second, even if unenforceable laws did not pose a threat to the rule of law, they would still hamper the legal system's ability to secure and promote justice. On the one hand, such laws would tempt officials to overreach, sacrificing valuable resources trying and failing to enforce unenforceable laws at the expense of worse enforcement for other laws. On the other hand, the largely idle threats that accompany unenforceable laws may erode a legal system's credibility, thereby decreasing its subjects' inclinations to comply with other aspects of the legal system. Therefore, while a legal system could certainly recognize many unenforceable laws, including legal rights, there seems to be at least a *prima facie* reason for not recognizing them, and for eliminating them where they already exist.

Since a legal system should neither recognize nor try to enforce all individual moral rights, choices must be made about which moral rights a legal system ought to protect. It seems clear enough that a legal system ought to place priority on protecting



the most urgent moral rights, and on the interest theory of rights set out above, this means adequately protecting rights grounded on the interests most crucial to human welfare before expending resources on securing other rights. Here we can see the beginnings of how the practical concerns that motivated the perceived need for the Urgency Condition will re-enter the picture as an important element in a theory of legal human rights. The fact that legal systems can only enforce so many rights, and should not recognize rights they cannot enforce, means that there will need to be a line drawn between moral human rights which should and should not be institutionalized. But it is important to see that this line will not be drawn by reference to some philosophical concept of ‘decency,’ but is determined instead by the practical limits on enforceability within a given jurisdiction. In fact, these practical limits might be taken to provide a suitable resolution to the vagueness of decency: various kinds of life are decent only relative to a society’s institutional capacity to secure and promote its members’ well-being. As far as delineating a class of legal rights is concerned, however the concept of decency does no work whatsoever.

Before moving on to my argument for a progressive theory of human rights, a word must be said about the differences and similarities between domestic and international legal systems. The primary conceptual difference between them is that international legal systems include domestic governments among their subjects, and so protect individual moral rights from one level of political organization higher than domestic legal systems do. The relationship is analogous to the relationship between state-level domestic legal systems and the legal systems of their administrative sub-units, although there is typically greater overlap and closer coordination between these two levels than between international and domestic legal systems. This contributes to the

primary practical difference between the two, which at this point is largely a matter of effectiveness. Where domestic legal systems, or at any rate the governments which they support, usually possess something close to a monopoly on the means of coercion within their territory, while international legal systems do not have anything like a monopoly on coercion within theirs. However, the consolidation of coercive powers at the level of sovereign states is beginning to blur in both directions, as sub-national units acquire various forms of intrastate autonomy, and as international legal institutions gain more influence over state behavior.

In any case, as in domestic law, the international legal system does have some ways to sanction those subject to its authority, and so to enforce compliance with its laws. It can incentivize compliance by offering sovereignty, recognitional legitimacy, and legal standing, financial aid, development assistance, and disaster relief, and it can also threaten to revoke these benefits. Moreover, it can employ a range of coercive political, economic, and military sanctions through condemnation, exclusion, isolation, or intervention. As with domestic legal systems, the international legal system must manifest the rule of law, which I presume entails publicly correlating specific classes of sanctions with specific classes of non-compliance, and then consistently applying those rules. So long as it does, which sanctions should be correlated with which violations of the law appears to be a practical matter of determining which rules most effectively promote justice by protecting individual moral rights. Adopting Functionalism, but applying it to legal rather than moral rights, I will say that the human rights which should be recognized under the international legal system are the moral human rights (or their

legal analogues) whose violation can (but does not necessarily) justify coercive intervention into sovereign states.

The argument for a progressive theory of human rights can now be set out in its clearest form. If Legal Instrumentalism is correct, then the purpose of the international legal system is to promote justice by protecting individual moral rights. But the rule of law requires that the international legal system recognize only those rights it can enforce, and since its enforcement capacity is limited by the resources at its disposal and its subjects' native inclination to comply, it should only recognize institutionalize as legal human rights those moral rights it can adequately enforce. However—and this is the crucial move—the international legal system's enforcement capacity varies from time to time and from place to place. It follows that when and where the international legal system's enforcement capacity changes, so too should the range of legal human rights it recognizes. As the international legal system gains more influence over state behavior, and as the norms its laws embody gain increasing acceptance from individual subjects, the range of legal human rights it recognizes and enforces should expand, starting with the most important protections for moral rights grounded on the most basic interests, and progressing outwards towards the ideal, in which the system would protect all moral human rights. Of course, the rule of law demands a degree of immutability in a legal system, so progress should be slow and cautious. Moreover, it is unlikely that the ideal will ever be reached, not only because persistent moral disagreement over the upper reaches of the non-basic interests will prevent a consensus from forming over the content of the legal ideal, but also because, even were such a consensus to form, the quality and quantity of resources needed for such robust enforcement would be astronomical.

Nevertheless, that idea provides a direction for change, and Legal Instrumentalism combined with the theory of human rights for which I have been arguing provide both the impetus and mechanism for that change.

The case for a progressive theory of human rights can be brought out in three more ways. First, it allows the human rights recognized by the international legal system to track the demands moral human rights place on states independently of the law. As we saw above, the Responsibility Principle holds that the content and stringency of the duty grounded by a particular rightholder's interest for a particular duty-bearer is proportional to (1) the importance of the interest to the rightholder's well-being, and inversely proportional to (2) the cost to the duty-bearer of protecting or promoting that interest. As moral agents themselves, states are very powerful, and it is often very easy for them to protect a great many shared human interests. But if the content and stringency of the duties borne is inversely proportional to the ease with which the duty-bearer can discharge them, then as a state's enforcement capacity increases its duties to protect basic interests increases and it does more wrong by failing to discharge them. Of course, the moral relationships that obtain between state and subjects changes far more quickly than the rule of law will tolerate. But a progressive theory of human rights at least allows the content of international legal norms to follow longer trends in available resources, enforceability, and state power.

Second, a progressive theory of human rights provides better incentives for states to protect more shared human interests, and to protect them better. Since on such a theory many benefits of participating in the international community, as well as immunity against many kinds of intervention, are contingent on meeting a continually rising

standard, states would have compelling reasons to invest in securing the current list of legal human rights, as well as in prospectively developing their capacity to secure moral rights that will eventually be on that list. Some, however, might believe that is it somehow unfair to require states to continually improve upon their protection for individual moral rights. Isn't some level of protection for some finite subset of rights sufficient to garner those benefits and immunities? But again, there appears to be little or no in-principle reason to believe that such absolute thresholds exist, and what practical reasons there are for demarcating them are sensitive to institutional context in the ways discussed above.

Third and finally, a progressive theory of human rights would prevent the language of human rights, and the extraordinary consensus that has emerged regarding their centrality to the conduct and evaluation of international affairs, from becoming irrelevant as a result of setting unrealistic standards or of becoming obsolete. Standards for international conduct we believe are appropriate today would have simply been too high for states that existed one hundred years ago; likewise, the standards that would have been appropriate for those states are ludicrously easy for most states to meet today. A transhistorical list of human rights, one whose content did not change relative to institutional context, would likely face one or the other of these fates, if not both, over the course of history. By allowing the scope of legal human rights to change in ways that are sensitive to the capacity individual states and the international legal system have to enforce them, a progressive theory preserves the relevance of human rights.

In sum, the idea that human rights are or should be transhistorical and geographically universal standards is, at the very least, misleading. While it is true that

the *grounds* of *moral* human rights—the underlying class of shared human interests—are independent of place and time, the *content* of those rights is highly sensitive to context. And when we turn our attention to the way human rights should be recognized and enforced under international law, we find that scarce resources and the rule of law require us to adopt a much narrower class of grounding interests, and tightly specify the degree of protections state must provide and the range of threats they must protect against. The moral force of legal instrumentalism provides a justification for raising the standards of decency where and when resources allow; thus, on my view, a plausible theory of legal human rights will articulate a progressive and regionally varied class of rights. This not only allows the international legal system’s demands on its subjects to track the actual moral obligations those states bear to their constituents, but will also promote positive change, and prevent the language of human right from becoming irrelevant.

#### CONCLUSION

In this chapter, I have set out a general, interest-based account of rights, and argued for a version of Samaritanism buttressed by the Responsibility Principle: the principle that the content and stringency of the duty grounded by a particular rightholder’s interest for a particular duty-bearer is (1) proportional to the importance of that interest to the rightholder’s well-being, and (2) inversely proportional to the cost to the duty-bearer of protecting or promoting that interest. I then used this account to motivate a theory of moral human rights, according to which they are the rights grounded on shared human interests. While the Decent Life Approach would restrict these grounds to only the most basic or urgent shared human interests, I rejected the Urgency Condition because there is

no principled reason to accept it, and because the practical reasons for restricting the grounds of human rights apply only to legal, and not moral rights. Finally, I argued that the demands of legal instrumentalism and the rule of law, along with the limits of enforceability, support the view that the international legal system should only recognize the rights it can enforce, and that it should place priority on enforcing rights grounded on our most basic interests. But since that legal system's limits of enforceability change from time to time and from place to place, the human rights it recognizes should also change. So long as the extent to which international law can influence state behavior increases, and so long as the consensus about the list of shared human interests grows, the scope of legal human rights should expand, gradually approaching the ideal of complete legal protection for all moral human rights.

## CHAPTER II

### SELF-DETERMINATION, REPRESENTATIVE GOVERNMENT, AND DEMOCRACY

In this chapter, I present an account of the conceptual and normative relationships between political self-determination, representative government, and democracy. I argue that a group's political self-determination, or at any rate, its right to political self-determination, depends on whether it has a representative government—that is, a government whose decisions, actions, and policies reflect the collective political will of the people it governs. I also argue that democratic governments tend to represent their people better than non-democracies, and that therefore the reasons we have for respecting and protecting political self-determination are stronger for societies arranged along democratic lines. My argument proceeds as follows.

In the first section, I clear some ground by elaborating on a stipulative and provisional account of political self-determination. I explain that political self-determination has both positive and negative aspects, and that both aspects are a matter of degree. In the second section, I argue that the primary value of political self-determination is instrumental: a group's self-determination should be respected and protected because it allows those most familiar with and most motivated to pursue group members' interests to do so. In the third section, I set out an account of representative government, and argue that there are two importantly different ways to identify the members of a self-determining group. On one of these ways, representative government turns out to be a conceptually necessary condition for political self-determination; on the other, it turns out to motivate or strengthen the reasons for respecting a group's political



self-determination. Finally, in the fourth section, I offer a descriptive account of democratic political institutions, and argue that democratic governments are better able to represent the political will of the people they govern. In combination with the forgoing arguments, it follows either that democratic societies are more self-determining than non-democracies, or that there are stronger reasons to respect the self-determination of democracies than there are to respect the self-determination of non-democracies.

### 1. THE CONCEPT OF POLITICAL SELF-DETERMINATION

The concept of political self-determination is central to the law and conduct of international affairs, but canonical legal statements of what the concept entails are elliptical. The International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights provide a prominent example. The both adopt the same formulation, proclaiming 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.”<sup>1</sup> Though they implicitly distinguish the principle of self-determination from the concept—the right from what it protects—they do not give much indication of how to identify the relevant peoples, or what it means for them to “determine their political status” or “pursue their development;” much less what it means for them to do so “freely.” Philosophical discussion of political self-determination, on the other hand, tends to focus on the normative questions surrounding self-determination—revolution, secession, intrastate autonomy, and so on—often glossing over the prior

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<sup>1</sup> United Nations, “International Covenant on Civil and Political Rights,” and “International Covenant on Economic, Social, and Cultural Rights,” in *Basic Documents on Human Rights, 5<sup>th</sup> Ed.*, I. Brownlie and G. Goodwin-Gill (eds.), Oxford University Press (2006).

analytical question of what it is that makes a group self-determining. Daniel Philpott's definition of self-determination as "a legal arrangement which gives independent statehood or greater autonomy within a state," is a case in point.<sup>2</sup> Since Philpott is more concerned with justifying the moral importance of political self-determination, he explicitly leaves open the precise form that self-determination ought to take, on the grounds that "different situations require different solutions."<sup>3</sup> But there is much to be said about the nature of political self-determination between the formal, bare-bones characterizations often proffered in the literature and the particular legal arrangements that obtain in the real world, especially about the relationship between the self-determining people and its political agent, the government. In this section, my intention is to offer and elaborate on a provisional definition before turning to questions about the value of political self-determination and about the kinds of political institutions it requires.

On my view, political self-determination is a group's capacity to make and implement political decisions that apply to all group members, and to do so free from interference by outsiders, that is, by persons and organizations who are not group members. Political decisions, for our purposes, can be understood as decisions about the basic framework of rules and institutions that govern the conduct of persons in society—about the content of the rules themselves, as well as about their legislation, adjudication, and enforcement. It is important to see that these functions are both necessary to preserve order and safety for all members of society, and that they are essentially territorial. As

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<sup>2</sup> Daniel Philpott, "In Defense of Self-Determination," *Ethics* 105/2 (1995), pp. 352-85, at 353.

<sup>3</sup> *Ibid.*

Christopher Wellman writes, “Peace would be unavailable in the absence of a decisive and accepted method of enforcing common rules and adjudicating conflicts. Because conflicts typically occur between parties in spatial proximity...and because a judge can peacefully and decisively settle conflicts only if she has authority over both parties, a judge must have power over all those who share spatial proximity.”<sup>4</sup> While perhaps not every political decision deals with necessarily territorial functions, many if not most of them do, and for that reason I will limit my discussion to the political self-determination of territorially localized groups.

Like liberty, freedom, and autonomy, political self-determination has both positive and negative aspects—the positive aspect being the group’s native or internal capacity for choice and action, and the negative being the absence of interference from outsiders. In what follows, I will for the most part be focusing on the former aspect, but it is worth pointing out how external interference can undermine or constrain a group’s self-determination. External agents can undermine self-determination by inhibiting or damaging a group’s internal capacity for decision-making, for instance by deceiving, manipulating, blackmailing, or coercing individuals who occupy important roles within the institutions that allow for self-determination. Or they may simply constrain the group as a whole, by threatening it with economic sanctions or intervention should it refuse to comply. But many authors, particularly legal scholars, appear to place too much emphasis on this negative aspect of self-determination; for some, it is almost as if group

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<sup>4</sup> Christopher H. Wellman, *A Theory of Secession: The Case for Political Self-Determination*. Cambridge University Press (2005), pp. 14-15. Pogge call this the “contiguity requirement,” writing that a “key function of government” is “to support common rules among persons who cannot avoid influencing one another through direct interaction and through their impact on a shared environment;” see Thomas Pogge, *World Poverty and Human Rights*, Polity Press (2002), p. 193.

self-determination is compatible with utter chaos and anarchy, so long as those outside the group refrain from interfering.<sup>5</sup> Self-determination as mere non-interference is an anemic interpretation of the concept, because it fails to give proper attention to the “self” of self-determination. The positive aspect—the agential capacities to make and implement decisions—is just as crucial as the negative.

What is it, then, that enables a group to make and implement decisions? By virtue of what do groups become agents? In my view, the clearest analysis of group agency in the philosophical literature comes from Arthur Applbaum.<sup>6</sup> Applbaum argues that there are three ways in which groups can acquire the necessary capacity: “meshed aims and plans,” “representation,” and “procedure.” A group has meshed aims and plans when each member of the group shares the same goal, knows the other members of the group share that goal, and intends to coordinate his or her actions in ways that complement the others so as to achieve the goal. This is the simplest way to form a group agent, though it is usually only sufficient for agency in small groups working towards concrete goals in fairly straightforward ways, as with small orchestras, sports teams, and so on. Applbaum’s use of the term “representation” differs slightly from my own, as he is referring to the way in which we can voluntarily allow or “authorize” others to act on our behalf. In Applbaum’s words, “under certain conditions, A can act for B in a way that

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<sup>5</sup> Fernando Tesón offers a compelling attack on this overemphasis; see his classic *Humanitarian Intervention: An Inquiry into Law and Morality*, 3<sup>rd</sup> Ed., Ardsley, NY: Transnational Publishers (2005), esp. Ch. 2-3.

<sup>6</sup> Arthur Applbaum, “Forcing a People to Be Free,” *Philosophy & Public Affairs* 35/4 (Fall 2007), pp. 359-400, esp. 380-86. For other recent work on group agency, see Frank Hindriks, “The freedom of collective agents,” *Journal of Political Philosophy* 16/2 (2008) and David Copp, “On the Agency of Certain Collective Entities: An Argument from Normative Autonomy,” *Midwest Studies in Philosophy* 30 (2006), pp. 194-221.

makes B the author of the action, and so the proper locus of responsibility for the action.”<sup>7</sup> Certain problems arise when we attempt to extend this model to political self-determination, as it is doubtful that members of a self-determining group do or even can voluntarily cede this authority to their government, as I discuss below. Finally, procedures—rules, practices, and institutions—allow individuals to compose group agents by providing a way to aggregate preferences and delegate responsibilities to group members to accomplish various tasks and goals. Applbaum correctly notes that “Complex instances of shared agency typically will rely on all three routes,” and I assume throughout what follows that this is especially true for political self-determination.<sup>8</sup>

One final point deserves emphasis. Political self-determination, in my view, is a matter of degree. That is to say, groups can be more or less free from interference by external parties, and they can have a more or less ‘robust’ capacity for making and implementing political decisions. What I mean by “robust” is that the three “routes” to shared agency just discussed can all suffer from various problems—the absence of shared plans, wayward representatives, broken institutions, and so on. The scalar nature of political self-determination has two important implications. First, if we have moral reasons to respect a group’s political self-determination, the strength and extent of those reasons will depend on the degree of political self-determination a group has (or is able to) attain. As with immature or mentally disabled individual persons, the decisions of

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<sup>7</sup> Applbaum “Forcing a People to Be Free,” p. 382

<sup>8</sup> Applbaum “Forcing a People to Be Free,” p. 383

groups whose self-determination is highly compromised should not carry the same weight as the decisions of groups with a less-impaired capacity for self-determination.<sup>9</sup>

Second, that political self-determination comes in degrees can help us to see how it provides the continuum along which we can understand the increasingly important distinction in international affairs between what Philpott referred to earlier as “independence” and “autonomy.” Naturally, there are many territorially localized groups that have little or no capacity for political organization at all. But among groups that have the capacity for political self-determination, some possess a more or less ‘complete’ self-determination—as self-sufficient internal capacity for group decision-making and action over all matters of political concern, and total freedom from external interference in those decisions. Call this degree of self-determination “political independence.” Other groups, however, have the capacity to make and implement decisions over some domains of political activity and not others, whether because they lack the resources, institutional sophistication, or some other part of the positive aspect of self-determination, or because their self-determination is limited, by agreement or by coercion, by some other, more independent group. This kind of limited self-determination appears in many forms, ranging from municipalities and other administrative units within federal systems, to reservations for indigenous peoples, nationalist or separatist enclaves, and territories undergoing decolonization or post-conflict occupation and political reconstruction. The

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<sup>9</sup> As I suggested in Chapter 1, “A Progressive Theory of Moral and Legal Human Rights,” and will discuss again in Chapter 3, “Democratic Cosmopolitanism and Forcible Democratization,” while there may be sound practical reasons for positing thresholds at which we will recognize a group as self-determining or not, there is little reason to think that such thresholds are an essential component of the concept itself.

self-determination these groups possess is called “political autonomy,” or sometimes “intrastate autonomy.”<sup>10</sup>

In the next section, I address the *value* of political self-determination in general, without advancing any specific conclusions about the conditions under which groups may attempt to achieve varying levels of political autonomy or independence. Much has been written on revolution and secession already, and although my arguments draw on those discussions, my purposes here do not require me to take a stand on these issues. Instead, my focus will be on the moral reasons external parties have to refrain from interfering in the affairs of a group with a capacity for self-determination. A note of caution is in order here: in subsequent sections, I aim to complicate the concept of self-determination I set out above. Specifically, I will be concerned with how we ought to identify the members of a self-determining group, that is to say, with how we ought to identify the “self” of such a group. The substance of self-determination will remain the same, but how we understand the value of self-determination will turn out to hinge on the answer to this crucial question.

## 2. THE VALUE OF POLITICAL SELF-DETERMINATION

In this section, I present a general argument for the value of political self-determination. I claim that external parties have *prima facie* moral reasons to refrain from interfering with groups with a capacity for political self-determination—reasons to *respect* self-

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<sup>10</sup> For discussions emphasizing the potential benefits and harms of intrastate autonomy, respectively, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford University Press (2004), Ch. 9, and Svante E. Cornell, “Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective,” *World Politics* 54 (January 2002), pp. 245-76.

determination—because that capacity tends to promote to well-being of group members. This is true, I argue, because human beings are naturally most familiar with and most motivated to pursue their own interests and the interests of those with whom they associate and identify. Obviously this is not always the case, and so the reasons external parties have to refrain from interfering in the political affairs of the group are defeasible. Nevertheless, the likelihood that external parties are less familiar with and less motivated to pursue the interests of group members supports a general policy of non-interference. I will also canvass three other possible accounts of the value of self-determination, two of which I reject outright, while remaining agnostic about the third. For the sake of rhetorical convenience, I will sometimes refer to group's *right* or *claim* to self-determination; although these terms carry an extraordinary amount of theoretical baggage with them, I intend them to imply no more than that external parties have *prima facie* reasons to refrain from interfering.

Perhaps the most common and direct attempt to account for the value of political self-determination is by reference to the value of individual autonomy, and specifically, the right to freedom of association. The argument is that a group's right to self-determination is nothing more than the sum of individual group members' rights to associate and disassociate with whomever they please. Since we may exercise that right at our discretion we may do so in concert with others, voluntarily forfeiting our membership in one group in order to acquire membership in a new group at our discretion. For external parties to interfere with such a voluntarily composed self-



determining group, or to prevent us from forming one entirely, the argument goes, would inevitably violate the rights of individual persons.<sup>11</sup>

Now, there is no problem with this argument insofar as it is used to justify emigration, even massive emigration. But a major problem appears when it is used to justify a group's right to political self-determination. Recall that political self-determination is essentially territorial, because many critical political functions, like administering a legal system, can only be accomplished when all those within a particular region are subject to the same rules. The Freedom of Association argument, by claiming that the value of political self-determination is to be explained by reference to individual autonomy, must stipulate that individuals may voluntarily dissociate from another self-determining group in order to join another—and in order for this argument to differ from the argument for emigration, it must also stipulate that these individuals *can bring their territory with them*. This would inevitably erode the territorial integrity of a pre-existing self-determining group, thereby undermining its ability to perform the political functions they need to protect their members from severe harm (violating Pogge's "contiguity requirement"). Of course, it is possible to argue that we could restrict this right to territorially localized groups, which would allow the pre-existing group's territory to remain contiguous (though of course not wholly intact). But again, such a group would almost inevitably bring with its swath of territory individuals who wished to remain members of the prior group, thereby violating *their* rights to free association. On the

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<sup>11</sup> For versions of the Freedom of Association argument, see David Gauthier, "Breaking Up: An Essay on Secession," *Canadian Journal of Philosophy* 24 (1994), pp. 357-372 and Harry Beran, "A Liberal Theory of Secession," *Political Studies* 32 (1984), pp. 21-31. Allen Buchanan presents a very clear, though more tentative discussion in his *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Westview Press (1991), pp. 29-32 and 70-73.

assumption that individual freedom of association can trump neither itself, nor the right members of the pre-existing group have to the basic necessities only effective political institutions can provide, the Freedom of Association argument for the value of political self-determination must be rejected.<sup>12</sup>

The second argument for the value of political self-determination, rather than placing the onus of justification squarely on the individual, instead places it entirely on the group. Collectivist arguments hold that political self-determination is valuable to groups in the same way that autonomy is valuable to individuals. This account requires us to accept the view that groups, *qua* group, have a moral status analogous to that of individual human beings, and that this moral status entitles the group to an analogous sphere of moral dominion over its own affairs. On the Collectivist account, it is the group itself, and not its members, that is wronged by interference. The problem here is that it is difficult to see why groups as such should matter from a moral perspective. At least part of why human beings matter is that they have a “point of view” from which the satisfaction of its interests can be experienced, that is, from which that satisfaction makes a difference *to the entity itself*. As L.W. Sumner writes, “our common notion of an individual subject is of a unique, enduring centre of consciousness;” since groups as such do not possess any mental states at all, let alone the kind of consciousness that would allow it actually to experience harms or violations of its rights, it is not clear why we should extend to them anything like the moral status we extend to human beings and

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<sup>12</sup> The foregoing objections to the Freedom of Association argument have been well-canvassed in the literature. See, e.g., Wellman, *A Theory of Secession*, pp. 6-11 and Allen Buchanan, “The Making and Unmaking of Boundaries: What Liberalism Has to Say,” in *States, Nations, and Borders: The Ethics of Making Boundaries*, Buchanan and Moore (eds.), Cambridge University Press (2003), pp. 231-61 at 254-56.

other sentient life.<sup>13</sup> But if groups cannot be moral subjects in any meaningful sense, then the Collectivist argument must also be rejected.

The Freedom of Association argument and the Collectivist argument for the value of political self-determination fail because they overestimate the justificatory work that can be done by one or the other side of the relation between individual group members and the self-determining group. The remaining two arguments I want to discuss make a more explicit attempt to bridge that gap. I endorse what I will call the Instrumental argument. It begins by noting that individual human agents have epistemic and motivational advantages over others when it comes to their own interests: we are almost always more familiar with our own needs, desires, and preferences than other people are, and, too, we are almost always more concerned to promote those needs, desires, and preferences. These premises are obvious that it is difficult to think of arguments for them that do not seem to belabor the point. Suffice it to say that we have privileged access to our own mental states, have much more opportunity to observe our own behavior, often benefit from the feedback of close acquaintances, and know our own histories and future plans in more intimate detail than anyone else. Moreover, concern for our own interests appears to be as close to a biological and psychological imperative as anything can be. An only slightly less banal claim—and for similar reasons—is that we are usually more familiar with and concerned to promote the interests of our families, friends, and extended circle of associates.

More interesting, perhaps, is why bases other than kinship and direct association should be expected to yield similar, though weaker epistemic and motivational

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<sup>13</sup> L.W. Sumner, *Welfare, Happiness, and Ethics*, Oxford University Press (1996), p. 30.

advantages vis-à-vis others' interests. On the one hand, as Clifford Geertz has noted, we do appear to have such "primordial attachments" grounded on "the assumed givens...of social existence: immediate contiguity and kin connection mainly, but beyond them the givenness that stems from being born into a particular religious community, speaking a particular language, or even a dialect of a language, and following particular social practices. These congruities...are seen to have an ineffable, and at times, overpowering, coerciveness in and of themselves."<sup>14</sup> Henry Shue cites this passage in order to illustrate how very strong attachments can form to "groups much smaller than nation-states," and yet they are still a powerful illustration of our familiarity and concern for individuals beyond our close associates. On the other hand, similarly powerful attachments to larger groups are also common features of human psychology. As Kai Nielsen writes, when one compatriot meets another abroad, "normally there will be a sense of at-homeness and an affinity with her [compatriot] that is rooted in their having a common culture: the songs they sing, the structure of jokes, the memories of places, a sense of common history, literary references, political experiences, and the having of all kinds of common forms of intimate ways of living."<sup>15</sup> Moreover, Nielsen suggests, membership in self-determining communities fosters these forms of attachment through shared social, economic, and political experiences. While the boundaries of a political community may

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<sup>14</sup> Clifford Geertz, "The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States," in *Old Societies and New States: The Quest for Modernity in Asia and Africa*. Ed. Clifford Geertz. New York: Free Press (1963), p. 109, cited in Henry Shue, *Basic Rights: Subsistence, Affluence, and American Foreign Policy*, 2<sup>nd</sup> Ed. Princeton University Press (1996), p. 145.

<sup>15</sup> Kai Nielsen, "Liberal Nationalism and Secession," in *National Self-Determination and Secession*, Margaret Moore (ed.), Oxford University Press (1993), pp. 103-33, at 109.

cut across cultural lines, they cultivate new forms of attachment by placing members in a position where cooperation is necessary to confront mutual problems.

Here it would be appropriate to pause for a moment to clarify how this appeal to culturally-based attachment operates in the Instrumental argument, because it would be easy to conflate my position with nationalism. Nationalists typically accept three theses: “(1) There is nothing inappropriate about identifying with one’s nation and conationals; (2) conationals have special obligations toward one another; and (3) each nation has a right to political self-determination.”<sup>16</sup> I accept (1) and reject (2) and (3), but exactly *none* of these theses is necessary for my argument. First, my claim is not that conationals *ought* to identify with one another. It is perfectly compatible with my argument to think that conational identification is a regrettable and morally unjustifiable aspect of human psychology, and that we should take measures to prevent it from happening. Second, I make no claim that conational identification grounds special obligations, obligations that we have over and above those we have toward other human beings. Third, my argument neither relies on nor implies that each nation has a right to self-determination. My only claim is that large numbers of conationals are often members of the same self-determining groups, and that these individuals will tend to have epistemic and motivational advantages in promoting each others’ interests. While the three theses associated with nationalism are normative, my premise is purely descriptive. Furthermore, there is no reason to think that the kinds of attachment formed between members of a self-determining group need to be based on cultural similarity. Members

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<sup>16</sup> Wellman, *Theory of Secession*, p. 97.

of the same society often have mutual economic and ideological interests that could only tententially be brought within the realm of nationalist attachment.

In any case, from here the Instrumental argument is fairly straightforward. I have claimed that the members of self-determining groups, owing to their personal and cultural attachments, as well as to their similar positions within the social, economic, and political units in which they find themselves, are generally more familiar with and more concerned to promote the interests of their fellow group members than outsiders are. And they are beyond doubt more familiar and more concerned to promote their own interests. But if this is so, then it seems reasonable to suppose that allowing those same people to make and implement the political decisions by which they are to live, they are more likely than outsiders to do so in ways that promote their welfare. The corollary to this is that external parties are *less* likely to make and implement political decisions that promote the welfare of group members. Thus, on the self-evident assumption that human welfare is something worth protecting and promoting, external parties have *prima facie* reasons to respect a group's political self-determination.

Now, clearly these reasons are defeasible. Some group members will remain ignorant of some of their compatriots' interests as a result of physical or social distance, lack of education, or a lack of known, tangible mutual concerns. More disturbingly, some group members, far from being ignorant of the compatriots' interests, will be indifferent to or even openly hostile towards them. Religious resentment, ethnic hatred, regional jealousies, ideological polarization, and class warfare can, at their worst, rend asunder the general communal beneficence the Instrumental argument presupposes. In fact, such conditions can undermine the possibility of group self-determination

altogether, as I explain below. The existence of these regrettable circumstances is not itself an objection to the Instrumental argument and it seems reasonable that an account of the value of political self-determination should be sensitive to cases in which self-determination would or does have disastrous consequences for members of the group in question.

The real objection to the Instrumental argument is that it provides too flimsy a set of reasons against interference. The intuition behind the objection is that grounding the value of political self-determination on instrumental reasons opens up the possibility that even if self-determination is beneficial to group members, interference by outsiders might be even *more* beneficial. Thus, the objection claims, the Instrumental argument allows reasons to respect self-determination to be overridden too easily, both when there is sufficient internal division to render self-determination harmful, *and* when there are outside parties able to interfere in beneficial ways, regardless of the level of internal division.

Two counterpoints must be borne in mind to accurately assess the force of this objection. First, the mere presence of social conflict does not undermine the Instrumental argument; conflict and cohesion exist in all political communities, and for the Instrumental argument to fail to justify political self-determination in particular cases (as it surely does) the conflict must be severe enough to overcome the cohesive effects discussed above. Social conflicts over religion, ethnicity, region, ideology, and class can be significantly dampened in communities where individuals typically identify with several overlapping social groups—it allows members of clashing ethnicities, for example, to find common ground in class solidarity, and provides a new basis for

familiarity and reciprocal beneficence. Perhaps most important is a stable consensus about the political mechanisms through which such conflicts are to be resolved. So long as both parties to a conflict continue to place value on the institutions and procedures that enable their political self-determination, they will share at least some values with their compatriots, and some motivation to refrain from actively undermining their interests.

Second, the Instrumental argument for political self-determination need not be taken as a case-by-case guide to the moral force of the reasons for non-interference. That these reasons are defeasible does not mean that outsiders should consider intervening every time they are. Instead, the Instrumental argument can be taken to support a heuristic, a rule of thumb, or a strong presumption against non-interference. The familiar thought here is that even though a general policy of non-interference may err on the side of caution, leading outsiders to refrain from interference when it could do a considerable amount of good, it might promote human welfare better than a policy of consistently interfering whenever it appears that interference would benefit members of the self-determining group, because this latter policy would lead outsiders to err on the side of temerity. There are good reasons to think that this is generally true, namely, the fact that external parties contemplating interference are highly likely to overestimate their abilities and commitment to benefiting the self-determining group, and to underestimate the risk and uncertainty involved in such attempts, as a result of ignorance, hubris, bias, and self-interest.

Still, some philosophers remain troubled about the prospects for grounding the value of political self-determination on purely instrumental reasons, and prefer to search for deontological reasons to respect self-determination. Wellman, for instance, believes



that both individuals *and* groups capable of self-determination “retain their positions of dominion even when their decision making clearly does not maximize overall happiness,” and so believes that arguments based on the positive consequences of political self-determination are insufficient because “agents are *entitled* to their self-determination, and *entitlement* is a fundamentally deontological notion that cannot be fully cashed out in consequentialist terms.”<sup>17</sup> In my view, the most compelling deontological argument for reasons to respect self-determination is Altman and Wellman’s view that those reasons stem from the importance of respecting collective achievement.<sup>18</sup>

The Collective Achievement argument begins by noting that the capacity for self-determination generally requires an enormous amount of coordination, which, in turn, requires great skill, effort, and commitment on the part of group members. It is not easy to develop or maintain the social and political institutions necessary for responsible self-government, as many failed attempts at doing so have shown. Acquiring the capacity for genuine self-determination therefore represents a significant accomplishment, and to deny a politically viable group the opportunity to determine its own affairs wrongfully disrespects the efforts put forward by individual group members. As Altman and Wellman point out, this disrespect becomes especially clear in the context of colonialism and forced annexation. “Imperial domination is an affront to the colonized in the form of an attitude that says, ‘You cannot govern yourselves properly and so we must govern you.’ As with forced annexation,” they write, “this affront constitutes a serious wrong against the individuals who make up the colonized group. [It] denies to the group the

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<sup>17</sup> Wellman, *Theory of Secession*, p. 40

<sup>18</sup> Altman and Wellman, *A Liberal Theory of International Justice*, Oxford University Press (2009), p. 40.

recognition respect that is owed to it in virtue of the fact that its members are able and willing to perform the requisite political functions of a legitimate state.”<sup>19</sup>

The Collective Achievement argument may appear to run afoul of value-collectivism, because it claims that the politically viable group, *qua* group, is the holder of a right to self-determination. But Altman and Wellman are quick to point out that while the argument attributes a moral right to the group, the parties actually *wronged* by the violation of this right are individual group members, rather than the group itself. In denying a politically viable group the ability to choose its own path, a state derogates the members of that group by implicitly or explicitly acting as if they, the individual group members, are incapable or unwilling to coordinate their activities in the ways needed to form an independent, legitimate state. Where group members are able and willing to do so, however, they are entitled to respect—a respect which gives other parties a strong deontological reason to respect their self-determination.

I remain agnostic about this argument not because I see in it any serious potential weaknesses—although as I explain below, if the Collective Achievement argument supports the self-determination of groups whose political decision-making systematically excludes many group members, it is not clear whether and to what extent those members’ contributions to the achievement should count as a basis for respect. Instead, I am simply unmoved by the alleged need to find a deontological basis for individual or group self-determination, and am skeptical of the idea that we require the notion of entitlement to explain our very strong sense that individuals and groups should be left alone to make

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<sup>19</sup> Ibid.

their own self-regarding decisions. Wellman anticipates such a response, writing that “Although thoroughgoing consequentialists will no doubt bristle at this explanation of the deontological reasons to respect autonomy, I suspect that most will find it congenial.”<sup>20</sup> Despite my skepticism, the Collective Achievement argument at least does no damage to my claims in subsequent sections, so I am happy to remain agnostic on the matter. In what follows, I present thumbnail accounts of representative government and democratic political institutions, and relate them back to the Instrumental argument for the value of political self-determination just discussed.

### 3. SELF-DETERMINATION AND REPRESENTATIVE GOVERNMENT

In this section, I offer an account of political representation. The account is not intended to be perfectly general since, following Pitkin, I believe that there are at least several plausible ways to understand the concept of representation.<sup>21</sup> My intention, rather, is to use the concept of representation to explain the relationship that must obtain between a government and the people it governs in order for the group as a whole to be capable of the kind of political self-determination worthy of respect. For my purposes, I will define a representative government as one whose decisions, actions, and policies reflect or accord with the collective political will of the people. After detailing this view, however, I will—as promised—highlight an ambiguity that plagues the account of political self-determination I set out in the first section. This ambiguity concerns how we ought to delineate or ‘individuate’ self-determining groups. I will not attempt to resolve the

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<sup>20</sup> Wellman, *Theory of Secession*, p. 41.

<sup>21</sup> Hanna F. Pitkin, *The Concept of Representation*, Berkeley: University of California (1967).

ambiguity, but will instead use it to motivate a constructive dilemma: either representative government is conceptually necessary for a group's political self-determination, or it is practically necessary for a group's political self-determination to have value. In this next section, I explain why democracies represent the collective political will of their peoples better than non-democracies.

Political self-determination is a group's capacity to make and implement political decisions, and as I said above, requires a form of group agency. Central to the concept of agency is the notion of a 'will.' In a causal story of intentional behavior, the will mediates between deliberation and action: an agent deliberates about her desires and about alternative ways to fulfill them, aggregating them into a more or less coherent and unified will, and that will is what moves the agent to action. Following Harry Frankfurt, I will say that an individual agent's will is the effective subset of her desires: the desires that do, or will, or would move her to action given the operation of some deliberative faculty or procedure.<sup>22</sup> When Alice orders steak from the menu instead of fettuccini despite her desire for both, her order indicates the content of her will: it is her desire for steak, and not her desire for fettuccini, that moves her to action. Prior to her deliberation, her will was indeterminate, because (we are supposing) her desires for steak and fettuccini were evenly matched. But it is important to see that even when considered in abstraction from the deliberative faculty or procedure by which Alice's desires are whittled down to their effective subset, her will is not completely indeterminate. Imagine, for instance, that Alice possesses an overpowering desire for steak, or that her

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<sup>22</sup> Harry Frankfurt, "Freedom of the Will and the Concept of a Person," *The Importance of What We Care About: Philosophical Essays*, Cambridge University Press (1988), pp. 11-25, at p. 14.

desire for steak, while not particularly strong, is simply uncontested, because she has no desire for anything else on the menu. In cases like these, some of Alice's will is determinate independently of her faculty of deliberation because some of her desires would be effective under almost any reasonable deliberative procedure. What this means is that deliberation is only partially responsible for creating the agent's will; some of that will is predetermined by the structure of her desires, and to that extent the agent's deliberation serves only to discover and refine that structure.

A parallel account can be given for the will of a group agent. I will say that a group's will is the effective subset of all of its members' desires: the desires that do, or will, or would move the group to collective action, given some aggregative and deliberative procedure by which those desires are assessed and prioritized. The only difference between an individual and a group will, on this account, is that in the case of the group, the potentially relevant set of desires is distributed among all and only group members. Again, the group's will is necessarily indeterminate when considered in abstraction from the procedure by which some desires are made effective and others are not. Nevertheless, as with individual agents, the group's will need not be entirely indeterminate. The clearest cases of this are when group members are unanimous in sharing some particularly strong desire regarding their collective action. All things being equal, such a desire should move the group to action under almost any reasonable deliberative procedure. Some readers may balk at this last claim, because it is possible to imagine group decision-making procedures that could prevent such a desire from effectively moving the group. My full answer to this question will emerge from my argument in the remainder of this section; for now I will just say that my answer amounts

to the claim that such a decision procedure would not be deliberative in the right sort of way for the group to constitute an agent (although I will not make the argument in those terms).

In any case, having introduced the notion of a group will, it will be easy to explain what I mean by the term ‘representative government.’ Recall that any large-scale, complex shared agency will require meshed aims and plans, authorized representatives, and procedures. With respect to political organization, a *government* comprises the latter two: the formal rules, practices, and institutions that aggregate desires, delegate responsibilities, and so on, together with the individual agents who occupy the roles and offices of those institutions. A government is therefore a locus of collective decision-making, and I will call the group of individuals over whom its decisions are implemented—those to whom the decisions apply—the government’s *people*. As I suggested above, the group’s will can be divided into two parts: the part that is determinable independently of any particular decision procedure for aggregating individual members’ desires, and the part that can only be known once that procedure has been applied. For the sake of rhetorical convenience, I will refer to the former part as the collective political will *of the people*, to distinguish it from the group’s fully specified and institutionally embodied will. In Applbaum’s terms, the people’s collective political will would consist of only the group members’ “meshed aims and plans,” without reference to the procedures and officials who help give more determinate shape to those

aims. A representative government, then, is one whose decisions, actions, and policies reflect or accord with the collective political will of the people it governs.<sup>23</sup>

Some caveats are in order here. First, I mean to keep the concept of representative procedurally neutral. I argue below that democratic political institutions are the best way to ensure that the government represents its people's will, so it would beg the question for me to stipulate that representation requires democracy. Instead, representation should be understood as a success condition: so long as government policy is congruent with the people's will, it does not matter how this comes about. This is compatible with a kind of 'accidental' representation; in the same way that a broken watch is right twice a day, so too might randomly chosen government policies happen to reflect or accord with the people's will as a matter of mere coincidence. Second, representation is clearly a matter of degree. The people's collective political will might encompass many particular policy preferences, and government policies may reflect or accord with some of these and not others. Moreover, government policies may reflect or accord with a given policy preference to a greater or lesser extent.

Third, the people's will may be more or less internally coherent; all things being equal, when group members are evenly divided between different policies, the government will be equally representative no matter which of those policies it adopts, although it would be *more* representative if some mutually acceptable compromise could be found between the opposing sides. To some extent, the existence of some set of overlapping desires and preferences, some meshed aims and plans, is necessary for

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<sup>23</sup> Rogowski offers a similar, though more formal, account of representation in Ronald Rogowski, "Representation in Political Theory and in Law," *Ethics* 91/3 (April 1991), pp. 395-430, but I will not pause to discuss the differences between our views here.

representation since in its absence there would literally be nothing to represent. Along with effective institutions, the existence of a collective political will is a major social precondition for the possibility of representative government. Fourth and finally, to say that a government is representative is not to say that it is ultimately good, justified, legitimate, or authoritative. While representation may be a necessary condition on a government's being one or more of those things, it is clearly possible that people can collectively will things that are morally wrong. A government whose policies reflected that will would do bad things, but it would not therefore be any less representative. I will explain the value of representative government in terms of its relation to political self-determination. But before doing so, we must attend to a problem about how to identify or individuate politically self-determining groups.

I have said that political self-determination is a group's capacity to make and implement political decisions. The problem is that, as stated, this definition is ambiguous between two different ways to individuate the relevant group. On one view, we pick out self-determining groups by first locating the capacity for making and implementing political decisions, and then ask which individual persons' desires or preferences have some sort of influence over the outcome of those decisions. Those whose desires do are part of the self-determining group; those whose do not, are not. Call this the Capacity First approach to the problem of individuation. On another view, we identify self-determining groups by first locating a group whose membership is settled by reference to something other than the ability to influence the outcome of collective decision-making processes—culture, ethnicity, nationality, citizenship, and so on—and then ask whether some portion of that group has the capacity to make and implement political decisions



that apply to the rest of the group. If it does, then the group is self-determining, and if not, then not. Call this the Group First approach to the problem of individuation.

To see why this is a problem—why the right way to individuate groups is not obvious—consider the following example. Suppose there are a number people across the street engaged in a task of considerable complexity: they are building a house. Completing the task requires a high degree of coordination between the individual workers; some workers are pouring concrete, others are constructing the frame, while still others are installing plumbing and electricity. Facilitating this coordination is a project foreman, who consults the blueprints he has drawn up, occasionally making modifications, and who shouts orders to the workers and inspects their work. The group appears to be—the group is—a collective agent. Neither the foreman nor any of the individual workers could accomplish the task by himself. Do we know enough to say that the group is self-determining? On the Group First approach, we do. There is no way that such an agent could function without having the capacity to make and implement decisions that apply to everyone engaged in the project, and on the Group First approach, this answers the question.

But now imagine that all along, the project foreman has been coercing the workers to comply with his commands—he has a gun, and the workers believe he will shoot them if they do not do as he says. Moreover, the foreman simply ignores any suggestions or requests that come from the workers. They are given detailed instructions and they carry them out without question. Note that this does not change the Group First answer: the group has the capacity to make and implement decisions, period. But on the Capacity First view, the answer is different. On that view, we first locate the capacity for

decision-making and then ask who has the ability influence the outcome of those decisions. In this case, that includes the foreman and no one else. For the Capacity First view, there are really two groups building the house. The foreman is the sole member of the self-determining group (imagine the foreman and his wife are running the project together, if you have problems with single-member groups), and his decisions alone determine the behavior of the members of the other group.

I suspect that most readers will be drawn to the Capacity First view, because in this case they do not want to describe the whole group—workers and foreman—as self-determining. I am similarly drawn to that approach. But there are two reasons to be skeptical of this intuitive response. The first is that the Group First view is difficult to argue against on purely conceptual grounds. Of course we may have good moral reasons to prefer that the foreman not coerce his workers at gunpoint. But why think such normative considerations are relevant to the question of self-determination? Why *not* identify political self-determination with mere collective agency? The question cannot be answered except by stipulation. The second problem is that ordinary discussions about self-determination seem implicitly to adopt the Group First view. We ask: are the Kurds in Northern Iraq capable of political self-determination? Are Kosovars? Are Texans? We are not looking at the government in Kirkuk and asking after the extent to which the preferences of the Kurdish inhabitants in Northern Iraq can influence the outcomes of political decision-making. Instead, we are asking whether the government in Kirkuk is strong enough to implement its political decisions throughout Iraqi Kurdish territory. I do not want to adjudicate between colloquial and philosophical senses of the term “political self-determination” for the same reason I do not want to adjudicate the

descriptive-normative issue: there are no decisive arguments on either side, and stipulating one or the other runs the risk of equivocation. Pending arguments to the contrary, I will proceed on the methodological assumption that neither approach to the problem of individuation is unreasonable or unjustified. My remaining argument about the relationship between self-determination and representative government will work for both approaches, although in slightly different ways.

There are two arguments for the view that representative government is necessary for valuable self-determination, that is, self-determination worthy of respect by outside parties; each argument corresponds to one of the two ways of individuating self-determination spelled out above. For those who adopt the Capacity First approach, I offer a conceptual argument. According to the Capacity First approach, we are to individuate groups by first locating the capacity for collective decision-making, and then ask whose desires and preferences could potentially influence the outcome of those decisions. Now suppose we have a representative government—a government whose decisions, actions, and policies reflect or accord with the collective political will of the people. Since each group member's desires are potential components of the people's will, and since the decisions of a representative government reflect that will, it follows that under representative government, each group members' desires could potentially influence the outcome of that government's decisions. And since each group member's desires could potentially influence the outcome of the government's decisions, according to the Capacity First view, that group is self-determining. But the situation is different under a non-representative government. The decisions, actions, and policies of such governments do *not* reflect or accord with the collective political will of the people, and

so some members' desires will inevitably lack even the potential to influence the outcomes of government decision-making. But this implies that the group in question is not self-determining—the “self” doing the determining excludes some group members. On the Capacity First approach to individuating self-determining groups, representative government is conceptually necessary for political self-determination because only under such governments is the scope of the group's “self” coextensive with the group over whom the government implements its decisions. Without representative government, there would always be one self-determining subgroup whose decisions unilaterally applied to the remaining members.

On the Group First view, however, representative government is not a *conceptually* necessary condition on the group's self-determination. Instead, it is a *practically* necessary condition on the *value* of that group's self-determination. On the Group First view, we first delineate the group based on some characteristic other than whose interests potentially influence government decisions—say, based on citizenship—and then ask whether some subgroup of citizens has the capacity to make and implement political decisions that apply to the group as a whole. Now, recall that the Instrumental argument for the value of political self-determination held that self-determination is valuable because it allowed those most familiar and most motivated to pursue their own and their fellow group members' interests to make and implement the political decisions that affect those interests. But while each citizen's desires potentially influence the collective political will, the decisions of a non-representative government will be unresponsive to some parts of that will, leaving some of those most familiar with and most motivated to pursue their own and their fellow group members' interests out of the

decision. This implies that the extent to which a government represents the collective political will of its people is roughly the extent to which the epistemic and motivational advantages those people have vis-à-vis the promotion of their interests will accrue to the value of their self-determination. In short, the more group members who go unrepresented, the less likely that group's political self-determination is to promote their interests, and so the weaker the *prima facie* reasons outside parties have to respect it. On the Group First view, the degree of representation will roughly correlate with the value of the group's self-determination; or, put more simply: representation is practically necessary for a group's self-determination to have value.

It's also worth noting that a parallel argument can be made for the Collective Achievement argument. According to the Collective Achievement argument for the value of political self-determination, outside parties ought to refrain from interfering in a self-determining group because to do so would disrespect individual group members' contributions to the group's ability and willingness to perform the requisite political functions. But on the Group First approach to individuating self-determining groups, self-determination is compatible with many group members playing little to no role in those political functions. Under a representative government, we might say that all group members play at least some role in the group's capacity for political decision-making, even if they are merely passive subjects, since their desires and preferences help compose the group will which in turn helps determine government policy. So long as the government continues to represent the people's will, enough passive subjects could adopt policy preferences that would run the group's capacity for self-determination into the ground, or they could adopt preferences that would allow it to flourish.

Under a non-representative government, they would be incapable of even this kind of contribution to political decision-making. True, they might be employed in the *implementation* of political decisions made by others. But first, unless the government wields direct control over every sector of the society, it will remain the case that a great many people are not so much implementing the government's decisions as they are passively complying with them. It seems a stretch to believe that private citizens going about their daily lives, working jobs and paying bills, are somehow contributing to the group's capacity for self-determination, and thereby worthy of respect on those grounds. Perhaps the case could be made that group members contribute by paying taxes, but again, this is done under threat of punishment. Recall the foreman example from above: are the coerced workers disrespected by a passerby who interferes with the foreman's ability to make decisions and issue commands? Clearly not.

Second, even where it is not coerced, the extent to which active participation in the implementation of government policy warrants the necessary kind of respect is unclear. The argument here must be that group members implementing government policy deserve respect for the same reason a wide receiver does for her participation in plays called by the quarterback. But it seems as though the quarterback deserves considerably more credit for her role than the receiver does for hers—the appropriate degree of respect appears to diminish the less influence one has over policy decisions, which means that the contributions of many low-level officials warrant considerably less respect than the contributions of those with more responsibility. The upshot is that, unlike non-representative governments, representative governments allow everyone they govern to have at least some potential influence over policy decisions, while requiring

(*ceteris paribus*) roughly the same level of participation in the implementation of those policies. In other words, the individuals under a representative government will likely be more entitled to respect than their counterparts working under non-representative governments. As with the Instrumental argument, the strength of the reasons outside parties have to respect a group's self-determination appear to depend, in large measure, on the extent to which its government represents the collective political will of the people it governs. However, since my primary claim is based on the Instrumental argument for the value of political self-determination, I will prefer to say that ultimately the strength of those reasons derives from their connection to human well-being.

#### 4. REPRESENTATION AND DEMOCRACY

To this point, I have argued that political self-determination, understood as a group's capacity to make and implement political decisions free from outside interference, is valuable because it generally promotes the welfare of individual group members, and that, all things being equal, the better the government represents the collective political will of the people it governs, the better off those people will be. I now want to argue that democratic governments are generally better at representing the collective political will of the people they govern, and so tend to make those people better off than they would be under non-democratic governments. Before making that argument, however, it will be necessary to discuss how I intend to understand the concept of democracy.

Like self-determination and representation, democracy is an essentially contestable concept—one about whose broadest outlines there is some widespread agreement, but whose finer contours and content are subject to perpetual disagreement.

There are two very general ways to talk about democracy. We might discuss democracy in terms of the core values it is supposed to embody or promote, or we might discuss the institutions needed to embody or promote those values in a specific context. In my view, the best way to capture the sense of democracy is by reference to the value of political participation, and more specifically, to what Robert Dahl called the Principle of Affected Interests.<sup>24</sup> The Principle of Affected Interests holds that all those affected by a government's decisions have a right to participate in them.<sup>25</sup> This principle is prone to various counterexamples in which it is alleged that merely being affected by a decision does not entitle the affected party to participate, and the standard response is to qualify the principle in the appropriate ways. For instance, by limiting the principle's scope of application only to those whose most basic or important interests are affected by government decisions, or to those whose most basic interests are significantly affected, which would prevent the implication that the (usually) relatively trivial affects a government's decisions have on distant foreigners have a right to participate in that government. Or, rather than limiting the principle's scope by reference to the *degree* of affect a government's decisions have on potential rightholders' interests, it might be limited by reference to the *kind* of affect it has. Many philosophers have thought that a more plausible version of the Principle of Affected Interests is the Coercion Principle, which holds that only those who are *coerced* by a government's decisions have a right to

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<sup>24</sup> Robert Dahl, *After the Revolution? Authority in a Good Society*, Yale University Press (1970), p. 49.

<sup>25</sup> For discussion, see Robert Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy & Public Affairs* 35/1 (2007), pp. 40-68 and David Miller, "Democracy's Domain," *Philosophy & Public Affairs* 37/3 (2009), pp. 201-228, esp. 214-18.



participate in its decisions. There is much more to be said about the Principle of Affected Interests, but I will leave that discussion for another time.<sup>26</sup>

But having fixed the concept of democracy around the concept of participation, it is important to note that the preconditions for effective participation by those who have a right to participate vary from one context to another. Since I am interested in the political self-determination of whole societies, I will adopt Dahl's account of the political institutions necessary for large-scale democracy.<sup>27</sup> This amounts to an *operational* definition of the concept, one that allows us to assess whether and to what degree particular societies are democratic by reference to a list of concrete, tangible institutional criteria. According to Dahl, six kinds of institutions are necessary for a functioning large-scale democracy:

1. Elected officials
2. Free, fair, and frequent elections
3. Freedom of expression
4. Alternative sources of information
5. Associational autonomy
6. Inclusive citizenship

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<sup>26</sup> See Chapter V, "Jus Post Bellum and the Principle of Affected Interests."

<sup>27</sup> Robert Dahl, "What Institutions Does Large-Scale Democracy Require?" *On Democracy*, Yale University Press (2000), pp. 83-99.

Clearly there is some overlap between these six kinds of institution, and below I hope to indicate at least some of the deep relations of mutual support and dependence between them. But my main purpose here is to relate these institutions to the notion of political participation, and then to explain how they tend to produce more representative governments than do non-democracies, that is, societies in which some of these institutions are seriously hobbled, or missing entirely.

In very large groups, *direct* participation by every group member (participation in which group members assemble, debate, and decide about what actions to take and what policies to implement) is largely impossible. There are simply too many people for everyone to participate in the same political forum at the same time. But *indirect* participation (participation in which group members participate by proxy) remains possible by virtue of an electoral system embodied in criteria (1) and (2) from the list above. Under such a system, group members select officials through majoritarian procedures to assemble, debate, and decide about political matters on their behalf. Of course, in order for this system to work, voters must have accurate information about candidates' goals and values and about their elected officials' performance while in office, which in turn requires institutions that allow and protect the free flow of information between and among themselves, candidates for office, and office-holders— institutions embodied in the freedom of expression (3) and a free and independent press (4). The freedom to form political associations such as interest groups, fundraising and lobbying organizations, political campaigns, political parties, and so on (5), contributes to this free flow of information, as well as to the ability of individual group members to engage in effective political action. Finally, the right to participate in these institutions

must be broadly inclusive (6); that is, everyone, or nearly everyone who falls within the scope of the government's decisions must have access to all of them. Naturally, different democratic theorists will characterize, prioritize, and defend these institutions in different ways and by reference to values other than political participation. But however we decide to motivate Dahl's criteria, I take it as given that the institutions he describes are the subject of a widespread consensus about what large-scale democracy requires in the real world.

Why are democratic governments more likely to represent the collective political will of the people they govern? The answer is straightforward. The institutions that structure the political affairs of a large-scale democratic society give the very people whose desires and preferences *constitute* the collective political will significant control over the government's decisions, actions, and policies. First, owing to their freedom of expression and their access to a variety of independent sources of information, the people will be aware of what the government is doing and how it might affect them. Second, when the government's behavior begins to diverge from what the people want, they can use the electoral system at their disposal to quickly replace the responsible officials at little cost to themselves. (In non-democratic societies the only way to bring about comprehensive changes in government personnel is through revolution.) Third, the fact that they can be quickly and efficiently replaced for failing to represent the collective political will of the people gives them strong incentives to avoid diverging from that will in the first place. Fourth, associational autonomy buttresses both the free flow of information necessary to an informed policy, and provides a foundation on which to build the political momentum for change: the freedom to organize for political purposes

multiplies individual group members' ability to broadcast and promote their political views, and thereby influence the direction of government decision-making. Finally, inclusive citizenship ensures that no numerically significant population whose desires and preferences partially constitute the collective political will are disenfranchised: no contributor to the collective will is prevented from taking action to ensure that his or her interests are given due consideration. In short, democratic governments tend to represent the collective political will of the people they govern because when it does not, those people are aware of that fact, and have the means to correct it.

Another way to bring out the advantages democracy has for representative government is to consider how those advantages also mark out deficiencies in non-democratic political systems. Paradigmatic examples of non-democracies are societies that lack anything like the electoral system described above. A government lacking in elections and elected officials may still protect freedom expression, freedom of association, and a free press, and may even extend those institutions to everyone. But without a formal, effective, and peaceful mechanism by which the people can hold their government accountable for its behavior, the government is likely to flout or simply ignore their collective will. This need not be a matter of exploitation, at least not initially. Government officials will often share many desires and preferences for policy with the people they govern, and many of them will no doubt be motivated to represent the collective political will of their own volition. But the fact is that such officials are often individually and collectively in a position to exploit their subjects, and repeated iterations of political decision-making will increase the opportunity and therefore the

likelihood of opportunism. Lack of accountability will eventually lead to a lack of representation.

A similar dynamic is likely to occur even in societies that do have an electoral system, but whose system has too few offices open to electoral contest, or whose contestable offices are too insignificant to have much influence over political decision-making, and likewise for systems in which elections are subject to voter coercion, or in which elections are a rare event. Government officials need time to craft and implement new policies, so there is a danger of holding elections too often, but the lower the frequency of the elections, the less responsive to the collective political will the government will be in the meantime. Infrequent elections pose the additional danger that officials will be able to consolidate enough power during their terms that they are able to affect the electoral system itself, essentially stacking the deck against potential rivals and securing their own positions. The same can be said for unelected officials. If elected posts are merely symbolic, or if, taken together, they do not allow elected officials to be the key decision-makers on the most important matters of policy, then an unelected class of bureaucrats or hereditary rulers will have largely unaccountable, and therefore unresponsive control over government decisions. The same is true for the absence of inclusive citizenship: widespread or subgroup-specific disenfranchisement can render a government systematically insensitive to important aspects of the collective political will.

But, finally, even with a reasonably uncompromised formal electoral system and inclusive citizenship, a government can fail to represent the collective political will of the people it governs if those people are misinformed about the available political options, or about the effect those options would have on them. In the absence of freedom of

expression, access to independent sources of information, or associational autonomy, individual voters are more likely to be ignorant of important concerns facing their compatriots, ignorant of how the government is performing, and ignorant of the reforms political candidates for office are proposing. Worse, the void left by a lack of information in such societies is often filled with government propaganda, which is intentionally designed to mislead voters about the government's behavior. If the people cannot reliably translate their own or others' desires and preferences into electoral decisions likely to advance those desires, then there is no reason to suppose that the officials they elect will enact policies that represent the collective political will. For all of these reasons, democratic governments tend to better represent the collective political will of the people they govern than do non-democracies.

#### CONCLUSION

In this chapter, I have argued that democratic political institutions—officials chosen in free, fair, and frequent elections, free speech and a free press, associational autonomy, and inclusive citizenship—tend to produce government actions, decisions, and policies that better reflect and accord with the collective political will of the people subject to that government's control. Moreover, I have argued that such representative government is valuable insofar as it makes genuine political self-determination possible, or at any rate, insofar as it makes political self-determination valuable in the first place. Of course, much of my argument has been instrumental, which inevitably leaves open the possibility that self-determination, representative government, or democracy might, in some cases,

fail to promote group members' interests to the extent that they might be under alternative political systems. But again, on the one hand, a theory which claimed that any of those conditions were valuable even when they were seriously harmful to group members would be unappealing for that very reason. On the other hand, when the harm a self-determining people does to itself is relatively slight, the theory presented here is friendly to the suggestion that there may good reasons to refrain from interference so as to remain faithful to a rule of non-interference, one that promotes the overall well-being of group members in many groups, even when it fails to promote the well-being of group members in certain exceptional cases. Articulating the proper conditions of this rule—when exceptions are allowed and when they are not—is a task that lies beyond the scope of this chapter. In the chapters to follow, I use the account of representative government developed here, and the theory of moral and legal rights developed Chapter I, to spell out a theory of political legitimacy I then use to argue for the moral, and eventually the legal permissibility of forcible democratization.

### CHAPTER III

#### DEMOCRATIC COSMOPOLITANISM AND FORCIBLE DEMOCRATIZATION

Recent wars have led many to believe that the promotion of democracy cannot justify foreign intervention. The American intervention in Iraq in particular has brought scholars, politicians, and the public to believe forcible democratization, the use of armed force to establish or restore democratic political institutions abroad, is unnecessarily destructive, ineffective, illegal, and fundamentally unjust. I believe opponents of this practice—many of whom work from the same liberal, cosmopolitan perspective that I do—have been overly rash to rule it out completely in their (quite understandable) anxiousness to condemn the war in Iraq

Allen Buchanan briefly offers several reasons cosmopolitans should not dismiss forcible democratization so lightly: (a) sovereignty is not absolute, but conditional on adequately protecting human rights; (b) democracy is “the most reliable arrangement for securing basic human rights;” (c) humanitarian interventions that do not aim at political reconstruction risk violence upon withdrawal; (d) if democratic revolution is morally permissible, then the same reasons may support forcible democratization from without; and (e) the requirement that armed force may only be used against an actual or imminent attack may become obsolete as institutional context minimizes the risk of preventive uses.<sup>1</sup> But Buchanan does not attempt to develop these potential justifications further; his

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<sup>1</sup> Allen Buchanan, “Institutionalizing the Just War,” *Philosophy & Public Affairs*, 34/1 (2006), pp. 2-38. For commentary on these themes and on other aspects of the morality and legality of forcible democratization, see Arthur Applbaum, “Forcing a People to Be Free,” *Philosophy & Public Affairs* 35/4 (Fall 2007), pp. 359-400; James Bohman, “War and Democracy,” in *War: Essays in Political Philosophy*, ed. Larry May and Emily Crookston. Cambridge University Press (2008); Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law*, Oxford



interest lies, instead, in a making a more general point about how empirical and institutional analysis should inform just war thinking, and he uses a discussion of how robust international institutions could mitigate the “extraordinary risks” of using democratization to justify armed intervention to illustrate this larger point. I accept most of what Buchanan has to say about the kinds of institutions that would be needed to justify legalizing forcible democratization, but my focus in this chapter is both narrower and further upstream. In particular, I aim to develop a more detailed normative account of forcible democratization roughly along the lines of (a), (b), and to a lesser extent (e) above, and in a way that gives higher priority to the moral importance of political self-determination than Buchanan does.

I begin from an account of political legitimacy, which holds that a government’s right to non-intervention should hinge on whether it (1) adequately protects its subject’s human rights, and (2) adequately represents their collective political will. I go on to argue that when and where the international legal system’s ability to enforce human rights matures, and the social conditions for better representation emerge, the standards

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University Press (2001), esp. pp. 88-111; Tomas M. Franck, “The Emerging Right to Democratic Governance,” *American Journal of International Law* 86/1 (January 1992), pp. 46-91; Christine Gray, *International Law and the Use of Force*, 2<sup>nd</sup> Ed. Oxford University Press (2004), pp. 49-52; Larry May, *Aggression and Crimes Against the Peace*, Cambridge University Press (2008), esp. pp. 96-100; Jeff McMahan, “Just Cause for War,” *Ethics & International Affairs* 19/3 (Fall 2005), pp. 1-21, esp. p. 17; Jedediah Purdy, “Liberal Empire: Assessing the Arguments,” *Ethics & International Affairs* 17/2, (Fall 2003), pp. 35-47; W. Michael Reisman, “Sovereignty and Human Rights in Contemporary International Law,” *American Journal of International Law*, 84/4 (October 1990), pp. 866-876 and “The Manley O. Hudson Lecture: Why Regime Change Is (Almost Always) a Bad Idea,” *American Journal of International Law* 98/3 (July 2004), pp. 516-525; Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3<sup>rd</sup> Ed. Ardsley, NY: Transnational Publishers (2005), esp. Ch. 6, and “The liberal case for humanitarian intervention,” in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Holzgrefe and Keohane (eds), Cambridge University Press (2003), pp. 93-129; Michael Walzer, “The Moral Standing of States: A Response to Four Critics,” *Philosophy & Public Affairs* 9/3 (Spring 1980), reprinted in *International Ethics: A Philosophy & Public Affairs Reader*, Beitz, Cohen, Scanlon, and Simmons (eds.), Princeton University Press (1985), pp. 217-237.

for adequate protection and representation should rise. Finally, I argue that since democracy significantly augments both functions of government, eventually the right to non-intervention should depend on maintaining democratic institutions. Failure to do so will at that time provide a (defeasible) justification for pro-democratic intervention, up to and including the use of armed force.

In the first section, I offer a brief analysis of a government's so-called "right to rule," in order to highlight the important distinction between political legitimacy and political authority, and then motivate the two-pronged account of legitimacy mentioned above. In the second section, I place special emphasis on the notion of "adequacy" at play in this account, and argue that the standards of adequate human rights security and collective representation are context-sensitive in the same way that standards for adequate parenting are: as knowledge, social conditions, and enforcement capabilities improve, the standards of adequacy should rise. In the third section, I argue for the view that, all things being equal, democratic institutions are superior to non-democratic alternatives with respect to both protecting a people's human rights and representing their collective political will. Finally, I argue that since democratic institutions are superior to non-democratic institutions along both dimensions of political legitimacy, and since the standards of adequacy security and representation should progress along those same dimensions over time, we can expect that either now or at some point in the future the democratization of non-democratic governments will provide a just cause for armed intervention. I close by addressing the serious but surmountable objections that forcible democratization is either practically infeasible or internally inconsistent.

## 1. LEGITIMACY, AUTHORITY, AND THE RIGHT TO RULE

As with most philosophically interesting rights, we may divide a government's "right to rule" into its constituent parts, or 'incidents.' There are two primary parts to the right to rule. The first is political legitimacy, which consists in a government's liberty to coerce its subjects through a system of law, and its claim against foreign intervention with that system. The second is political authority, which consists in a government's discretionary power to waive, alter, or impose morally binding obligations. In other words, political authority is a government's right to be obeyed, or as it is sometimes said, its ability to impose so-called "political obligations" on its subjects.<sup>2</sup> My concern in this chapter is with the concept of political legitimacy, and specifically with two important necessary conditions on a government's claim-right against foreign intervention.

But before moving on, it is worth noting that this analysis of the right to rule, and the fairly conventional use to which I am putting it here, misleadingly suggests that the division of labor between political legitimacy and political authority neatly tracks what might be called the 'internal' and the 'external' aspects of that right. That is to say, since the claim-right against foreign intervention appears to deal only with parties that fall outside the government's jurisdiction, and since the power to impose political obligations appears to deal only with parties that fall inside that jurisdiction, it is easy to think that theories of legitimacy and authority do and should deal exclusively with internal and external parties, respectively. This is a convenient fiction for expository reasons, but the

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<sup>2</sup> Cf. Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112 (July 2002), pp. 689-719. My analysis is structurally identical to Buchanan's, except that he uses the term "authority" to refer to the entire right to rule, and the term "political obligation" to refer to what I am calling authority. While I think that my usage of authority is more in line with conventional and philosophical conventions, this is a terminological and not a philosophical difference.

truth is more complicated. It is more complicated, because it turns out that on standard views governments not only hold a claim right to non-intervention by foreign parties, but may also hold a claim to non-interference against their own subjects--an internal aspect of legitimacy. Likewise, governments are thought to wield some discretionary power to impose political obligations on their subjects, but it also seems intuitively correct that they also possess discretionary powers to, for example, waive foreign parties' duties of non-intervention--a form of authority over external parties. Thus, the distinction between legitimacy and authority cross-cuts the internal-external distinction in ways that usually go underappreciated.

I emphasize this point because my purpose in this section is to motivate an account of political legitimacy, but use it to justify only a part of the external aspect of a government's right to rule, leaving aside questions about the government's authority over foreigners (e.g. a right to invite foreign militaries into its territory), as well as questions about the government's claim right against interference from within (e.g. rights against revolution or secession). All of these components of the right to rule could be relevant to the normative questions surrounding forcible democratization, but unfortunately, any attempt to spell out the relations between all of them would require a more comprehensive treatment than I have space for here.<sup>3</sup> I have chosen to focus on the claim-right against foreign intervention because it seems to me to be the first and most

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<sup>3</sup> The government's authority would be relevant to forcible democratization if it were possible for it to be transferred, by forfeiture, to the people it governs, thereby allowing the subjects of a government, rather than the government itself, to waive that government's claim right to non-interference. A broader definition of forcible democratization would include internal attempts at establishing or restoring democratic rule, which would require a more detailed treatment of a government's claim to non-interference against its own people, which, in turn might be used to justify forcible democratization by outsiders along the lines of Buchanan's point (d) above.

important moral question a theory of forcible democratization must confront. Whether and under what conditions a government might waive its claim to non-intervention by foreigners, forfeit its claim to non-interference by its own subjects, or forfeits its authority over foreign parties I will leave for another time.

Intervention, as I will understand the term, is the use of armed force in a foreign state without that state's permission.<sup>4</sup> The claim-right to non-intervention implied by political legitimacy, then, amounts to a government's claim against the use of armed force within that government's territory and without its permission. In the remainder of this section, I present a "two-pronged" account of legitimacy borrowed from recent work by Arthur Applbaum.<sup>5</sup> My intention is not to mount a comprehensive defense of this account, but instead is simply to motivate what I take to be two necessary conditions any government must satisfy in order to be legitimacy, and so to have a (presumptive) claim against intervention by foreign armed forces. In short, I claim that legitimacy requires that a government must (1) adequately secure its subjects' human rights, and (2) adequately represent their collective political will. I address each condition in turn, and then offer some further clarification about the account and its role in what follows.

The first condition on legitimacy requires that a government adequately secure the human rights of all those subject to its coercive control. The justification for this "prong" of legitimacy starts from the assumption that all human beings have shared interests in security, subsistence, autonomy, and so on, and that relevantly situated moral agents have

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<sup>4</sup> This is a generalization of Holzgrefe's definition of humanitarian intervention; see J.L. Holzgrefe, "The Humanitarian Intervention Debate," in *Humanitarian Intervention*, pp. 15-52, at p. 18.

<sup>5</sup> See Arthur Applbaum, "Forcing a People to Be Free," pp. 359-400. While I adopt the broad outlines of Applbaum's account of legitimacy, I add some matters of substance with which he may or may not agree.

moral duties to protect and promote those interests. Now, there are many different accounts of human rights, but on my view, to say that one's interests ground duties for other moral agents is just to say that one has a right—specifically, a claim right—to the performance of those duties; when that interest is an interest shared by all other human beings, the right in question is a *human* right.<sup>6</sup> Some of the duties grounded on these shared human interests are negative, requiring only that the duty-bearers refrain from actions that would undermine the interest; the other duties are positive, requiring the duty-bearer to act in ways the further the interest. Many of our interests, for example, our interests in social coordination, effective crime prevention, impartial conflict resolution, and collective self-defense, require the implementation of a government and a coercive legal system in order to be protected. This requires relevantly situated moral agents to create and maintain these institutions, and it also requires the institutions themselves—insofar as they are collective agents—to perform the requisite political functions. A government which failed to perform these functions, yet continued to coerce its subjects, would therefore not only be neglecting its negative duties to refrain from harming its subjects, but would also abrogate the positive duties that justify its continued existence. We may therefore say that a government forfeits its right to coerce its subjects free from interference—forfeits its legitimacy—when it fails to adequately secure their human rights.

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<sup>6</sup> I defend this view of human rights in Chapter 1, “A Progressive Theory of Moral and Legal Human Rights.” In contrast to my interest-based theory of human rights, Applbaum appears to adopt a ‘personhood’ account similar to that found in James Griffin, *On Human Rights*, Oxford University Press (2008).

The second condition on legitimacy requires that a government adequately represent the collective political will of the people subject to its coercive control. This condition begins from the assumption that a group's political self-determination—its capacity to make and implement political decisions—is morally valuable in the sense that outside parties have a *prima facie* reason to refrain from interfering. There are a number of reasons to believe that outside parties ought to respect a group's political self-determination in this way. The value of political self-determination might derive from the importance of individual freedom of association, or from the instrumental benefits it provides to members of the group, or from the respect owed to group members by virtue of their collective achievement in acquiring the capacity for self-determination, or even from the idea that self-determining groups attain the same kind of moral standing that we attribute to individual human beings, and that their autonomy is worthy of respect for the same reasons.<sup>7</sup> But genuine political self-determination requires a substantive connection between the government and its people. A government which makes political decisions and then implements those decisions over those subject to its coercive control, and yet does so in ways that fail to reflect or accord with those subjects' collective political will, is not enabling their political self-determination, but undermining it. In other words, genuine political self-determination requires that a government adequately represent the collective political will of the people it governs, and if political self-determination is an important political value, then a government forfeits its right to coerce its subjects free from interference—forfeits its legitimacy—when it fails to do so.

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<sup>7</sup> I present an instrumental argument for the value of political self-determination in Chapter 2, "Self-Determination, Representative Government, and Democracy."

In the next section, I will make heavy weather of the concept of “adequacy” at work in both of these conditions on political legitimacy. But for now, let me qualify the account just given by noting that there are a wide range of alternate justifications for both prongs of legitimacy. For the purposes of this chapter, I intend to remain neutral between competing conceptions of human rights as well as competing justifications for the value of political self-determination. Nor will I take a stand on whether and to what extent the two conditions are normatively related. At some point in the correct lines of justification for human rights and political representation it may turn out that the two converge in a way that prioritizes one of them over the other, or even reduces one to the other, or reduces both of them to some other distinct value. For example, it may be that the only reason legitimacy hinges on a government’s representation of its people’s will is that this is the best way to ensure that their human rights are adequately secure, in which case the second condition would ultimately be a mere corollary to the first. My purpose here is only to motivate both conditions for the sake of the argument to follow.

Moreover, I have not claimed that these conditions, as stated, are jointly *sufficient* for legitimacy. In fact, legitimacy probably depends not only on a government’s performance of these functions vis-à-vis its own subjects, but on its behavior towards foreign governments and their respective subjects as well. Such additional criteria might be tacked on as further necessary conditions, or they might be folded into the two I have set out above, but I will not attempt to answer those questions here. Finally, skeptics may argue that one or the other condition is not in fact a necessary condition on political legitimacy at all. As I said, my intention here is not to mount a comprehensive defense of this account, since that lies far beyond the scope of this paper. While I stand by the



account as presented, it is important to see from the outset how it is contributing to my overarching thesis. Since my argument in subsequent sections will be that non-democratic governments violate *both* of these conditions (or at least *will* violate them, once the standards of adequacy have reach a certain threshold), my case for forcible democratization will be weakened, but not defeated, if it turns out that one of them is not necessary for legitimacy after all.

## 2. ADEQUACY, CONTEXT, AND INTERNATIONAL LAW

What exactly do *adequate* security and representation entail? The problem—and it is a deep one—is that the concept of adequacy is inherently vague: governments can secure their subjects’ human rights to a greater or lesser extent, represent their collective political will more or less completely, but there does not seem to be any way to draw a principled line on either continuum. The illusion of an answer may be proffered by claiming that adequate security for human rights requires that most of a government’s subjects are able to live minimally decent lives, or that adequate representation requires a government to make and implement political decisions that reasonably approximate their people’s will. But these and similar formulations only push the problem of back onto equally vague concepts like “minimal decency” and “reasonable approximation.” In whatever language the appropriate standards of adequacy are couched, they cannot tell us with any precision how much security and representation are necessary for political legitimacy. I do not think the problem of vagueness can be eliminated or solved, and I do not aim to do so here. Instead, I argue that the standards of adequacy necessary for political legitimacy, wherever they happen to be, are *context-sensitive*. I submit that the

standards of adequacy for a government's political legitimacy should change depending on external agents' capacity to affect the degree of security and representation that government's subjects enjoy, whether indirectly, by giving the government sufficient reason to improve its protections for human rights and its representation, or directly, by coercive intervention aimed at reforming or replacing it. Since an external agent's ability to affect the security and representation a government provides its subjects depends on a great many empirical factors, including, especially, the ability to monitor levels of security and representation from outside, the relative difference in coercive power between the agent and the government, and the social and economic conditions that exist within that government's domain, many factors will go into determining where standards of adequacy should be set.

Before making this argument, however, some preliminary remarks are in order. First, we must distinguish two different kinds of standards so as not to conflate them. The question that distinguishes two of them is: adequacy for what? When I address political legitimacy, I am concerned with whether a government's provision of security and representation are adequate enough for it to retain a right to non-intervention against external parties. But it is easy to confuse this kind of standard with a standard of adequacy for moral responsibility, that is, whether the government's provision of security and representation are adequate enough for it to be praiseworthy, or at least not blameworthy, for its actions.<sup>8</sup> Ignorance and an inability to do otherwise are the most

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<sup>8</sup> We could also distinguish between different senses of praise- and blameworthiness; we might be referring to objective standards of moral responsibility, or to the practical and institutional standards by which we might *hold* agents responsible, and therefore liable to punishment (the legal notion of strict liability is an illustration of where these standards may diverge, since its seems to have no moral analogue).

common conditions that can undermine an agent's moral responsibility, and governments are no different.<sup>9</sup> The problem is that these two standards of adequacy—legitimacy-relevant and responsibility-relevant standards—can and do diverge: just because I might not be blameworthy for accidentally forgetting to feed my dog, or for being unable to feed him because all of my dog food was stolen, does not mean that you should not intervene and feed him for me. The two kinds of standards are easy to conflate because they are two forms of agent-evaluation; the difference is in the implications that meeting or failing to meet those standards implies for other agents. As I hope to clarify in what follows, blameworthiness and liability to intervention are largely independent of one another.

Second, the inherent vagueness of adequacy might prompt an interesting, if somewhat too-easy response. On at least one approach to vagueness, vague predicates are simply underspecified: for any given borderline case it is literally neither true nor false that the predicate applies.<sup>10</sup> On this view, there just is no fact of the matter about the adequacy of some levels of security and representation for legitimacy—the question can only be resolved by stipulation. But the inevitable arbitrariness of stipulation opens the door to a host of practical considerations about where to set the standard. Of these, moral considerations should presumably take precedence: all things being equal, we should set standards of adequacy wherever they will best promote justice and human

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<sup>9</sup> For an excellent treatment of moral responsibility, see John Martin Fischer and Mark Ravizza, S.J., *Responsibility and Control: A Theory of Moral Responsibility*, Cambridge University Press (1998).

<sup>10</sup> See Kit Fine, "Vagueness, truth, and logic," *Synthese* 30 (1975), pp. 265-300, David K. Lewis, "General semantics," *Synthese* 22 (1970), pp. 18-67, and (though he rejects the view) Michael Dummett, "Wang's Paradox," *Synthese* 30 (1975), pp. 301. The Fine and Dummett articles are reprinted in *Vagueness: A Reader*, Ed. Rosanna Keefe and Peter Smith, The MIT Press (1997).

well-being. For instance, we might establish low standards when higher standards would license too many interventions, or when interventions are likely to impose heavy moral costs. On the other hand, we might establish high standards when doing so would not license enough interventions, or where interventions would not be likely to impose heavy moral costs. Note that this makes standards of adequacy entirely institutional; except for the limiting cases of genocidal dictatorships on the one hand, and well-ordered utopias on the other, the threshold is entirely a matter of convention. Times and circumstances change, and so does what will be promote justice. If our standards of adequacy are essentially institutional, then we can, and should, change them too.

I find this view attractive, not least because it would make establishing my overarching thesis much easier, but also because I am generally skeptical of the kinds of precise thresholds philosophers often use to demarcate conceptual categories, moral or otherwise, and so am drawn to supervenience independently of my views about legitimacy. But I am also aware that my skepticism about precise thresholds may be due solely to the epistemic barriers to knowing where those thresholds are. Some governments are clearly legitimate and others clearly are not, it seems overly hasty to infer from the wide swath of gray between them that there could not be some specific point at which a government forfeits the right to non-intervention. My argument for the remainder of this section, then, will proceed on the methodological assumption that standards of adequacy are at least *supposed* to carve political legitimacy at some natural joint, however difficult it may be to determine precisely where those joints are. My thesis is that wherever these extant standards of adequacy for security and representation

happen to be, they are not fixed at that point forever, but instead change relative to context.

To set the stage for my argument about the context-sensitivity of political legitimacy, consider the way another set of norms are sensitive to context: the standards we use to evaluate the adequacy of parenting. Not long ago, children were expected to work long hours of hard labor with little or no compensation; they were not taught to read or to write; they were often given barely enough food to survive; they were punished harshly or arbitrarily; and they were occasionally sold into indentured servitude or slavery. However widespread and abhorrent these practices were, the point is that they were, in at least one sense, acceptable given their historical context. First, people were simply ignorant of the harms many of these practices caused to children. Second, some of those practices were unavoidable: where illiteracy and subsistence farming were the norm, education understandably took a back seat to producing enough food to survive. These two considerations might lead us to think that parents were not *blameworthy* for the low quality of their parenting. But another consideration, and the one most relevant to my argument, is that relevantly situated moral third parties were either just as ignorant of the harms these practices caused to children, or lacked the resources, knowledge, and ability to intervene effectively. In short, these practices were acceptable because nobody—neither the parents themselves nor surrounding moral agents—could be expected to do any better.

Now, of course, parents are expected to know that these practices will harm children, and where the level of social and economic development allows, they are expected to ensure that their children are healthier and better educated than in times past.

But even if a particular set of parents were engaging in these practices today because they did *not* know that those practices were harmful, or because they lacked the resources to provide their children with a certain level of education, nutrition, and medical care—that is to say, even if those parents were *blamelessly* harming their children—we would expect third parties to intervene. Teachers, counselors, and doctors are all expected to report suspected negligence or abuse to government officials, after which the government is expected either to force the parents to do a better job nurturing their children, or to remove the children from their care when it becomes clear that they are unable or unwilling to do so. Whether the responsibility-relevant standards for parenting have gone up across the board, or whether some parents can still be excused for their ignorance or lack of resources, the standards by which we evaluate whether relevantly situated third parties should intervene *have* gone up, and they have gone up precisely because those standards ensure better lives for children. It seems reasonable to suppose, and to hope, that this trend will continue into the future: that as our society becomes more knowledgeable about the needs of children, more sensitive to the moral claims those needs make on us, and more capable of providing social guarantees that these needs will be met, the standards for adequate parenting—the standards parents must meet to avoid liability to intervention by third parties—will continue to rise.

I maintain that the same is true of the standards for adequate security and representation necessary for political legitimacy, and for parallel reasons. As our understanding of how governments can best protect their peoples' human rights and represent their peoples' collective political will improves, and as the capacity for effective intervention by relevantly situated external agents increases, the standards of

adequacy for political legitimacy—for a government’s right to non-intervention—should rise. What does this entail in practical terms? If human rights are protections for shared human interests, a rising standard of human rights security would demand that governments gradually broaden the range of interests they protect, broaden the range of threats they protect against, and enhance the protections they provide for particular interests against particular kinds of threats. If genuine political self-determination requires a government to represent the collective political will of its people, a rising standard of representation would demand that governments gradually improve the procedures and institutions they employ to assess and integrate the desires and preferences of their subjects, and to ensure that they are increasingly accountable to the outcome of those procedures, both of which will improve the correspondence between government actions, decisions, and policies, on the one hand, and the people’s collective political will, on the other.

Note that I am leaving open precisely which ‘relevantly situated external agents’ may or ought to intervene in illegitimate governments. In the parenting example, I was able to appeal to background institutions to which private citizens could report suspected violations of acceptable standards of parenting, and which would then assume or delegate responsibility for interventions. In what follows, I will frame the case for forcible democratization in terms that presuppose analogous background institutions of international law—institutions able to assume or delegate responsibility for coercive intervention. But this should not be taken to imply that the existence of such institutions is a strictly necessary condition on the moral permissibility of forcible democratization, or that there are no conditions under which forcible democratization might be justified in

contravention to those institutions if they happened to exist. Consider the question in the context of parenting. Presumably, parents could engage in behavior that endangers their child so quickly and so severely that waiting for the proper authorities to intervene would result in unacceptable harm to the child. Or, similarly, third parties might justifiably believe that the relevant background institutions are so unreliable, unresponsive, or unjust, and so permissibly assume the responsibility for rescuing the child themselves. Or, finally, the relevant background institutions might be as just as is practically possible, and yet still fail to protect the well-being of children to the extent that would be possible given some marginal law-breaking by third parties who intervene where the government cannot.

My purpose here is not to argue that an analogous situations could or could not arise with respect to political legitimacy and intervention in the context of international affairs.<sup>11</sup> I only mean to indicate that it is at least conceivable that a government or coalition of governments could have a liberty, or even an obligation, to engage in illegal intervention against a morally illegitimate regime, regardless of whether or not the background institutions of an international legal system agrees. As I said above, my concern in this paper is with political legitimacy, rather than political authority, much less the authority of the international legal system, so I will remain neutral on the question of illegal intervention. In what follows, I will assume that international legal norms guide and constrain state behavior, at least to some extent, and that this makes the content of internationally recognized norms surrounding non-intervention an important subject of application for my arguments regarding the context-sensitivity of political legitimacy.

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<sup>11</sup> I take up this question in Chapter IV, "Humanitarian Intervention and the Duty to Obey the Law."



### 3. TWO ROADS TO DEMOCRATIC COSMOPOLITANISM

In this section, I present two lines of argument for democratic cosmopolitanism. Democratic cosmopolitanism is the view that democracy is morally superior to all other systems of government and so worth protecting and promoting abroad.<sup>12</sup> Of course, what democratic cosmopolitans mean by democracy will vary from one case to another, but in my view, democracy is essentially a matter of political participation. The more an organization allows those affected by its decisions to participate in the decision-making process, the more democratic it is. An ideally democratic government would allow everyone affected by its decisions to participate in its decision-making to the precise extent that they are affected by those decisions. A comprehensive statement of this model of democracy—let alone a philosophical defense—would require a much fuller discussion of the nature and value of political participation, of the conditions under which participation may be justifiably curtailed, and so on.

But for present purposes, a philosophical account of democracy will be unnecessary, since there is at least broad agreement about the kinds of political institutions democratic government requires in modern large-scale societies. Robert Dahl offers what is perhaps the best and the briefest list of these institutions. Dahl writes that democracy requires “(1) elected officials, (2) free, frequent, and fair elections, (3) freedom of expression, (4) alternative sources of information, (5) associational autonomy, [and] (6) inclusive citizenship.”<sup>13</sup> I will assume here that the relationship between these

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<sup>12</sup> Ian Shapiro. “Containment and Democratic Cosmopolitanism,” available at [http://opus.macmillan.yale.edu/workpaper/pdfs/Containment\\_cosmopolitanism.pdf](http://opus.macmillan.yale.edu/workpaper/pdfs/Containment_cosmopolitanism.pdf)

<sup>13</sup> Robert Dahl. *On Democracy*. Yale University Press (2000), Ch. 8: “What Institutions Does Large-Scale Democracy Require?” pp. 83-99.

institutions and political participation is transparent enough not to warrant explanation.<sup>14</sup> Democratic cosmopolitans may differ as to how best to preserve and promoting democracy around the world, but I will assume that at a bare minimum it is this cluster of institutions they think should be protected and promoted.

### *The Human Rights Argument*

The first line of argument for democratic cosmopolitanism maintains either that there is a human right to democracy itself, or that democracy is an especially important way to secure other human rights. As I explained above, I understand any shared human interest to be a potential ground for a human right, so long as it grounds duties for other moral agents.<sup>15</sup> This first line of argument for democratic cosmopolitanism, then, claims that either there is a shared human interest in democracy, or that other shared interests ground duties for moral agents to create and maintain democratic institutions because of the unique ways in which such institutions protect those interests against standard threats.

I believe that there is a shared human interest in democracy, for both intrinsic and instrumental reasons. The political participation which democracy allows is intrinsically valuable as an important venue for individual autonomy and public self-expression, in the same way as is participation in many other culturally significant aspects of communal life. As Rawls says, “other things being equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the

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<sup>14</sup> I spell out the connection in some detail in Chapter 2, “Self-Determination, Representative Government, and Democracy.”

<sup>15</sup> See also Chapter 1, “A Progressive Theory of Moral and Legal Human Rights.”

more the capacity is realized, or the greater its complexity.”<sup>16</sup> The opportunity to exercise and develop our capacities both for coordination and in coordination with others by engaging in work, education, entertainment and recreation, styles of dress and behavior, are all constitutive aspects of human well-being, and participation in the creation and maintenance of our social and political institutions is no different. Moreover, to be denied the right to participate can seriously affect one’s social status in society. As Thomas Christiano has argued, “To be treated in a way that entirely ignores one’s way of perceiving how one is treated constitutes a serious loss of status for a person in a society. A person whose judgment about that society is never taken seriously by others is treated in effect like a child or a madman.”<sup>17</sup> Political participation is special in that it allows individuals to make their views about society known, and to make them count in the process of political decision-making; to be prevented from such activity can undermine the self-respect of the disenfranchised.<sup>18</sup>

Political participation has instrumental value, as well, because it allows people to protect and advance their other interests during the process of political decision-making.<sup>19</sup> Given that individuals are generally speaking much more familiar with and much more motivated to pursue their own interests than are other people, the kind of participation

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<sup>16</sup> John Rawls, *A Theory of Justice*, Revised Ed. Cambridge, MA: Belknap Press of Harvard University Press (1971, 1999), p. 374.

<sup>17</sup> Thomas Christiano, “The Authority of Democracy,” *The Journal of Political Philosophy* 12/3 (2004), pp. 266–290 at 273.

<sup>18</sup> Cf. Rawls, *Theory of Justice*, p. 386. As Rawls says, “finding our person and deeds appreciated and confirmed by others who are likewise esteemed and their association enjoyed” is one of the key supports for our sense of self-worth.

<sup>19</sup> Perhaps the best discussion of the instrumental value of political participation can be found in Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2<sup>nd</sup> Ed. Princeton University Press (1980, 1996). I develop the argument for the instrumental value of democracy more fully in Chapter 2, “Self-Determination, Representative Government, and Democracy.”

which democratic political institutions allow provides an important mode of social self-defense—without it, those who *are* able to participate in political decision-making can use the government’s coercive resources and legal system to neglect or exploit those who are not with impunity, creating a serious moral hazard. I claim that both the intrinsic and the instrumental value of democracy support the conclusion that there is a shared human interest in democratic institutions, which in turn can ground duties for other moral agents, and so too a human right.

Some may argue that my conception of human rights is too inclusive. Many human rights theorists, for example, believe that the grounds for human rights must be not only universal, but also either of exceptionally high moral priority, non-instrumental, or both. Those who maintain that human rights protect only *urgent* human interests will be quick to argue that it is absurd to think that democratic political participation is urgent in any important sense; after all, many people appear to live perfectly decent lives without ever having or exercising rights to participate in political decisions. What seems most important is that we be able to participate in a sufficiently wide range of meaningful activities, not that this range cover any specific activities. Tradeoffs between different kinds of cultural participation being possible, there is no particular need for specifically *political* participation. To the instrumental argument, opponents of the human right to democracy will insist that only our interests in intrinsically valuable goods can ground human rights—that human rights must be grounded on *essential* human interests, those which are in some sense *necessarily* related to the concept of human welfare, rather than merely contingently.

I think that both attacks on the human right to democracy are seriously flawed, first because I think that political participation is tied to social status in a way that other forms of cultural participation are not, and second, because I see no coherent way to restrict the grounds of human rights to purely intrinsic interests without threatening to collapse numerous particular rights into single, abstract, all encompassing and practically useless “right to well-being.”<sup>20</sup> But rather than make responses to these objections a primary feature of my argument, it will be more useful to explain why even if they do hold, they would not undermine the human rights argument for democratic cosmopolitanism. That is because democratic political institutions provide *stronger* protections against a *wider range* of threats to *uncontroversially* urgent human interests, especially our interests in security and subsistence. There is now a growing body of empirical literature that strongly supports the conclusion that democracies are less likely to engage in state violence against their own subjects, less likely to subject them to famine, less likely to inhibit economic growth, less likely to go to war, and less likely to

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<sup>20</sup> Consider the quite plausible human right to “to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services” (Art. 25, Universal Declaration of Human Rights). The problem with restricting human rights to only intrinsically valuable goods, those *essential* or *conceptually necessary* to human well-being is that on such an account we do not actually have human rights to food, clothing, or housing, since nutrient pills and a persistently temperate climate could conceivably render these things unnecessary to achieving a fairly high standard of living. The interests that remain standing on such an account are so few and abstract as to provide almost no practical guidance to moral agents, which I take to be of primary importance in constructing a list of human rights. To avoid this conclusion, we might relativize the concept of human well-being to particular circumstances, like those found in ordinary or “natural” human conditions, thereby bringing food, clothing and shelter back into the range of essential human interests. But now the scope of human rights depends a great deal on those assumptions; are exploitation and neglect by governments part of the natural human condition? It seems to me that they are, but this would put our interests in protection against them back into the “intrinsic” category, and to draw the line so as to include food and clothing, but exclude democracy seems *ad hoc* to me. My complaint is not that the distinction between intrinsic and instrumental interests cannot be made, but rather that it is irrelevant to delineating an appropriately varied and concrete class of human rights.

experience violent resistance and civil war among their own populations.<sup>21</sup> More and more, it seems that the instrumental value of democracy cannot be denied. Therefore, either democracy is itself a human right or it appears to be an importantly robust protection for other human rights. In both cases, a commitment to the value of individual welfare and autonomy leads us to democratic cosmopolitanism.

### *The Self-Determination Argument*

The second line of argument claims that whether or not democratic governance is necessary for group self-determination, it improves the government's representation of its people, and so constitutes the kind of moral superiority over non-democratic government that should lead us to endorse democratic cosmopolitanism.

As I said above, political self-determination requires the government to represent the collective political will of the people if governs, that is, it requires government actions, decisions, and policies to reflect or accord with the people's will. Some authors, however, are inclined to see self-determination in almost entirely negative terms, emphasizing not a procedural connection between a government and its people, but only the absence of external interferences. This view of self-determination implies that that each political community should determine not only substantive matters of policy for

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<sup>21</sup> Thomas Christiano, "Arguments for a Human Right to Democracy," forthcoming, citing Steven C. Poe, et al., "Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993," *International Studies Quarterly*, 43/2 (June 1999), pp. 291-313; Christian Devenport and David A. Armstrong, II, "Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996," *American Journal of Political Science* 48/3 (July 2004), pp. 538-554; Bruce Bueno de Mesquita, et al., "Thinking inside the Box: A Closer Look at Democracy and Human Rights," *International Studies Quarterly* 49/3 (2005), pp. 439-57; Adam Przeworski, et al., *Democracy and Development: Political Institutions and Well Being in the World 1950-1990*, Cambridge UP, 2000. See also, Amartya Sen, *Development as Freedom*, First Anchor Books (1999).

itself, but should also determine for themselves questions about how their political institutions go about representing the collective political will. As Simon Chesterman writes, “if the right to democratic governance means anything, it is that its content *and the manner of its expression* must be determined by the people in whom it vests.”<sup>22</sup> I do not deny that some groups are entitled to decide for themselves how they will structure their governments. I want only to emphasize that certain forms of government, especially non-democratic forms, exclude large sectors of the population from participating in these decisions. Views that rely too heavily on the strictly negative notion of non-interference, and recognize no positive, procedural criteria on constraints on the concept of group self-determination, thereby risk equivocating between the group doing the determining, and the group being determined.

Consider a dictatorship. The dictator has unilateral control over all government policy, and does not consult with any of her subjects when making decisions. If the dictator and her subjects are considered part of the same group, and if self-determination is construed in a purely negative sense, then this dictatorship counts as a self-determining community as long as it remains free from external interference. But this cannot be what proponents of the value of self-determination have in mind, and examples like this one prompt most people to accept some procedural constraints. Andrew Altman and Christopher Heath Wellman, for instance, argue that “there is nothing wrong, in principle, with the establishment and indefinite perpetuation of [a] monarchy... as long as the constitution allows the people to force at any point a binding referendum on whether

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<sup>22</sup> Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford University Press (2001), p. 110.

democracy should replace [an] existing monarchical arrangement.”<sup>23</sup> They go on to explain that the reason for this (admittedly austere) resort to political participation is to ensure that future generations are not bound by the decisions of past group members: so long as a society retains the freedom to collectively opt out of its current institutions, nothing more than non-intervention is required for that society to be self-determining in the relevant sense.

Note how much weight this argument places on the force the people are able to bring to bear on government decisions as a result of a constitutionally binding referendum. Altman and Wellman’s argument is plausible only insofar as we assume that such constitutional arrangements can remain effective during a prolonged concentration of political power in the hands of a monarch. But this assumption gives the game away: we might as well *stipulate* that the monarch and her descendants will remain responsive to the will of their people in perpetuity, thereby negating the need even for the opportunity to vote them out of office. Of course a people is self-determining when those in power are antecedently *guaranteed* to represent their political will—and this is precisely what such stipulations are intended to accomplish in the abstract and relatively uncluttered world of thought experiments. The point to see here is that in the real world, different political institutions are differentially likely to protect political self-determination, and historically, non-democratic governments have not represented their people’s will very well for very long.

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<sup>23</sup> Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice*, Oxford University Press (2009), p. 28.



John Rawls resorts to a similar invention in order to defend the potential legitimacy of non-democratic societies; he imagines a people organized into a ‘decent consultation hierarchy’:

In political decisions a decent consultation hierarchy allows an opportunity for different voices to be heard—[though] not, to be sure, in a way allowed by democratic institutions... Persons as members of associations, corporations, and estates have the right at some point in the procedure of consultation (often at the stage of selecting a group’s representatives) to express political dissent, and the government has an obligation to take a group’s dissent seriously and to give a conscientious reply.<sup>24</sup>

Again, I grant that such arrangements are conceivable. It might even be argued that some actual societies have come close to approximating this kind of political system. But the democratic cosmopolitan response is not that a decent hierarchical society *cannot* accurately represent the collective political will of its people; instead, the much more plausible objection is that these institutions will not represent the people’s will as well as they might, and to the extent that they do, it is likely a temporary condition. What incentive is there, after all, for the government to “take a group’s dissent seriously and to give a conscientious reply” if group members have no formally protected political influence? To his credit, Rawls acknowledges that the plausibility of such benevolent non-democratic governments is open to empirical challenge. “Should the facts of history, supported by the reasoning of political and social thought, show that hierarchical regimes are always, or nearly always, oppressive and deny human rights,” he writes, “the case for liberal democracy is made.”<sup>25</sup> Still, the democratic cosmopolitan is not wedded to the

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<sup>24</sup> Rawls, *Law of Peoples*, p. 72

<sup>25</sup> *Ibid*, p. 79

claim that non-democratic governments necessarily violate their people's human rights or flout their collective political will. But all things being equal, democratic governments are better stewards and better representatives than alternative political systems.

Now, there is a very minimal sense in which Altman and Wellman's monarchy and Rawls's decent hierarchical society *are* democratic, because neither entirely eliminates the people's ability to participate effectively. But presumably neither view is sufficiently sanguine about democracy to be labeled democratic cosmopolitanism, and the difference appears to be a matter of degree: the less inclusive and secure a people's ability effectively to participate in political decision-making, the more likely the government is to misrepresent their political will. By protecting broad and effective political participation through elected officials, free, frequent, and fair elections, freedom of expression, alternative sources of information, associational autonomy, and inclusive citizenship, democratic institutions ensure that government policy represents the collective will, and thereby contributes to more genuine group self-determination. Insofar as we are committed to the value of political self-determination, and insofar as we are convinced that democratic institutions contribute to more genuinely representative government, we have good reason to adopt democratic cosmopolitanism. If individual welfare and autonomy or political self-determination are universally valuable—and they are—then the preceding arguments provide good reason to adopt democratic cosmopolitanism.

#### 4. THE CASE FOR FORCIBLE DEMOCRATIZATION

The in-principle argument for forcible democratization can now be stated in its most general form. A government is legitimate just when it has a right to coerce its subjects free from outside interference; forfeiting this right renders a government liable to coercive intervention. In order to be legitimate, a government must (1) adequately secure the human rights of its subjects, and (2) adequately represent their collective political will. But as the ability of relevantly situated external parties to stage effective interventions increases—that is to say, as the international legal system and its members becomes more able to encourage or coerce governments to provide better security and better representation for its subjects—the standards for adequate security and representation should rise. If democratic cosmopolitanism is correct, and democracies are morally superior to non-democracies along both of these dimensions, it follows that regardless of what present standards of adequacy require, we can expect that at some point in the future a government's right to non-intervention will depend on its maintaining democratic political institutions. Failure to do so will at that time provide a (defeasible) justification for pro-democratic intervention, up to and including the use of armed force.

To be clear, my primary conclusion here is institutional: that assuming present trends continue, international legal standards for the right to non-intervention will eventually include democratic criteria. But the same argument could be run under pre-institutional assumptions. As matters currently stand, international law exists and all moral agents, state actors especially, must take the moral importance of those laws into account. But if there were no background institutions, the question about the justifiability

of forcible democratization would remain. Consider again the analogy to parenting, only this time imagine that families exist in something like a Lockean state of nature, in which individual agents still bear moral duties to one another, but lack the capacity for social coordination that governments provide. Could relevantly situated third parties intervene in order to halt or avert negligent or abusive parenting? I think so, but as Locke points out, moral agents acting independently to correct wrongs are likely to make serious errors about whether a wrong has actually been committed, and about the appropriate course of action to take in cases where one has been.<sup>26</sup> Given their lack of impartiality and their propensity to “overpunish,” there is a strong presumption against intervention. The same holds true for forcible democratization. Although standards for (moral, rather than institutional or legal) political legitimacy would still be sensitive to context, since capacities for effective third party intervention could and would change over time, the absence of relatively impartial international institutions would impose a much higher epistemic burden on would-be democratizers.<sup>27</sup> Knowing that they are very likely to make mistakes about when forcible democratization is justified, and be prone to exploiting their intervention and occupation for their own ends, they would have to recognize a similarly strong presumption against intervention.

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<sup>26</sup> John Locke, *Two Treatises of Government*. Peter Laslett (ed.), Cambridge: Cambridge University Press (1689, 2004): “[I]t is unreasonable for Men to be Judges in their own Cases...Self-love will make Men partial to themselves and their Friends...Ill Nature, Passion and Revenge will carry them too far in punishing others...I easily grant, that *Civil Government* is the proper Remedy for the Inconveniences of the State of Nature, which must certainly be Great.” (Ch. 2, Sec. 13).

<sup>27</sup> For a thorough discussion of the risks of abuse associated with the use of democratization as a justification for military intervention and a reasoned argument for possible institutional remedies, see Buchanan, “Institutionalizing the Just War,” pp. 28-36.

Another point of clarification: the defeasibility qualification mentioned in the conclusion of my general argument warrants special attention. Traditional just war theory typically invokes a list of conditions that need to be satisfied in order for a war to be just. Although the length and contents of this list vary widely from one theorist to another, the three most common conditions are just cause, necessity, and proportionality.<sup>28</sup> In recognizing illegitimate governments as liable to coercive intervention, and then spelling out my account of legitimacy, I believe I have offered what amounts to a formal theory of ‘just cause,’ that is, the range of considerations which can provide a positive rationale for armed intervention. But necessity and proportionality remain important limiting conditions on the use of force. The necessity condition—which in the *ad bellum* context is often referred to as the condition of ‘last resort’—holds that if a just cause can be achieved by less morally costly means than armed intervention, it should be. The proportionality condition, on the other hand, holds that the (expected) moral costs of an intervention must not exceed its (expected) moral benefits. I endorse both conditions, and agree that failure to satisfy either would override an otherwise justified instance of forcible democratization. In the remainder of the paper I will consider the two most prominent and compelling objections against forcible democratization: the Infeasibility and Inconsistency Objections.

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<sup>28</sup> There is a vast literature on the *ad bellum* conditions on justified war. The definitive modern treatment of just war theory is Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3<sup>rd</sup> Ed., Basic Books (1977). Other prominent contemporary expressions include A.J. Coates, *The Ethics of War*, Manchester University Press (1997) and Larry May, *Aggression and Crimes Against Peace*, supra. Several valuable anthologies have also been published, especially *Ethics and Foreign Intervention*, Chatterjee and Scheid (eds.), Cambridge University Press (2003); *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Holzgrefe and Keohane (eds.), Cambridge University Press (2003); and *War: Essays in Political Philosophy*, Larry May and Emily Crookston (eds.), Cambridge University Press (2008). A comprehensive theory of forcible democratization would of course require a more detailed engagement with the assumptions and conditions of just war theory, but I do not have the space to pursue these matters here.

### *The Infeasibility Objection*

The Infeasibility Objection is the most common worry about forcible democratization, especially in light of the recent interventions, occupations, and attempts at reconstruction in Iraq and Afghanistan. The objection holds that forcible democratization is impermissible because it simply does not work, or at any rate, cannot work without violating the proportionality condition.<sup>29</sup> James Bohman deploys a typical, though unusually explicit version of the objection. He writes,

Whether or not a nondemocracy could become democratic by force is something for which there is a great deal of historical evidence. In general, the answer is clearly no, given failure in every case after World War II except for small and very brief wars with Grenada and Panama. In the case of larger states closer in size to Iraq and Afghanistan there is a resounding history of failure. War is not an effective means to achieving democracy...<sup>30</sup>

There are three reasons I am not persuaded by Bohman's allegedly categorical rejection of the feasibility of forcible democratization. First, note that he is emphasizing cases that support his position while making light of cases that do not. It is not clear why Bohman has ruled out of court the post-war democratization of the Axis powers, especially since

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<sup>29</sup> For a good overview of the practical problems confronting any kind of regime change, see Reisman, "Why Regime Change Is (Almost Always) a Bad Idea." Reisman's worries center on two issues: the advent and increasing prevalence and effectiveness of asymmetric warfare, and the gradual erosion of domestic support for lengthy foreign occupations. These are serious worries indeed, but successful instances of forcible democratization demonstrate that they are not always decisive. For more empirically sophisticated treatments, see also Dobbins, Jones, Crane, and DeGrasse, *The Beginner's Guide to Nation-Building*, RAND Corporation (2007), available at [[http://www.rand.org/pubs/monographs/2007/RAND\\_MG557.pdf](http://www.rand.org/pubs/monographs/2007/RAND_MG557.pdf)] and Karin Von Hippel, *Democracy by Force: US Military Intervention in the Post-Cold War World*, Cambridge University Press (2000). Buchanan identifies a range of factors relevant to the difficulty and cost of democratic regime change: whether the target government is native or foreign in origin; whether there is a recent history of democratic institutions, whether the target government has "suffered total defeat in a war caused by its own aggression," and the levels of economic development and education. Buchanan, "Institutionalizing the Just War," p. 34.

<sup>30</sup> Bohman. "War and Democracy," p. 108.

these countries had populations reasonably close in number to those of present day Afghanistan and Iraq during and after World War II. Nor is it clear why Bohman thinks the small size of Grenada and Panama renders their successful democratization irrelevant to his conclusion. Does Bohman take the US interventions in Iraq and Afghanistan to be typical cases of forcible democratization? Which other interventions is he including, and more importantly, excluding from his sample? I do not mean to deny that the history of forcible democratization contains more failures than successes. But the data appear to be less one-sided than Bohman admits.

Second, like many other opponents of forcible democratization, Bohman appears to assume that past failures were more or less inevitable specifically because they were attempts at democratization. This assumption ignores the very real possibility that some of these failures had more to do with specific, avoidable errors made by intervening forces, rather than with their ultimate goals, or with the characteristics of the society they were attempting to democratize.<sup>31</sup> Moreover, no proponent of forcible democratization would claim that military force is “*the* proper means to the end of establishing a democracy.”<sup>32</sup> The fact that heart surgery is not always an effective way to cure heart disease does not imply that heart surgery is never permissible—presumably, the permissibility of heart surgery will depend on whether alternatives are available and the likelihood of error; once medical science comes to a better understanding of which

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<sup>31</sup> Underfunding and underdeployment are especially relevant here. The difference in initial and sustained money and manpower that went into (successful) post-WWII reconstruction and the (mostly unsuccessful) attempts at regime change during the 1980s and 90s is staggering. Iraq and Afghanistan, on the other hand, whose combined price tags are now on the order of a trillion dollars, remain plagued by insurgency and instability. See n. 29 above.

<sup>32</sup> Bohman, “War and Democracy,” p. 108; my emphasis.

techniques are best applied in which cases, the frequency of botched surgeries will decrease (in fact, it already has). Likewise, as social scientific knowledge about the social, political, and economic preconditions for democracy improves, and as the institutional context surrounding international relations and armed intervention changes, forcible democratization may become more likely to succeed, and therefore a more morally viable option.

Third, once we turn our attention away from blatantly disastrous examples of forcible democratization, a range of plausible scenarios emerge in which its chances for success seem much higher than those the United States had with Iraq and Afghanistan. It stands to reason that forcible democratization would be much easier, or at least much less risky, where large proportion of the target government's subjects are known to favor democratization, as when formerly democratic governments are overthrown by a military coup, or where democratic revolutionaries have already begun the attempt to overthrow an authoritarian regime. Moreover, forcible democratization need not be identified with large-scale land-invasions, and the ensuing occupation and political reconstruction of foreign states. It also includes pro-democratic interventions on a smaller scale—training and arming revolutionaries, conducting espionage and intelligence gathering missions, and engaging in covert efforts to destabilize trenchantly non-democratic governments. Finally, abstracting away from the necessity and proportionality considerations surrounding specific kinds and instances of forcible democratization, it is worth pointing out that the standards of adequacy may vary from one region to another. Although I have been discussing legitimacy as if all countries would be held to the same standard, this need not be the case. The international legal system might be well advised to recognize



that what counts as adequate security and representation in developed Western governments may not yet apply to the governments of more impoverished, or at any rate less socially and economically developed parts of the world.

### *The Inconsistency Objection*

The Inconsistency Objection holds that forcible democratization is internally inconsistent. Forcible democratization, the objection runs, is undemocratic, because it betrays the very values it intends to promote. There are several different versions of the Inconsistency Objection, and I will address each of them in turn. The first version of the objection holds that mobilization for military intervention inevitably leads democratic states to abridge their democratic institutions, suspend important democratic freedoms, and to adopt undemocratic forms of hierarchy. In Bohman's words, "The institutional capability to wage war increases along with the heightening of executive and administrative powers within the state on matters of security, which often bypass democratic mechanisms."<sup>33</sup> While I concede that this is a possible, perhaps even likely outcome of forcible democratization, I find this version of the objection highly implausible. First, not only do the kinds of small-scale interventions outlined above seem not to require much in the way of military mobilization, there is no reason to think that undemocratic compromises are inevitable, even for full-scale invasions aimed at occupation and reconstruction. Second, supposing for the sake of argument that such compromises were inevitable, there is no reason to think that those compromises would be permanent—democracies might mobilize for war, sacrificing some of their subjects' democratic freedoms in the process,

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<sup>33</sup> Bohman, "War and Democracy," p. 114.

and then return to normal once the war was over. Third, even if such compromises were inevitably permanent (which they clearly are not), there is no reason to think that sacrificing *some* democratic freedoms for the sake of correcting a foreign population's lack of *all* democratic freedoms would be undemocratic. It is perfectly consistent with democratic cosmopolitanism to claim that democratization has diminishing returns: the first steps towards democratic ideals are more important than the last.

The second version of the Inconsistency Objection holds that forcible democratization is undemocratic because it does not permit the intended targets to participate in the decision about whether or not to intervene. Put another way, it violates what I take to be a fundamental tenet of democratic theory, the Principle of Affected Interests, which holds that all those affected—or at any rate, coerced—by a government's decisions have the right to participate in them. But there is something strange about this objection's reliance on the Principle of Affected Interests. First, although the moral relevance of the principle is intuitively obvious, it is unclear why other considerations—such as whether observing that principle will allow others to violate it in perpetuity, for example—could not sometimes override it. Second, it is unclear whether the Principle of Affected Interests should apply to those who cannot participate because they are being prevented from doing so by forces beyond the decision-maker's control. A parallel argument should make these two problems clear. Imagine coming across a stranger who is bound, gagged, and locked in a cellar. On the strong interpretation of the Principle of Affected Interests this version of the Inconsistency Objection requires, the stranger should not be released, because she cannot participate in the decision about whether to release her. This is patently absurd, but if proponents of this version of the objection

were to weaken the principle to avoid that conclusion, that is, if they were to concede that decisions which affect those who cannot participate in the decision-making process need not respect the status quo, then that principle could no longer function in the sense the objection requires.

The third and most promising version of the Inconsistency Objection draws again on the value of political self-determination, and exploits a dialectical instability between the two conditions on political legitimacy I have relied on throughout this chapter. The question this version of the objection poses is what to say about what I will call *profoundly illiberal peoples*. Profoundly illiberal peoples are those whose individual members are strongly and unanimously opposed to democratic political institutions, whether because they are deeply committed to a religious ideal that requires that political decisions be made by a theocratic states, because they place great value of an enduring tradition of monarchy that is built into the very foundation of their culture, or for some other reason. Supposing for the sake of argument that the government of such a group would be able and willing to secure all of their human rights *except* their human right to democracy, how could a democratic cosmopolitan consistently claim, even in principle, that imposing democracy on such a group does not violate their right to political self-determination? If self-determination requires a government to adequately represent the collective political will of the people it governs, and if the collective political will of a given people is adamantly opposed to democracy, a government consisting of democratic institutions would, *ipso facto*, render it unrepresentative and therefore illegitimate.

I find this objection compelling. However, it is both weaker and more limited than it appears. The first thing to note is that it relies on extraordinarily strong

assumptions. On the one hand, the security and representation non-democratic governments provide to their people are unstable, for the reasons discussed above. The lack of accountability such governments enjoy creates the opportunity for them to exploit or neglect their people's interests and preferences, and repeated iterations of political decision-making will multiply the likelihood that individual officials or governments as a whole will capitalize on their unilateral control for reasons of self-interest. On the other hand, the assumption of unanimity requires a degree of homogeneity that does not exist in the real world, and the further from anti-democratic consensus the people's collective will gets, the less representative its governing theocracy or monarchy would become. Of course, these practical worries merely demonstrate that forcible democratization would be internally consistent in the real world. As a matter of pure theory, the objection remains standing. Even when considered as a thought experiment, however, this version of the Inconsistency Objection has a very limited scope: it is not forcible democratization itself that is internally inconsistent, as with the other version of the objection, but only the forcible democratization of profoundly illiberal peoples. There is nothing inconsistent about imposing democratic institutions where non-democracies fail to adequately secure human rights, or where the people they govern are divided in their preferences for democratic government.

But a democratic cosmopolitan response could go even further, pending a complete account of how the two conditions for political legitimacy are normatively related. As I said above, at some point in the correct lines of justification for human rights and political representation it may turn out that one is more important than the other, or even subsumes it. I do not intend to take a stand on this question here, but it is

worth pointing out that if the value of political self-determination is reducible to its instrumental value for protecting human rights, or for promoting human welfare more generally, then the risk that the non-democratic government of a profoundly illiberal people might begin to fall seriously behind what a democratic government could accomplish with respect to human rights and human welfare might trump the non-democratic preferences of that people. This is in no uncertain terms an argument for paternalism, writ both large and small. It tells not only a representative government, but also the individual subjects of that government, that they simply do not know what is good for them, at least when it comes to political systems. But the argument is paternalistic implies neither that it is inconsistent, nor that it is unsound. I will remain agnostic about whether such an argument could succeed, because it would require a much more comprehensive treatment of the relationship between human rights, human welfare, and democracy than I can provide here, or have even attempted to provide in the preceding chapters. Nevertheless, this response is available to the democratic cosmopolitan.

Finally, it is worth pointing out that even if this in-principle argument for forcibly democratizing profoundly illiberal people could succeed, there are very strong infeasibility reasons why it would not be a good idea to actually try it. First, the attempt would likely result in unacceptably high casualties, violating the proportionality condition on justified military intervention (it is unlikely that anything less than full-scale invasion and occupation could impose democratic institutions on a profoundly illiberal people). Second, even supposing democratic institutions could be imposed on profoundly illiberal peoples, those very institutions would allow them to revert to their

preferred system of government in short order, the only difference being that they would afterwards have good reason to despise their departed democratizers. The only way to ensure that such a people remained under a democratic government would be to effectively annex them, and I will assume here that the *prima facie* moral reasons against annexation and colonization are sufficient to put this option beyond the pale. So if forcible democratization is not strictly inconsistent in the small range of hypothetical cases this version of the Inconsistency Objection holds that it is, democratic cosmopolitans should at least agree that imposing democratic institutions on profoundly illiberal people is generally a bad idea, if only for practical reasons.

#### CONCLUSION

In the end, the permissibility of pro-democratic intervention depends on the standards of adequate human rights security and political representation which can be reasonably expected and reliably enforced by the international legal system and its members. Necessity and proportionality considerations will play a pivotal role not only in assessing the permissibility of particular instances of forcible democratization, but in determining the relevant standards for international law. I have said next to nothing about what these standards should demand at present, and I concede that it is quite possible that the international legal system will never be able to enforce democratic norms of legitimacy with the same consistency and decisiveness with which the United States government would enforce them on its own constituent states, were one of them to be overthrown in a coup, or even democratically abolished and replaced with a religious theocracy. On the other hand, it is also quite possible that the international legal system is not nearly as

aggressive as it could be in promoting democracy in regions where it might take root. I will leave these matters to others. My thesis here has been conditional: if the international legal system or other relevantly situated agents acquire the ability to enforce higher standards of adequate security and representation, they should do so. Democratic cosmopolitanism gives us reason to think that if and when these standards continue to rise, they should eventually demand democratic governance. At that time, failure to create or maintain effective democratic political institutions will provide a (defeasible) justification for pro-democratic intervention, up to and including the use of force.

## CHAPTER IV

### HUMANITARIAN INTERVENTION AND THE DUTY TO OBEY THE LAW

The American intervention and occupation of Iraq was (and continues to be) condemned for its violation of international law. For some this condemnation was based on a merely prudential concern: non-compliance with international law would incur the disapproval of allies and erode respect for a mutually beneficial but fragile body of norms. For others, the law codified, or perhaps simply coincided with what morality required the United States to do anyway, namely, to refrain from unnecessary warfare. But for many if not most of these critics, the observation that the US was engaging in an illegal intervention took on a moral force of its own: the US was *bound* by international law.<sup>1</sup> It had a duty to *obey*, and shirking that duty was wrong in and of itself, regardless of whatever other prudential or moral considerations counted against the intervention. The implications of this view are striking, since it seems to provide grounds for condemning even interventions whose humanitarian credentials are far less suspect than those of the war in Iraq.

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<sup>1</sup> Morality and legality are often run together in public discourse, so it can be difficult to infer the philosophical commitments of any given condemnation of the war in Iraq. But the moral force behind invocations of illegality is often unmistakable in tone. To cite just one example: in January and February of 2003, the Eastern Division of the American Philosophical Association passed a resolution, by an overwhelming margin, that expressed “serious doubts about the morality, legality and prudence of a war against Iraq led by the United States. Both just war theory and international law say that states may resort to war only in self-defense. Iraq has attacked neither the United States nor any other nation, and claims that it is about to do so are not credible.” Notwithstanding the resolution’s plain misunderstanding of both just war theory and international law, any straightforward reading of text has it presenting the war’s illegality as an independent reason for condemnation. My aim in what follows is to explain why I think such claims are either negligible or false.



Whether there is a general duty to obey the law is a central preoccupation in political philosophy, and is possibly its oldest ground of contention. But the question has almost always been approached within the domestic context, even in the contemporary literature. The debate focuses on whether individual citizens or subjects have a duty to obey the laws of their states, and, with few exceptions, neglects the parallel question of whether states and other international actors have a duty to obey international law.<sup>2</sup> The core philosophical problem concerns the twin concepts of political authority and political obligation, and while I cannot add much to the traditional debate about their nature and justification, I do aim to say something useful—and surprising—about their application in the international context, and more specifically, about their application to humanitarian intervention and democratic regime change.

In this paper, I argue that even if there is a duty to obey international law—which is by no means certain, as I explain below—that duty is likely to make no difference to practical deliberation about the moral permissibility of intervention and regime change. In short, I claim that a duty to obey international law would be so weak as to be utterly negligible, next to the other moral considerations that ought to play a role in those deliberations. Critics of the American regime change in Iraq may be right about its imprudence and its immorality, but they are incorrect if they think that its illegality was itself a moral reason to condemn it.

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<sup>2</sup> Notable exceptions include Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford University Press (2004), Ch. 7, David Lefkowitz, “The Principle of Fairness and States’ Duty to Obey International Law,” (forthcoming); and Eric A Posner, “Do States Have a Moral Obligation to Obey International Law?,” *Stanford Law Review* 55 (2003), p. 1901 *ff.*

My argument proceeds as follows. In the first section, I describe a tension between the moral and legal norms surrounding the international use of force, focusing in particular on how current international law prohibits morally justified humanitarian interventions, and on why such a conflict is inevitable. I use this tension to refine my guiding question—whether there is a duty to obey international law—into a more philosophically profitable inquiry: would states have a duty to obey a just and legitimate international legal system’s prohibition against an otherwise justifiable humanitarian intervention? In the next section, I transpose the language of “a duty to obey the law” into the more precise and technical language of political authority and political obligation, and then use that language to explicate the differences between Authoritarian, Statist, Anarchist, and Abolitionist positions on political power and coercion (I co-opt these titles as terms of art; they are distinct from—though related to—their colloquial counterparts). In the following two sections, I advance a destructive dilemma against the view that the duty to obey international law is relevant to practical deliberation about humanitarian intervention: either anarchism or authoritarianism is the correct view about the authority of international law. If anarchism is correct, then there is no duty to obey the international law, and, *ipso facto*, no duty to obey international laws regarding intervention and regime change. On the other hand, if authoritarianism is correct, then that duty is trivial enough to be irrelevant to deliberation about high-stakes international activity, including humanitarian intervention. In the final section, I explain why democratic regime change may be a special case: the duty to obey international law may in fact be strong enough to render at least one kind of democratic regime change morally impermissible.

## 1. ILLEGAL HUMANITARIAN INTERVENTION

Humanitarian intervention is the use of armed force to halt or prevent human rights violations in a foreign state without that state's permission.<sup>3</sup> The consensus view among most political philosophers is that humanitarian interventions can be morally justified, provided that they are a necessary and proportionate means to halting or averting massive, widespread, and severe human rights violations.<sup>4</sup> But this view is in clear tension with standard interpretations of international law, most conspicuously with Article 2(4) of the United Nations Charter. Article 2(4) mandates that all Member states "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The only notable standing exception to this general prohibition in the Charter is the use of force in individual or collective self-defense, a right protected in Article 51, which has been construed so as to allow for limited interventions into belligerent states when necessary. Since humanitarian interventions by definition aim to defend the human rights of foreign people against internal attackers, it is fairly clearly ruled out by any straightforward interpretation of international law.<sup>5</sup>

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<sup>3</sup> J.L. Holzgrefe, "The Humanitarian Intervention Debate," in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Holzgrefe and Keohane (eds.), Cambridge University Press (2003), pp. 15-52 at p. 18.

<sup>4</sup> For commentary on this consensus, see Andrew Altman and Christopher H. Wellman, "From Humanitarian Intervention to Assassination: Human Rights and Political Violence," *Ethics* 118 (2008), pp. 228-257 and Michael Blake, "Reciprocity, stability, and intervention: the ethics of disequilibrium," in *Ethics and Foreign Intervention*, Chatterjee and Scheid (eds.), Cambridge University Press (2003), pp. 53-71.

<sup>5</sup> Which is not to say that no one has sought ways around these straightforward interpretations; in general, the first move in arguments for the legality of humanitarian intervention is to claim that the meaning of Article 2(4) is not fixed. I cannot pursue the matter in more detail here. The volume of legal scholarship surrounding the question of humanitarian intervention is enormous; for entries into the subject, see

*Ad hoc* exceptions to the general prohibition against the use of international force may occur under the authorization of the Security Council.<sup>6</sup> But historically, that body has been reluctant to recognize domestic human rights violations as threats to the peace, as breaches of the peace, or as acts of aggression, any of which would legally warrant a Security Council response. That reluctance may change in light of a recently published and widely discussed ICISS report entitled “The Responsibility to Protect” (R2P), a non-statutory document outlining appropriate responses to genocide, ethnic cleansing, and other crimes against humanity.<sup>7</sup> While formally recognized by the UN General Assembly, it is not clear whether and to what extent R2P will influence Security Council recommendations and actions.<sup>8</sup> In any case, what the UK Foreign and Commonwealth Office said of the matter remains true: “the best that can be said for humanitarian intervention is that it is not unambiguously illegal.”<sup>9</sup>

The tension between the moral consensus on humanitarian intervention on the one hand, and its straightforward illegality, on the other, threatens a dangerous dilemma for those who believe that there is a moral duty to obey the law. If this duty applies not only

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Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law*, Oxford University Press (2001), esp. Ch. 2; Christine Gray, *International Law and the Use of Force*, 2<sup>nd</sup> Ed. Oxford University Press (2004), esp. Ch. 2; Larry May, *Aggression and Crimes Against Peace*, Cambridge University Press (2008), Ch. 14; and Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3<sup>rd</sup> Ed. Ardsley, NY: Transnational Publishers (2005).

<sup>6</sup> United Nations Charter, Chapter VII.

<sup>7</sup> “Responsibility to Protect,” International Commission on Intervention and State Sovereignty, (2001).

<sup>8</sup> See Alex J. Bellamy, “The Responsibility to Protect—Five Years On,” *Ethics & International Affairs* 24/2 (2010), p. 143-69 and Carsten Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?” *American Journal of International Law* 101/1 (January 2007), pp. 99-120.

<sup>9</sup> “Is Intervention Ever Justified?” Planning Staff of the Foreign and Commonwealth Office (1984), Foreign Policy Document No. 148, cited in Chesterman, *Just War or Just Peace*, p. 86.

to the private subjects of domestic legal system, but also to states and other subjects of international law, then it seems as though it ought to play some role in moral deliberation about whether a state should engage in humanitarian interventions. Indeed, if states have a moral duty to obey international law, then that seems to amount to a presumptive case against even those humanitarian interventions which would otherwise be morally justified. For all practical intents, all that may be needed to dodge the dilemma is a plausible argument that the present international legal system is illegitimate, or if it is legitimate, that the prohibition on the use of force for humanitarian purposes is unjust. For instance, one might argue that Article 2(4) is too blunt an instrument, and that the UN should recognize a legal right to unilateral humanitarian intervention on the part of interested states.<sup>10</sup> Alternately, one might argue that such a right would be unnecessary if the Security Council were a more effective instrument of international justice, that is, less driven by the geopolitical interests of its key players, and more willing to authorize the use of force to halt or prevent human rights abuses where appropriate. These are sensible responses to the current practical moral dilemma facing state actors with the capacity to stage effective humanitarian interventions. But they sidestep the deeper philosophical issue about what to do in cases where a just and legitimate international legal system nevertheless prohibits what would otherwise be a morally justifiable intervention.

To prevent such evasive maneuvers, I will pose the question in a starker, more direct fashion, by assuming, for the sake of argument, a reformed international legal system, one which has corrected whichever of these defects we find to be a compelling

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<sup>10</sup> For criticism, see Allen Buchanan, "From Nuremberg to Kosovo: the Morality of Illegal Legal Reform," *Ethics* 111 (2001), pp. 673–704; for a response, see David Lefkowitz, "On Moral Arguments Against a Legal Right to Unilateral Humanitarian Intervention," *Public Affairs Quarterly* 20/2 (April 2006), pp. 115-34.

reason to reject the justice and legitimacy of contemporary international law. It is neither methodologically useful nor descriptively plausible to posit a legal system whose laws are so just that they perfectly align with what states' independent moral duties would be in each and every scenario. An international legal system idealized to that extent would be useless to a philosophical inquiry about the duty to obey international law, since if the laws of that system never contradicted the independent demands of morality, it would be impossible to determine whether that duty was doing any explanatory or justificatory work. But such a system would be descriptively implausible in any case, since conflict between legal and moral norms is inevitable. Legal systems must of practical necessity establish and maintain relatively simple rules and procedures incapable of mirroring morality in every detail—stark and enduring lines need to be drawn, formal procedures need to be followed, and as a result, discrepancies will arise. Some lack of fit between legal and moral norms surrounding humanitarian intervention is therefore likely to remain, even in a just and fully legitimate international legal system. We do not need a detailed picture of such a system to see why: on the one hand, general laws may prohibit otherwise morally permissible—or even obligatory—interventions, and on the other hand, adjudicative political bodies tasked with making exceptions to those general laws may still make serious errors about whether a case warrants exception or not.

We are now left with the following question: would states have a duty to obey international laws pertaining to humanitarian intervention under a just and fully legitimate international legal system? Or, to put this in terms echoing those used above, would the illegality of a particular humanitarian intervention provide an independent moral reason not to intervene? I will argue that there is no duty to obey the international

law of humanitarian intervention even under such idealized conditions, or that even if there were, that duty would be so insignificant as to be totally irrelevant to practical moral deliberation about humanitarian intervention. Moreover, it seems clear that even if states did have what I claim would be a rather trivial duty to obey the law under such an idealized international legal system, that duty would be far weaker under international law as we know it today. It is important to say from the outset that my view is not as radical as it may first appear. While I do believe that any alleged duty to obey international law would be too weak to play any significant role in moral deliberation about humanitarian intervention, I do not infer from this that international law itself should be ignored. There may be strong reasons to cooperate with an ideal or a non-ideal international legal system and to comply with its commands, though these reasons are highly contingent on the vagaries of particular circumstances. What these reasons are, and how they differ from a general duty to obey the law, will be explained below. But before that, we must first situate our guiding question within the philosophical debate surrounding the duty to obey the law—a debate which centers on the closely related concepts of political authority and political obligation.

## 2. POLITICAL AUTHORITY AND POLITICAL OBLIGATION

Authority is a form of discretionary control over another agent's moral obligations—it is a Hohfeldian moral power to waive, alter, or impose those obligations by mere command.<sup>11</sup> It is important to understand the difference between discretionary control

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<sup>11</sup> My concern here is with political authority, the species of moral authority governments are said to possess. Political authority must be distinguished from legal authority, which I understand to be a purely positive notion—an agent has legal authority when she can exercise discretionary control over another's *legal* obligations, which may or may not accord with moral obligations. Political authority as I

and incidental control. Incidental control is the ability to alter another agent's moral obligations by changing that agent's environment or circumstances in morally salient ways. For instance, I could cause other agents to have an obligation to stop their cars simply by stepping into oncoming traffic, but I would not thereby exercise authority over them.<sup>12</sup> Discretionary control, on the other hand, is direct. An authority's control is unmediated by environment or circumstances—the authority's will, and the communication of that will to the subject, is sufficient to bring about the desired change in obligations.

Another way to highlight the characteristic feature of authority is to draw a distinction between obedience and compliance. Compliance means merely acting in accordance with a command, but does not imply that the command was or should have been a reason for acting in that way. Obedience is a form of compliance in which one acts in accordance with a command *because that action was commanded*. Obedience does not rule out the possibility that there may be other reasons, perhaps sufficient on their own, to act in accordance with the command. But to obey is to take the command as reason, in itself, for compliance. To have a duty to obey means, in effect, that one has a duty to allow the authority's decision about how one should act count against (though not

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understand it here must also be distinguished from what is often called *de facto* political authority, that is, a government's ability to exercise coercive control over the inhabitants of a given territory. I will use the terms "duty" and "obligation" interchangeably throughout the remainder of the chapter.

<sup>12</sup> Estlund offers another enlightening example: "If a petulant child of a brutal dictator whimsically tells the minister to leave the palace, and the dictator will unleash brutality on the masses out of anger if the minister disobeys, then the child's command has created a moral requirement to obey. The child has the moral power to require action, but it sounds wrong to say that she has authority. One way of capturing this is to point out that in this case, when the minister considers what to do, the fact that the child commanded him to leave has no weight of its own...In cases of authority the fact that it was commanded is itself a moral reason for action." David Estlund, *Democratic Authority*, Princeton University Press (2008), p. 118.



necessarily override) whatever independent prudential or moral reasons he has for non-compliance. The duty to obey an authority's commands, and therefore authority itself, is nearly always constrained in two important ways. First, authority and the duty to obey are domain specific: they apply only within a more or less constrained scope or jurisdiction. Except in cases of *absolute* authority—the kind of authority only God could hold—the duty to obey does not imply that subjects must forfeit their discretion in every aspect of life, which is just to say that subjects generally retain some significant sphere of personal liberty. Second, the duty to obey is *prima facie* in the sense that conflicting moral considerations can override the authority's command, even when that command remains within the appropriate domain. An authority's commands may have a kind of presumptive force, but once countervailing considerations become weighty enough they can override a subject's duty to obey. All the same, within these two constraints a subject's duty to obey is content-independent: so long as the authority's command is within the appropriate scope, and is not overridden by conflicting moral considerations, the content of that command does not matter to whether the subject ought to comply.

Political authority is authority held by a political entity over its subjects. (Paradigmatically, the debate over political authority focuses on states, though in subsequent sections I will be addressing the political authority of the international legal system.) Given the relationship between authority and the duty to obey, it is no surprise that those who believe that states can or do in fact wield authority over their subjects—as well as their opponents—often frame their arguments in terms of political obligations. Political obligations are simply moral obligations imposed by, and (usually) owed to, political entities such as state, governments, legal systems, by virtue of their authority.

Since political authority and political obligation are logical correlates, proponents of the state's (potential for) discretionary control over their subjects' moral obligations are for that reason wedded to (the possibility of) a general, domain-specific, prima facie, content-independent duty to obey the law. That is to say, debates over political authority, political obligation, and the duty to obey the law are, by definition if not by recognized convention, debates about the same thing. For the sake of expository convenience, I will make use of all three terms.

But before moving on, it is necessary to clear up two kinds of confusion relating to the distinction between authority and legitimacy. The first kind of confusion is conceptual. As I will deploy the term here, "legitimacy" means that a political entity is at liberty to coerce subjects into compliance with a body of rules.<sup>13</sup> Following Wellman, I understand coercion broadly and descriptively as a way to influence an agent's behavior by imposing disincentives on undesired actions: "A coerces B when A pressures B to act in a manner X by attaching an additional cost to B's doing not X."<sup>14</sup> Although state coercion is often backed by force, coercion does not necessarily imply the threat or use of physical compulsion or violence. Legitimate states, or more generally and more precisely, legitimate legal systems are morally justified in coercing their subjects, given certain constraints on the exercise of that coercion. On this understanding of legitimacy, it is clearly distinct from authority. Authority implies that an agent has a power to waive, alter, or impose moral obligations on another, while legitimacy implies that an agent is at

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<sup>13</sup> See Allen Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20/4 (2006), pp. 405-37. et al. I explain in Chapter 3 that legitimacy is actually both a liberty to coerce and a claim against interference with that coercion. I disregard the non-interference claim because it is not relevant in this context.

<sup>14</sup> Christopher H. Wellman, *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press (2005), p.133.

liberty to impose sanctions on another in order to induce compliance with a body of rules. The two are not only conceptually, but also logically independent: the possession of authority does not entail legitimacy, and vice versa.

The second kind of confusion is terminological, and results from an ambiguity in the word “anarchism.” Colloquially, it refers to the rejection of coercive political power; anarchists, in the popular vernacular, advocate for the abolition of political states. On the analysis of authority and legitimacy set out above, this would commit anarchists to the view that states are universally illegitimate. But owing to A. John Simmons’s highly influential distinction between political and philosophical anarchism, the matter is somewhat more complicated.<sup>15</sup> Political anarchism is the familiar form of anarchism—the abolitionist variety. Philosophical anarchism, however, refers not to the view that states are not, or cannot be legitimate, but rather to the view that states do not or cannot have authority. Curiously, prior to the introduction of this term, it appears that neither side of the debate over political authority had a widely-accepted title; the opposite view, that some states do or could have authority, still doesn’t. I therefore propose the following taxonomy:

- i. *Statism* - Political entities are or can be legitimate; that is, they are or can be at liberty to coerce their subjects into compliance with a body of rules.

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<sup>15</sup> See A. John Simmons, *Moral Principles and Political Obligations*, Princeton University Press (1979).

- ii. *Abolitionism* - Political entities are not or cannot be legitimate, and their exercise of coercive control is morally unjustified; this amounts to the view that political entities should be abolished (political anarchism).
  
- iii. *Authoritarianism* - Political entities do or can have authority over their subjects; that is, they do or can have discretionary control over their subjects' moral obligations.
  
- iv. *Anarchism* - Political entities do not or cannot have authority over their subjects, that is, they have no discretionary control over their subjects' moral obligations (philosophical anarchism).

Proponents of the duty to obey the law may balk at being called authoritarians. While I do believe that this is the most apt term for the view, because of its clear reference to the central philosophical concept at issue, I do not deny that it may appear tendentious to those who would prefer not to be saddled with a label that colloquially implies endorsement of oppressive and dictatorial regimes. Needless to say, this implication is no part of how I intend to use the term. However, it should also be noted that anarchism, in light of its association with violence and political disorder, suffers from symmetrical and equally negative connotations, so use of the word “authoritarian” is not exactly unfair. It is tempting to further justify these stipulative titles by spelling out how they relate to their more dramatic colloquial meanings—there are interesting connections to be

drawn—but I will instead return to the debate between authoritarians and anarchists and its application to international law and humanitarian intervention.

Before moving on I should explain my use of the cumbersome “do or can,” “are or can,” “do not or cannot,” and “are not or cannot” formulations in my taxonomy. The problem stems from a divergence in different kinds of arguments for the relevant positions. For instance, there are two kinds of argument for anarchism, *a priori* and *a posteriori*.<sup>16</sup> On the one hand, an anarchist might argue on *a priori* grounds that political authority cannot exist, either because the concept is incoherent, or because to the extent that it is coherent, it is categorically overridden by conflicting moral considerations. Robert Paul Wolff, for example, argues that any general obligation to obey the law would conflict with the more important moral obligation to retain one’s autonomy—we literally cannot forfeit or alienate the moral responsibility that comes along with our capacity for choice.<sup>17</sup> Consent theorists like Simmons, on the other hand, believe that such a transfer is not impossible: we can and may voluntarily grant another agent discretionary normative control over our obligations, thereby giving them authority over us. However, Simmons and like-minded anarchists believe that the kind of forfeiture required for authority simply does not happen between states and their subjects.

An analogy might be drawn to a view in the morality of war known as contingent pacifism. Contingent pacifists, as opposed to pacifists *simpliciter*, believe that just wars are possible, but that the conditions which would need to be met for one to occur never

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<sup>16</sup> A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge University Press (2001), pp. 104-106.

<sup>17</sup> Robert Paul Wolff, *In Defense of Anarchy*, 3<sup>rd</sup> Ed. Berkeley: University of California Press (1970, 1998).

actually obtain in the real world (at least, not under the conditions in which wars are fought today).<sup>18</sup> Contingent pacifists are pacifists, but only because of considerations external to their theory of just war. In the same way, *a posteriori* arguments for anarchism generate a kind of contingent anarchism—they are anarchists, but only by historical or sociological accident. Because the distinction between *a priori* anarchism (and the remaining concepts in the taxonomy) and *a posteriori* (contingent) anarchism is irrelevant to my argument here, I have chosen to stick with the simpler taxonomy and retain the “do or can” terminology in order to avoid the complications of adding an unnecessary third dimension to my analysis. I turn now to the debate between anarchism and authoritarianism as it applies to the international legal system.

### 3. INTERNATIONAL ANARCHISM

Philosophical anarchism, when applied to the international legal system, maintains that states (or any other international actors, for that matter) have no general duty to obey international law. I call this view “international anarchism,” and its denial “international authoritarianism.” While it is tempting to believe that the truth of philosophical anarchism at the level of domestic institutions would suggest that international anarchism is probably also true, that inference is not so easy to draw as it may first appear. Authoritarians have proffered many theories of political authority and obligation, and at least some of the objections philosophical anarchists have brought against those theories may depend on features unique to domestic legal systems and their individual human

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<sup>18</sup> See Larry May, *Aggression and Crimes Against Peace*, Cambridge University Press (2008), Ch. 2, “Grotius and Contingent Pacifism,” pp. 25-45.

subjects. But it is not my purpose here to mount a defense of either ordinary philosophical or of international anarchism. I aim only to examine the implications of international anarchism for moral deliberation about humanitarian intervention.

International anarchists, as I said, hold that there is no general duty on the part of states to obey international law. But this should not be taken to imply that international anarchists believe states are entitled to disregard the commands of an international legal system entirely. In fact, philosophical anarchists are typically concerned to show that there are often a great many reasons to comply with the law other than a general duty to obey it. Below, I present a brief list of potential reasons for compliance with domestic and international legal systems. The items on this list are not intended to be exhaustive, and careful readers will note some overlap between them. My point here is not to set out a rigorous taxonomy, but only to show how many and how compelling this class of reasons can be.

1. Prudential reasons. Legal requirements often overlap with self-interest. Some of this overlap may be coincidental, but more often it is the deliberate result of legal sanctions: the prospect of state punishment provides subjects with strong incentives to comply with the law.
2. *In se* moral reasons. Legal requirements also often overlap with morality. That is to say, the actions required or prohibited by law are often morally obligatory or morally wrong in and of themselves. (Again, this correlation is usually not

coincidental; coercive legal systems are established and maintained, in large part, to “give force” to independent moral requirements.)

3. **Advisory reasons.** Legal requirements often indicate the existence of independent prudential or moral reasons of which subjects may not have been aware. First, laws may alert us to danger, as when a “No Smoking” sign is posted in an area containing flammable materials. Second, the law may serve an adjudicative function: its relative impartiality can serve as a useful corrective to our individual biases and prejudices.
4. **Example-setting reasons.** In some contexts, non-compliance with legal requirements could make non-compliance by others more likely, which in turn threatens to undermine a valuable social norm. Example-setting reasons carry special weight in the formative stages of a given norm—a necessary or beneficial norm may not take hold if too many subjects fail to comply early on.
5. **Habit-forming reasons.** In the same way that our non-compliance can make others more likely not to comply with the law, it can also make future non-compliance easier for us. Given our other reasons for compliance, we often have a secondary reason to inculcate a habit of compliance.



6. Expectation-based reasons. Others may expect us to comply with legal requirements and will plan and act on those expectations. By failing to comply, we can frustrate those expectations and in so doing cause considerable harm.

Some clarification is in order with regard to expectation-based reasons. It may appear to some that expectation-based reasons can imbue a legal system with authority, because by exercising its coercive capacities to enforce a new law, the system thereby changes the incentive structure within which subjects act, and, in turn, changes the expectations they have for each other's behavior. Since others' expectations about our behavior can impose moral obligations on us, the state does indeed have a form of control over those obligations. The crucial point to see here, however, is that this control is incidental, not discretionary. The state can only influence the content of our expectation-based reasons for compliance by changing our external environment or circumstances, rather than by mere command. Thus, our expectation-based reasons ground neither political authority nor political obligations.

It is also worth pointing out that the existence of prudential, in se, advisory, example-setting, habit-forming, and expectation-based reasons could be taken as an inductive, demotivational argument against authoritarianism. The intuition that animates the Authoritarian project is that most of us, most of the time, should not break the law. From here, they proceed to the natural assumption that a general moral duty to obey the law would elegantly account for this intuition. One way to attack this inference to the best explanation is by showing that there is a better explanation—one that accounts for the same intuition via more obvious factors, and without any reference to a duty to obey

the law. In the same way that a more comprehensive understanding of biology, neurology, and cognitive science have made recourse to an immaterial soul unnecessary to explanations of human behavior, so too might a more comprehensive understanding of the reasons we have for complying with the law tend to erode what reason we had for positing a duty to obey the law in the first place. Of course, many philosophers remain committed to the existence of political authority and obligations for other reasons, so it is still incumbent on anarchists to continue refuting candidate theories. Nevertheless, insofar as what motivates the search for such theories is the sense that we usually should not break the laws of just and legitimate regimes, to that extent the foregoing list of reasons for compliance weakens the authoritarian position.

International anarchists need not claim that the commands of an international legal system are irrelevant to moral deliberation about humanitarian intervention. In fact, it is perfectly compatible with anarchism to argue that since the constraints effective legal systems place on our behavior promote the overall good, and since non-compliance with those constraints can weaken them, we often have good reason to comply. However, the importance of the distinction between the claim that there are reasons for compliance, on the one hand, and a duty to obey, on the other, should not be understated. In short, international anarchism holds that there is no general moral presumption against law-breaking. All of the reasons for compliance mentioned above are heavily contingent on the vagaries of particular circumstances in a way that a duty to obey the law is not. Since international anarchism denies that there is a general duty to obey the laws of even a just and legitimate international legal system, the fact that such a system would legally prohibit this or that humanitarian intervention is not, in itself, a reason to refrain from that

intervention. In no case is the difficult business of weighing the morally relevant reasons for compliance against those for non-compliance obviated by some overarching duty to obey. In the next section, I argue that even if there is such a duty, and even if it does have some moral weight for state actors, it is probably still too weak to have much if any effect on the correct outcome of moral decisions about humanitarian intervention.

#### 4. INTERNATIONAL AUTHORITARIANISM

As I mentioned above, on plausible theories of political authority, the duty subjects have to obey the law is *prima facie*—it can be overridden by conflicting moral considerations. It would be absurd to claim that the duty to obey the law is absolute, and that there are no circumstances under which another duty could be sufficiently important to override it. Thus, the frequency or likelihood that we must actually obey the law depends crucially on how strong that duty is, relative to other duties. But authoritarians have thus far been concerned primarily with justifying the existence of a duty to obey the law than with its relative strength. This comes as no surprise, given the lack of any systematic way to determine the relative strength of our moral obligations. The only way I know of to estimate the strength of a particular duty is by testing our intuitions about pair-wise comparisons between it and the duties with which it could come into conflict. However, I believe it is fairly easy, in the domestic case, to arrive at an approximation of an upper limit for the strength of the duty to obey the law. As in all such intuition-testing procedures, I will proceed by way of a thought experiment.

Suppose Alice is subject to a legitimate government that enforces just laws, and so has a duty to obey. Among those laws is a law that prohibits swimming at a given

beach (the rationale for this law does not matter, so long as it turns out the government is in fact justified in enforcing it). One day, while walking along the beach, Alice sees a stranger drowning about a hundred meters offshore. Alice is aware of the prohibition against swimming, but she also knows that she could rescue the drowning stranger by swimming out to him and pulling him to shore. Is Alice's *prima facie* duty to obey the law stronger than her *prima facie* duty to save the stranger's life? I think not, and I suspect most people would agree. Of course, in order to placate those who disagree, we could manipulate the example in order to place Alice's duty to obey the law in conflict with her duty to save many more people—ten, fifty, one hundred—but note that the plausibility of the alleged duty to obey the law decreases as its strength increases, that is, as it comes closer to being absolute. At some point, our political obligations can be overridden, even easily overridden, by conflicting moral obligations.

This is not meant to imply that the duty to obey domestic laws, if it exists, is always trivial. We are not often faced with choices in which the moral stakes are as high as they were in the example above. If there is a duty to obey the law, that duty is probably still relevant to moral deliberation in a wide range of circumstances. Had Alice's reason for swimming at the beach been to salvage her drifting canoe, or perhaps even to save the life her drowning pet dog, she may not have been morally justified in breaking the law. However, when the stakes are high enough, the *prima facie* nature of political obligations renders them liable to being overridden. My purpose in the foregoing example was merely to indicate the approximate strength of those obligations. When human lives do not hang in the balance, there is room for reasonable disagreement, but, to me at least, it seems to make a fetish of obedience to claim that we must obey the

law even at the expense of human lives. In any case, I will assume that the duty to obey the just laws of a legitimate domestic government can be overridden by the duty to save a stranger's life, if the only way to do so is by breaking the law.

Now, political philosophers are accustomed to a kind of analogical reasoning that takes interpersonal morality and the domestic affairs of states to be a model for international relations. Walzer calls this the "domestic analogy," and its implicit comparison between international and domestic societies might easily lead us to believe that the duty to obey domestic law somehow "scales up" when we turn to the duty to obey international law.<sup>19</sup> In this mode, it is easy to take for granted the thought that the strength of a state's duty to obey international law is greater than an individual's duty to obey domestic law in proportion to the relative moral importance of state actions in international affairs. After all, states can deprive thousands of people of food, send thousands of people to war, save thousands of people from natural disasters by their actions, while only in the rarest of cases can individuals even hope to affect such momentous changes. Therefore, the argument goes, since the consequences of state action usually carry with them a greater potential for both harm and benefit than do the actions of private individuals, their duty to obey the laws that regulate and coordinate their behavior is correspondingly stronger.

But this argument is mistaken. It is mistaken, because it conflates reasons for mere compliance with reasons for genuine obedience. As I said above, the distinction between the two is that with obedience one's reason for compliance with a command is

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<sup>19</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3<sup>rd</sup> Ed., Basic Books (1977, 2000).

*that it was commanded*—the state’s authority lends moral force to the command independent of the prudential, in se, advisory, example-setting, habit-forming, and expectation-based reasons subjects may (or may not) have to comply. To be sure, international actors have those reasons to comply, and those reasons may often be stronger at the international level, owing to the high moral stakes of state action. But this has no bearing on the strength of the state’s duty to obey international law. In fact, it is not clear what factors could increase or decrease the strength of any subject’s duty to obey the just laws of any legitimate legal system, since authoritarians have tended to focus on establishing the existence of political obligations rather than on what factors contribute to their relative strength. But without such an account, it is difficult to see any principled reason to believe that saving a single human life is any less of a reason for states to break international law than it is a reason for individuals to break domestic laws.

If this is correct, then states’ duties to obey international law do indeed begin to look rather trivial, precisely because the consequences of state action can affect momentous change. As in the case of individual action, when the stakes are high enough, political obligations are easily overridden. But if the strength of the duty to obey the law does not increase when we move from the domestic to the international arena, then the stakes are high very often, and the triviality of international political obligations is especially perspicuous in the case of humanitarian intervention. Again, the received view is that humanitarian interventions are only justified when they aim to halt or prevent serious human rights abuses—usually, this will imply that they are only justified when they aim to halt or prevent the loss of many (often very many) human lives. What this means is that any case in which humanitarian intervention is justified for strictly moral

reasons (i.e., reasons which do not include the duty to obey the law) is also likely to be a case in which the duty to obey international law is easily overridden. In short, the duty to obey international law, if such a duty exists, is practically irrelevant to moral deliberation about humanitarian intervention.

It bears repeating that the irrelevance of the duty to obey international law to practical deliberation about humanitarian intervention does not imply that international law is itself irrelevant. Again, there may be compelling prudential, *in se*, advisory, example-setting, habit-forming, and expectation-based reasons to comply with laws that prohibit humanitarian intervention. But if the duty to obey international law is as trivial as my argument seems to show, then the difference between international anarchists and authoritarians on this score is minimal: in both cases whether a state ought to obey international law is highly contingent on the circumstances of particular cases. Since the aforementioned reasons may fail to apply in a wide range of cases, even international authoritarians must admit that morally justified illegal humanitarian interventions may not be anywhere near as rare as the law would make them. In the next section, I apply these conclusions to a special class of humanitarian interventions: those which aim to establish or restore democratic political institutions abroad.

##### 5. ILLEGAL DEMOCRATIC REGIME CHANGE

There is no duty to obey international law, or if there is, it should probably be a negligible factor in moral deliberation about humanitarian intervention. That conclusion was based on the premise that humanitarian interventions paradigmatically aim to halt or prevent massive violations of basic human rights. But not all interventions, not even all

humanitarian interventions, have such unambiguously just causes. Democratic regime change of the sort attempted in Iraq is one especially salient example. But in order to assess whether and to what extent a duty to obey international law should play a role in moral deliberation about democratic regime change, we must distinguish between two different ways the use of armed force may be used to establish or restore democratic political institutions in a foreign country. Specifically, as Alyssa Bernstein writes,

...it is important to distinguish clearly the question of whether forcible intervention can be justified on the ground that its primary aim is to transform a [non-democratic] society into a democratic society, from the related question of whether in rebuilding an invaded country it is permissible or even mandatory to establish a democratic political system.<sup>20</sup>

Call a democratic regime change in which the intervention itself is defended on the grounds that it will establish or restore democracy in the target state “ad bellum” regime change; call a democratic regime change in which the intervention is defended on other humanitarian grounds (halting or preventing genocide, ethnic cleansing, etc.), but in which specifically democratic political reconstruction is thought to be either permissible or obligatory, “post bellum” regime change. I will address each kind in turn.

Among legal scholars who believe that humanitarian intervention is consistent with current international law—by far a minority view—are a considerably smaller number who believe that democratization provides valid legal grounds for armed intervention. The general argument for this position usually begins by noting that the UN’s Universal Declaration of Human Rights recognizes what amounts to a legal human

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<sup>20</sup> Alyssa Bernstein, “A Human Right to Democracy? Legitimacy and Intervention,” in *Rawls’s Law of Peoples: A Realistic Utopia*, Rex Martin & David A. Reidy, eds. Malden, MA: Blackwell Publishing, 2007, pp. 278-98, at 92.



right to democracy, and then arguing that intervention in order to halt or prevent violations of this right is either consistent with the purpose of the UN and with the legal obligations imposed by Article 2(4), or that state practice has generated a new customary norm that supersedes Charter statutes. The first argument is weak because, as with the legal argument for humanitarian intervention in general, it depends on a convoluted interpretation of Article 2(4). The second argument is weak because only very rarely have states made any reference to democratization in their formal legal justifications for armed intervention, and in some cases have explicitly acknowledged and rejected the possibility of such justifications.<sup>21</sup> In any case, I assume that ad bellum democratic regime change is illegal under current international law, and could be under a less controversially just and legitimate international legal system as well.

In the present context, then, there are two questions for ad bellum regime change. On the one hand is the question of whether it could be morally justified independent of legal considerations; on the other hand is the question of whether, if it could be morally justified, whether the reasons that count in its favor would be strong enough to override the alleged duty to obey (idealized) international law. There is reasonable disagreement on both points. Elsewhere, I have gone some distance towards showing that there are conditions under which ad bellum democratic regime change can be morally justified.<sup>22</sup> My basic strategy was to argue, first, that a state's right to non-intervention requires that it (1) adequately protect the human rights of its people, and (2) adequately represent their

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<sup>21</sup> See Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law*, Oxford University Press (2001), esp. pp. 88-111; Christine Gray, *International Law and the Use of Force*, 2<sup>nd</sup> Ed. Oxford University Press (2004), pp. 49-52

<sup>22</sup> See Chapter III, "Democratic Cosmopolitanism and Forcible Democratization."

collective political will. Next, I argue that, at least under some conditions, satisfying those requirements depends on having functioning democratic political institutions. One way to see this is as an argument that ad bellum regime change is an instance of humanitarian intervention, but one that aims to halt or protect rights violations which do not fall within the scope of the “massive, widespread, and severe” human rights violations, whose halting and prevention the consensus view takes to be a paradigm case of just cause for intervention. In addition to placing the threshold for intervention-justifying rights violations much higher than I do, detractors from this view object that democratic regime change is likely to be infeasible and is inherently inconsistent with democratic principles. I do not have the space here to mount a defense of ad bellum democratic regime change, so I will instead merely suppose for the sake of argument that I am correct, in order to move on to what those who disagree should see as a welcome concession.

Unlike paradigmatic cases of morally justified but illegal humanitarian interventions, ad bellum regime change does not necessarily aim to save many lives—in fact, it does not necessarily aim to save any lives at all. Since non-democratic states can and do often refrain from killing or enslaving their subjects, the moral case for ad bellum regime change does not require such serious wrongs in order to be justified. Of course, large-scale armed interventions of the kind able to defeat, occupy, and reconstruct a foreign state are likely to result in many casualties, so “pure” cases of ad bellum democratization—cases in which democratization functions as the sole just cause, and is not buttressed by concurrent just causes like halting genocide—are likely to be disproportionate in any case. But even if proportionate ad bellum democratizations are

possible, the reasons that count in their favor are much weaker than those that count in favor of interventions with more urgent humanitarian causes. I argued above for the provisional conclusion that the moral significance of saving a single human life indicated a kind of ceiling for the strength of any plausible duty to obey the law. It is perfectly consistent with that view to believe that *only* saving one or more lives can justify breaking the just laws of a legitimate legal system. Since I have no decisive grounds on which to argue against such a position, I must concede that the duty to obey international law could preclude (pre-institutionally justified) ad bellum regime changes.

But note well: this concession is only necessary if, first, international authoritarianism is correct, and second, the strength of the duty to obey the law falls just short of the strength of moral reasons for life-saving instances of lawbreaking. International anarchism, which remains a highly plausible alternative to authoritarianism, would undermine the case for obedience to international law from the outset. And even if it did not, the strength of the duty to obey domestic and international laws may be considerably weaker than I have posited for the sake of argument. Moreover, as I and others have argued elsewhere, one of the virtues of democratic political institutions is their empirical correlation with a relatively low incidence of other, more serious human rights violations. Democracies are less likely to engage in state violence against their own subjects, less likely to subject them to famine, less likely to go to war, and less likely to experience violent resistance and civil war among their own populations—all factors that will make a difference to the survival of many people. If the existence of a duty to obey international law is in question, if the strength of such a duty could easily be weaker than I have assumed, and if the imposition of democracy has the potential to save many

lives, then my concession to authority-based arguments against illegal, pure, ad bellum democratization seems to be considerably less damaging than it might at first appear.

Post bellum democratization avoids many of the justificatory barriers that ad bellum democratization encounters, since it seems clear that the same causes which uncontroversially justify humanitarian intervention from a moral perspective can also, in some circumstances, justify the occupation and political reconstruction of the target state.<sup>23</sup> This is so primarily where the target state has institutionalized norms that make genocide and other atrocities more likely, or even promote them. All the same, post bellum democratization is also generally illegal under international law, though customary norms since the reconstruction of the Axis powers following World War II have weakened these prohibitions somewhat, as the 2001 R2P document demonstrates.<sup>24</sup> The clearest statutory example of the prohibition against so-called “transformative occupations” appears in Article 43 of the Hague Regulations, which, though commanding occupiers to secure public order and safety, mandates that they do so “while respecting, unless absolutely prevented, the laws in force in the country.” The relevant questions here concern whether the duty to obey international law may be overridden by the moral case for replacing the target state’s government where this is not “absolutely” necessary, and whether democratization should be the presumptive mode of political reconstruction.

The normative landscape surrounding the first question is similar to that surrounding illegal ad bellum democratization, in that it presupposes answers to questions about whether there is a duty to obey international law, the strength of that duty, and the

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<sup>23</sup> See, e.g., Gary J. Bass, “Jus Post Bellum,” *Philosophy & Public Affairs* 32/4 (2004), pp. 384-412.

<sup>24</sup> R2P, Sec. 5: “The Responsibility to Rebuild.”

relative strength of the countervailing moral reasons in favor of democratization. Again, since I have offered no decisive arguments about these matters, I cannot rule out the possibility that the duty to obey outweighs the positive case for unnecessary democratization, though neither can we rule out the contrary. The second question is more interesting, because present international law gives little to no guidance regarding how occupiers ought to reconstruct an occupied society when reconstruction really is necessary. But this also serves to put the question beyond the scope of this paper, since there is no reason to think that democratization would or should be illegal under those conditions. The *prima facie* moral argument, of course, would be that in the absence of a native government able to adequately represent the political will of the occupied people, occupiers may, within certain limits, permissibly use their own discretion in deciding how to proceed with reconstruction. Perhaps the moral case for democratization even imposes on them an obligation to democratize the occupied society, if at all possible, as Bernstein suggests. But again, this is a subject for another time. In this section, I have endeavored only to map out the conceptual and normative space in which arguments for and against the duty to obey international law regarding democratic regime change must take shape.

#### CONCLUSION

To recapitulate, states may or may not have a duty to obey international law, even assuming a drastically more just and legitimate international legal system than exists at present. If there is no duty to obey international law, then contrary to many critics of the war in Iraq, the illegality of humanitarian intervention and democratic regime change is

not, in itself, a moral reason to refrain from or condemn such actions. On the other hand, if there is a duty to obey international law, there is little reason to suspect that it carries enough moral force to override the positive case for humanitarian interventions which are justifiable on independent moral grounds, which renders that duty practically irrelevant to moral deliberation about whether to intervene on humanitarian grounds. The relevance of a duty to obey international law with regard to democratic regime change is less clear, since ad bellum regime change need not aim to halt or prevent very urgent human rights abuses, and since post bellum regime change is neither clearly illegal, nor even objectionable in the obvious ways that would provide good reasons for making it illegal. Nevertheless, laws against democratic regime change may still plausibly be thought liable to disobedience for the same reasons as are laws against humanitarian intervention. In the next chapter, I address the question of how occupiers—including those engaged in regime change—ought to treat the occupied people.

## CHAPTER V

### JUS POST BELLUM AND THE PRINCIPLE OF AFFECTED INTERESTS

*Jus post bellum* is an aspect of just war theory that addresses normative questions surrounding the aftermath of military conflict. Given that wars often end in occupation, the treatment of an occupied people is of central concern to this line of inquiry. Recently, several authors have suggested a number of plausible guidelines surrounding the need for self-restraint, reconciliation, and reconstruction when dealing with post-conflict societies; however, they implicitly assume a highly undemocratic conception of occupation. As traditionally conceived, occupation involves an occupier's unilateral exercise of coercive control over the inhabitants of the occupied territory.<sup>1</sup> This control ought to be benign, of course, but the fact is that an occupied people generally has no influence over how it is treated, and so falls easy prey to neglect, abuse, and exploitation. The traditional conception encourages us to think that this 'democracy deficit' is an inherent feature of military occupation, and is therefore simply another item on the long list of necessary evils that attend even the most justified of wars.

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<sup>1</sup> To my knowledge, traditional occupation is universally assumed in the legal and philosophical literature on *jus post bellum*; see, e.g., Arthur Applbaum, "Forcing a People to Be Free," *Philosophy & Public Affairs* 35/4 (Fall 2007), pp. 359-400, esp. 380-86; Gary J. Bass, "Jus Post Bellum," *Philosophy & Public Affairs* 32/4 (2004), pp. 384-412; Allen Buchanan, "Institutionalizing the Just War," *Philosophy & Public Affairs* 34/1 (2006), pp. 2-38; Simon Chesterman, "Occupation as Liberation: International Humanitarian Law and Regime Change," *Ethics and International Affairs* 18/3 (2004), pp. 51-64; Robert E. Keohane, "Political authority after intervention: gradations in sovereignty," in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Holzgrefe & Keohane (eds.), Cambridge University Press (2004), pp. 275-98; Brian Orend, "Justice After War," *Ethics and International Affairs* 16/1 (2002), pp. 43-56; John Rawls, *The Law of Peoples*, Cambridge: Harvard University Press (1999); Stefano Recchia, "Just and Unjust Postwar Reconstruction: How Much External Interference Can Be Justified?" *Ethics & International Affairs* 32/2 (2009), pp. 165-187; and Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3<sup>rd</sup> Ed., Basic Books (1977, 2000).

But military occupation is not inherently undemocratic. An occupied people can and should have influence over their own occupation, particularly when the occupier aims at political transformation and reconstruction. In this paper, I argue that an occupied people has a right to effective representation in the occupying government. I set the stage for my argument by examining moral and practical problems inherent to traditional occupation as it is embodied in international law and contemporary just war theory. Next, I motivate a basic tenet of democratic theory known as the Principle of Affected Interests, and show how even a tightly restricted version of this principle supports the aforementioned right. Finally, using the recent occupation of Iraq as a case study, I address a range of foreseeable objections.

## 1. TRADITIONAL OCCUPATION

A military occupation occurs when a hostile army acquires coercive control over some or all of a foreign state's territory and inhabitants.<sup>2</sup> The coercive control characteristic of what I call 'traditional occupation' has three important features. First, the occupier's control is *direct*, in the sense that it is not mediated by the occupied people's government. Occupying forces always retain *de facto* political authority over and within the occupied territory, though they may sometimes co-opt local security and administrative divisions instead of ignoring, suppressing, or dissolving them. Second, an occupier's control is *temporary*. That occupation is not (or is not intended to be) permanent is what distinguishes it from annexation and colonization. Finally, and most importantly for our purposes, traditional occupation is *unilateral*. Implicit in this conception of occupation is

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<sup>2</sup> Cf. Hague Regulations 1907, Art. 42.



the thought that the occupied people have no effective influence over how the occupiers exercise their coercive control. It is this last feature of traditional occupation that makes it undemocratic; the primary aim of this paper is to explain why and how it should be changed.<sup>3</sup> Before moving on, however, it will be useful to point out the extent to which international law, as well as recent philosophical work on *jus post bellum*, have implicitly or explicitly recognized and sought to address the potential problems posed by unilateral military occupation without abandoning the traditional model.<sup>4</sup>

The international law of occupation imposes a number of legal obligations on occupying forces, and some of these pertain directly to the treatment of occupied peoples.<sup>5</sup> The Hague Regulations require occupiers to “restore, and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the laws in force in the country.”<sup>6</sup> Subsequent articles direct them to respect local cultural and religious institutions, and to refrain from annexation, pillage, and collective punishment. The Geneva Conventions elaborate on these obligations by providing more specific guidance regarding the treatment of children and the provision of food and medical

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<sup>3</sup> The term ‘unilateral’ is ambiguous in the context of international affairs. In some contexts it refers to a single state acting alone (as opposed to multilateral occupations), and in others it refers to a state or a coalition of states acting in the absence of UN authorization. Though the argument I present here has interesting implications for both multilateral occupations and for the international law of occupation, I do not have the space to address these complications in much detail here. In this paper, I use the term ‘unilateral’ to refer to an *unreciprocated* or *one-sided* distribution of political power.

<sup>4</sup> The forgoing account of occupation is not intended to describe the formal legal criteria for occupation; on my account it is entirely possible for an occupation to begin and end independent of its formal recognition as such under international law.

<sup>5</sup> The primary instruments of occupation law are the 1907 Hague Regulations (esp. Sec. III) and the Fourth Geneva Convention, 1949 (esp. Part III, Sec. iii).

<sup>6</sup> Hague Regulations, Art. 43.

supplies.<sup>7</sup> It also prohibits colonization, conscription, and ethnic cleansing (i.e., “mass forcible transfers”) of civilian populations.<sup>8</sup> But in general, statutory international law remains fairly conservative with respect to political reconstruction and so-called ‘transformative’ occupations, as we can see from the Hague Regulations’ insistence on “respecting” the “laws in force in the country,” and related articles in the Geneva Conventions.<sup>9</sup>

When coupled with the assumption that occupations will be relatively brief, the presumption against changing local laws might seem to undercut the need for occupying forces to consider the collective and individual preferences of the occupied people during the occupation. Since international law apparently legislates against causing long-term structural changes to the occupied society, and since it is safe to assume that the occupied people place priority on having their most basic needs met, there appears to be no reason to take their preferences about other matters into account. But customary norms—now formally articulated in a 2001 ICISS report entitled “The Responsibility to Protect”—are considerably more permissive with respect to transformative occupation than the Hague Regulations and Geneva Conventions indicate, particularly where an occupied people has been liberated from authoritarian rule.<sup>10</sup> The Allied occupation and reconstruction efforts

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<sup>7</sup> Geneva IV, Art. 50, 55-57.

<sup>8</sup> Geneva IV, Art. 49, 51.

<sup>9</sup> E.g., “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention” (Geneva IV, Art. 64). For a thorough discussion of transformative occupation under international law, see Adam Roberts, “Transformative Military Occupation: Applying the Law of War and Human Rights,” *American Journal of International Law* 100/3 (2006), pp. 580-622.

<sup>10</sup> International Commission on Intervention and State Sovereignty (ICISS), “The Responsibility to Protect.” December 2001 (<http://www.iciss.ca/report2-en.asp>). See esp. Sec. 5, “The Responsibility to Rebuild.”

in Germany and Italy following World War II, for example, were widely recognized as legal despite their deeply transformative aims.<sup>11</sup> Moreover, it is not uncommon for occupations to last many years, especially where significant reconstruction is necessary.<sup>12</sup> Given the possibility of long-term occupations, and of structural changes to local institutions that last far beyond withdrawal, the law's failure to protect the political will of occupied peoples appears to be a serious omission.

Recent philosophical literature is simultaneously more open to the idea of transformative occupation and more sensitive to its potential abuse. Gary Bass, for instance, has argued not only that occupiers have an obligation to reconstruct the occupied people's government where necessary, but also to "work throughout any occupation of foreign soil to make their actions accountable and transparent to the citizens of the vanquished state and to win the consent of the conquered population."<sup>13</sup> Similarly, Allen Buchanan invokes individual autonomy and consent when he argues for an 'Anti-paternalist Principle' to guide the transformation of authoritarian regimes.<sup>14</sup> Such a principle holds, at the very least, that the intervening and occupying forces "would

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<sup>11</sup> Roberts, "Transformative Military Occupation," pp. 601-03.

<sup>12</sup> Adam Roberts, "Prolonged Military Occupation: The Israeli Occupied Territories Since 1967," *American Journal of International Law* 84/1 (1990), pp. 44-104.

<sup>13</sup> Bass, "Jus Post Bellum," p. 388

<sup>14</sup> Buchanan, "Institutionalizing the Just War," pp. 26-7. In Buchanan's article, the Anti-paternalist principle is geared specifically to forcible democratization, rather than political transformation in general, but I presume that it also applies in the broader context. To be clear, I am not arguing here that occupied societies should be permanently democratized, or that respecting an occupied people's right to representation would necessarily promote that goal. Instead, my claim is only that representation would allow the occupied people an opportunity to participate effectively in decisions about which form of government the occupier should help them achieve. This leaves open the possibility that they might decide to 'opt out' of permanent democratic government. Whether an occupier may permissibly prevent them from doing so, or even restrict their right to representation in order to prevent them from doing so, is a question I will not attempt to answer here.

have to have good reason to believe that the intended beneficiaries could reasonably accept the risks” of armed intervention, occupation, and political reconstruction. Both Bass and Buchanan are also quick to point out that in addition to the moral reasons for avoiding paternalism during the reconstruction phase of an occupation, there is a strong practical reason as well: ignoring the will of the occupied people can easily provoke violent resistance.<sup>15</sup>

It seems plausible to believe that an occupying force ought to respect the will of the occupied people; but neither author recommends institutional mechanisms sufficient to ensure that this occurs. Given the potential conflict of interests between occupied and occupier, it is reasonable to worry that occupiers will often have strong incentives to ignore the will of the occupied people, and take their chances with an insurgency. Buchanan goes further than Bass in this regard, arguing that intervention and transformative reconstruction (in his view, democratization) would only be permissible against a backdrop of international institutions designed to hold ‘would-be’ state-builders accountable for their actions. But Buchanan’s institutional proposals are geared more towards forcing occupiers to make their final goals explicit and ensuring that those goals are pursued in a timely fashion, rather than towards ensuring that they are in accordance with the will of the occupied people.

In contrast to Bass and Buchanan, Arthur Applbaum argues that respecting an occupied people’s will may be impossible, claiming that a people without a government

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<sup>15</sup> For a synopsis of the practical problems facing transformative occupations, see W. Michael Reisman, “The Manley O. Hudson Lecture: Why Regime Change is (Almost Always) a Bad Idea,” *American Journal of International Law* 98/3 (July 2004), pp. 516-525.

does not, in fact, have a will coherent enough to be worthy of respect.<sup>16</sup> Standard accounts of collective agency require group members to have shared aims, authorized representatives, or decision procedures functionally capable of emulating the capacities of individual persons (“considering, willing and doing”), and since complex forms of collective political agency typically require all three, a people deprived of its government literally lacks the agency necessary for it to be even a potential subject of paternalism. “Strange as it may sound to ears that conflate cultural sensitivity with political respect,” Applbaum writes, “until individuals are constituted in the normative sense as a free people, nothing is owed to the people in the anthropological sense *qua* people.”<sup>17</sup> If this is true, it seems to support the view that the unilateral coercion characteristic of traditional occupation is largely inevitable.<sup>18</sup> But even if it would not paternalize the occupied people *qua* people, would it not still paternalize individual group members?

Applbaum agrees that even if their encompassing group lacks normative agency, individual group members “can complain that as...mature, competent individual agent[s] it is up to each to decide whether to accept the grave risks of violence, destruction, and upheaval that an invasion and occupation would bring.”<sup>19</sup> But he argues that even though respect for individual consent could conceivably “trump” occupiers’ views about the appropriate goals of reconstruction, still, “how disagreement among individuals is to be

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<sup>16</sup> Applbaum, “Forcing a People to Be Free.”

<sup>17</sup> Applbaum, “Forcing a People to Be Free,” p. 398.

<sup>18</sup> I doubt that the distinction between the possession or lack of collective normative agency is as stark as Applbaum makes out, because it seems to me that agency as a matter of degree. Nevertheless, traditional occupation is necessarily unilateral *to the degree* that the occupied people lacks agency.

<sup>19</sup> Applbaum, “Forcing a People to Be Free,” pp. 391-92

resolved necessarily is underspecified in the absence of legitimate decision rules for resolving disagreements” (ibid., p. 398). By way of analogy, it would be as if we were trying to respect the ‘will’ of an individual whose multiple personalities disagreed among themselves. Even if each of her personalities were entitled to respect (as are the individual members of an occupied society), the absence of psychological mechanisms capable of unifying such disparate beliefs and desires into a single, coherent will would make it impossible for us to determine which of her apparently contradictory demands we ought to follow. Though inclined to respect her choices, we would be forced, as the occupier is forced, to choose as best we can by our own lights.

Traditional occupation, then, is beset by at least three problems. First, its unilateral nature is worrisome in its own right, because it threatens unjustified paternalism by administering and reconstructing the occupied people in ways they (*qua* individuals or *qua* group) would not choose for themselves. Second, traditional occupation suggests no institutional mechanisms able to ensure that occupiers adequately discharge their duty to respect the will of the occupied people. And third, even if occupiers did selflessly strive to discharge this obligation, its content is “underspecified,” because in the absence of native political institutions, the collective will of the occupied people is nonexistent, and how occupiers ought to respond to disagreement among individual wills is indeterminate. In what follows, I argue that *democratizing* the traditional conception occupation can resolve these problems. In the next section I set out what I take to be a basic tenet of democratic theory, the Principle of Affected Interests. This principle has its own conceptual challenges, and is of considerable philosophical interest in its own right. But by restricting it to a very basic and plausible

formulation, I aim to show that it nevertheless presents a compelling case for an occupied people's right to effective representation in the occupying government.

## 2. THE PRINCIPLE OF AFFECTED INTERESTS

Robert Dahl's formulation of the Principle of Affected Interests holds that, "Everyone who is affected by the decisions of a government should have the right to participate in that government."<sup>20</sup> The right to participation has deep roots in liberal political theory and the social contract tradition, and though there are competing lines of thought about its ultimate justification, few deny its normative significance.<sup>21</sup> Political participation has been defended on both intrinsic and instrumental grounds. First, to deny people the right to participate in decisions about the structure of their society disrespects their status as free and equal persons, because it strips them of an important venue for self-determination and arbitrarily subjects them to the will of others. Second, widespread participation is a way to reduce bias, error, and predation in public policy, because it allows people to assess and defend their own interests in the process of political decision-making. Governments which prevent many of their constituents from participating are

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<sup>20</sup> Robert Dahl, *After the Revolution?: Authority in a Good Society*, Yale University Press (1970), p. 49. Many others have adopted the same principle, with slightly different wording; see David Held, "Principles of Cosmopolitan Order," in *The Political Philosophy of Cosmopolitanism*, Brock and Brighouse (eds.), Cambridge University Press (2005), pp. 10-27 at p. 14; Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Polity Press (2002), p. 184; John Rawls, *A Theory of Justice*, Cambridge: Belknap Press of Harvard University Press (1971), pp. 194-206; Iris Marion Young, *Justice and the Politics of Difference*, Princeton University Press (1990), pp. 91-95.

<sup>21</sup> For several excellent discussions on the importance of political participation, see Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2<sup>nd</sup> Ed., Princeton University Press (1996), pp. 71-87; Jeremy Waldron, "Participation: The Right of Rights," in *Law and Disagreement*, Oxford University Press, pp. 232-54; and Thomas Christiano, "The Authority of Democracy," *The Journal of Political Philosophy* 12/3 (2004), pp. 266-90.

therefore likely to be neglectful, abusive, and/or objectionably paternalistic. These justifications for the right to participation lend the Principle of Affected Interests considerable intuitive appeal. But Dahl's formulation is too loose for it to serve in my argument for democratic occupation. In this section, I introduce a more tightly restricted version of the principle by elaborating on the content and scope of the right to participation.

The right to participation requires that the rightholder wields some actual influence over the creation of policy—that, in Waldron's words, "his voice be heard and that it count in public decision-making."<sup>22</sup> But we should not think that the Principle of Affected Interests requires *every* public decision that affects an individual's interests to admit of *direct* participation by that individual. On one hand, the scale and complexity of modern political communities renders this impractical. On the other hand, individuals can participate *indirectly* by wielding influence over those who do participate directly. This is just the familiar connection between participation and representation.<sup>23</sup> So long as representatives effectively participate on behalf of their constituents, those constituents can influence decision-making indirectly, and their rights to participation have been satisfied. It bears emphasis that in order to satisfy the Principle of Affected Interests and the right to participation, representation must be *effective*, and not merely nominal or symbolic.

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<sup>22</sup> Waldron, "Participation: The Right of Rights," p. 236.

<sup>23</sup> Dahl takes this connection for granted in his discussion (Dahl, *After the Revolution?* p. 49 ff). There is a vast literature on the nature and purpose of political representation—the classic treatment is Hanna F. Pitkin, *The Concept of Representation*, University of California Press (1972), but for the purposes of my argument the following brief remarks will suffice.



There are at least two ways representation can fail to be effective. First, a representative may be prohibited from participating in some of the ways needed for her to exercise the appropriate level of influence over decision-making. This can occur through a variety of institutional mechanisms: her vote may be given reduced weight or subject to veto by others, she may be denied important information, she may be barred from initiating or participating in certain procedures, or even sidelined entirely. Second, representation is ineffective when representatives can simply ignore the interests of their constituents with impunity. An advantage of democratic systems of representation is that they tend to provide the right incentives for representatives by allowing constituents to replace them through regular elections when their performance is unsatisfactory. In contrast, systems in which representative positions are assigned or inherited tend to lack these incentives. For example, in the decades leading up to the American Revolution, British Parliament justified its disenfranchisement of the colonists by reference to the doctrine of ‘virtual representation.’ The argument was that members of Parliament did not merely pursue the interests of their regular constituencies, but magnanimously pursued the interests of *all* British subjects—even those not afforded a separate representative. The problem, of course, is that the kind of general benevolence supposed by this doctrine rarely motivates political actors, especially when they are weighing the interests of those to whom they are accountable against the interests of those to whom they are not. The celebrated colonial slogan “No Taxation without Representation” was an implicit rejection of virtual representation by the colonists, and a demand for representatives who would reliably pursue their interests.

To satisfy the Principle of Affected Interests with respect to a given set of affected persons, a government must ensure that their representatives are able to participate on roughly equal footing with other members of the relevant legislative bodies, and that those representatives are likely to pursue the interests of the people they are supposed to represent. It is important to note that effective representation can be increased or diminished by degrees along both of these dimensions. Under most real-world conditions, the Principle of Affected Interests should not expect *perfectly* effective representation. As I discuss below, it may be difficult to establish fair democratic procedures among people who lack basic security and a functioning civil society, and various institutional constraints can make it difficult to provide all similarly ranked representatives with equal influence over policy decisions. Nevertheless, the Principle of Affected Interests provides good reason to think that such discrepancies are only permissible when they are practically unavoidable.

Having made the connection between participation and representation explicit, I turn now to the principle's scope of application. Dahl's formulation might lead us to believe that the Principle of Affected Interests should categorically grant an equal right of participation to everyone affected by a government's decisions. However, there are two reasons not to adopt such an inclusive interpretation. First, the right to participation is neither absolute nor strictly universal. It is *pro tanto*, in the sense that it may be overridden, forfeited, or fail to apply. For example, the right to participate may be overridden when the moral costs of extending it would be egregious, as when democratization threatens to destabilize an entire society, exacerbate ethnic strife, and so

on.<sup>24</sup> It may be forfeited, as when criminals are denied the right to vote. And it may fail to apply to young children, the severely mentally disabled, and other subjects of justified paternalism. The important point is that in the absence of such exceptional circumstances, relevantly affected individuals are presumed to hold a right to participate: withholding it always requires special justification.

Second, we should recognize that a government's decisions affect different people in different ways and to different degrees. Ideally, the Principle of Affected Interests should apportion rights accordingly, although as we shall see below, this is often difficult to accomplish in practice. Moreover, we may want to rule out certain kinds of interests as a basis for extending a right to participation. The principal complications I want to avoid here involve trivial interests, whose satisfaction has little affect on one's welfare, external interests, whose satisfaction depends on whether *someone else's* interests are satisfied, and merely possibly affected interests, whose satisfaction *may or may not* actually be affected by a government's decisions.<sup>25</sup> A highly inclusive interpretation of the Principle of Affected Interests—one that offers participation even to those whose interests in a given decision are trivial, external, or merely possibly affected—runs the risk of *reductio*, because it seems drastically to overextend the right. If the principle were to grant everyone with even a passing preference for the outcome of domestic policy decisions in foreign countries a right to participate in those decisions, it would lead quickly to a robust form of world government few scholars seem ready to endorse.

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<sup>24</sup> See, e.g., Samuel Barnes, "The Contribution of Democracy to Rebuilding Postconflict Societies," *American Journal of International Law* 95/1 (2001), pp. 86-101, at p. 88.

<sup>25</sup> Robert Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy & Public Affairs* 35/1 (2007), pp. 40-68.

To avoid this implication, I will provisionally adopt a tightly restricted, and correspondingly simpler and more widely palatable formulation. For the remainder of this paper, I only assume that, *at the very least*, the Principle of Affected Interests attributes a *pro tanto* right to participate in a government to those whose most important interests are certainly and significantly affected by that government's decisions.<sup>26</sup> Of course, I do not mean to imply that this principle will prevent the need for some kind of international institutions. Some domestic decisions in some countries do have the capacity to significantly affect the most important interests of a large percentage of the world's population—decisions about carbon emissions, nuclear non-proliferation, and so on, still, on this formulation, require that the affected parties be represented in the decision-making process. But it is less clear whether a *world government* would be necessary to provide that kind of representation, or whether something closer to the relatively decentralized system of international law we have now would be sufficient. My point is only that the lower the threshold for inclusion in political decision-making, the greater the demand for more robust international institutions; by setting that threshold at certainly, significantly, and highly important interests, I intend merely to resist the most immediate worries about the need for a centralized world government.

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<sup>26</sup> My aim in restricting the relevant class of interests to those *certainly* affected is to avoid complications Goodin observes in a principle that grounded a right to participate on *actually* affected interests (Goodin, *ibid*). The Principle of Actually Affected Interests, he argues, is incoherent, because whether one's interests are actually affected depends on what cannot be known in advance of the decision, namely, the outcome of the decision itself. Moreover, since the outcome of the decision depends on who participates in making it, it would appear that any attempt to specify whose interests are actually affected by a decision is viciously circular. Since an occupied people's interests are inevitably affected by the occupying government's decisions whether or not the occupied people participate in them, I can avoid these complications by simply restricting the principle even further: all certainly affected interests are actually affected, but not all actually affected interests are certainly affected, so the Principle of Certainly Affected Interests is more conservative, and consequently more plausible than its Actually-Affected counterpart.

I will also assume that, as a general rule, those under a government's direct coercive control are certainly and significantly affected by it. Combining this with the foregoing discussion of representation, we arrive at the following formulation of the Principle of Affected Interests: everyone subject to a government's direct coercive control has a *pro tanto* right to effective representation in that government. As far as I can tell, it is difficult, if not impossible, to deny this principle while remaining committed to democracy as a political ideal, since doing so amounts to the view that a government needs no special justification for disenfranchising large numbers of its own constituents. In any case, I will proceed on the assumption that in the absence of special justification, governments which fail to satisfy the (duly qualified) Principle of Affected Interests are unjust.<sup>27</sup>

### 3. DEMOCRATIC OCCUPATION

My argument is straightforward. In a military occupation, the armed forces of a foreign government exercise direct coercive control over the inhabitants of the occupied territory. The Principle of Affected Interests holds that people subject to a government's direct coercive control have a *pro tanto* right to effective representation in that government. Therefore, in this context, the Principle of Affected Interests holds that the inhabitants of the occupied territory have a *pro tanto* right to effective representation in the occupying government. This, I maintain, will resolve the three problems with traditional occupation

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<sup>27</sup> Readers familiar with recent philosophical literature surrounding the Principle of Affected Interests will note that I have essentially reduced it to the weaker 'Coercion Principle.' I frame my argument in terms of the former because I believe that the Coercion Principle is best understood as a corollary to the Principle of Affected Interests, rather than a substitute, but I will not pursue the matter further here. Cf. David Miller, "Democracy's Domain," *Philosophy & Public Affairs* 37/3 (2009), pp. 201-228.

I identified earlier: the threat of unjustified paternalism, the lack of institutional accountability, and the indeterminacy of the occupied people's political will. By recognizing and respecting an occupied people's right to effective representation, the occupying government essentially brings them within the sphere of its own normative agency, providing them with a way to integrate their individual preferences into a coherent, collective political will. This, in turn, not only helps to specify the occupier's duties to the occupied people vis-à-vis their administration and their reconstructive goals, but it also ensures that they are institutionally committed to taking the occupied people's will into consideration during political decision-making.

This is my primary argument, but it is worth mentioning three ancillary arguments for the right in question. First, many people believe, with good reason, that if terrorism, insurgency, or revolution are ever justified, they are justified only as a last resort. So long as positive change can be brought about through non-violent political means, the use of violence—especially when it harms innocent civilians—is morally wrong. Thus, by respecting an occupied people's right to representation, thereby providing them with political means to defend their own interests, an occupying force may undermine the moral grounds for resistance. From a practical standpoint, the availability of non-violent means would also decrease the legitimacy of insurgent movements in the eyes of the occupied population, whose support is usually a major contributing factor to the success or failure of such movements. Second, recognition of an occupied people's right to effective representation in the occupying government would help to disincentivize unnecessarily transformative or prolonged occupations, and war-making in general.<sup>28</sup>

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<sup>28</sup> It may be objected that this disincentive cuts both ways, because it would disincentivize just and unjust wars alike. It should be noted first that both the argument and the objection presume an *institutional* or

Traditional occupation allows occupying forces to exercise unilateral coercive control over the occupied society, which, in turn, allows the occupiers to exploit and manipulate the occupied to their own financial and political advantage. So long as traditional occupation is the norm, it provides states that possess the necessary military capabilities with a powerful motive for invading, occupying, and transforming other societies. Fully democratic occupation would eliminate these incentives, at least in part, because it would provide the occupied people with an effective means to influence the occupier's decisions.

Finally, as Rawls puts it in *The Law of Peoples*, “well-ordered people are by their actions and proclamations, when feasible, to foreshadow during a war both the kind of peace they aim for and the kind of relations they seek. By doing so, they show in an open way the nature of their aims and the kind of people they are...” He continues, “The way a war is fought and the deeds done in ending it live on in the historical memory of societies and may or may not set the stage for future war. It is always the duty of statesmanship to take this longer view.”<sup>29</sup> While an occupied people may not be happy about their occupation, the trust and responsibility an occupying government would place in them by giving them effective representation would foster patience and a spirit of cooperation. Moreover, Rawls’s claim has a special relevance for those, like Buchanan, who would

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*legal* right to effective representation, which may or may not bear on the existence of a *moral* right to the same. Second, given the institutional nature of the question, I will offer an institutional solution: if the prospect of an international law granting effective representation to occupied peoples did objectionably disincentivize morally permissible or obligatory attempts at reconstruction or regime change, then that would support the creation of another international law, one able to reincentivize the good interventions through penalties or rewards. Third and finally, even without such a law in place, it is at least plausible to think that the proposed dampening effect of an occupied right to representation on warfare would be superior to the status quo.

<sup>29</sup> Rawls, *Law of Peoples*, p. 96.

endorse (under certain conditions) the permissibility of imposing democratic institutions on an occupied population. The willingness to use force in pursuit of some ideal demands a supreme confidence in the righteousness of the cause, and surely trust in the procedural justice of representative democracy must help motivate any argument for so-called ‘forcible democratization.’ On one hand, rejecting the need to democratize the process of democratization itself tempts inconsistency, and on the other hand, allowing an occupied people the opportunity to participate, at the highest levels, in the administration and reconstruction of their own society would lessen the humiliation which attends the need for intervention and occupation, and acclimate them to the social and political habits of democratic self-government.

Those who are disinclined to apply the model of democratic occupation to various particular cases will find a natural wedge in the *pro tanto* qualification built into my formulation of the Principle of Affected Interests, and I will address potential objections to a concrete example momentarily. As I said above, withholding the right to participation always requires special justification, and it is important to see that the general argument I offer here need not suffer from the fact that contingent circumstances could occasionally provide adequate grounds to deny an occupied people representation. After all, any government inclined to adopt the democratic model of occupation will face considerable practical challenges. Extending representation rights to occupied populations could require, among other things, changes to domestic constitutions, more flexible systems of representation, civic education and translation services for foreign representatives, and ways to forestall or minimize potential backlash by the occupying government’s native citizens. Each of these will entail significant financial, political, and



ultimately moral costs; if these costs are high enough, they could completely override the occupied people's right to representation. But it is more likely that the countervailing moral costs will merely weaken the right rather than overriding it completely. Effective representation admits of many degrees, so even if the occupying government cannot reasonably be expected to incur the costs of extending the kind and degree of effective representation I argue for below, they may still have serious obligations to come as close to this ideal as is practically (financially, politically, morally) feasible.

Some skeptics will be tempted to dismiss the democratic conception of occupation out of hand, because it appears, for all intents and purposes, to be *inaccessible*. These skeptics will claim that my arguments must be relegated to the ephemeral realm of "ideal theory" because there is no "practical route from where we are now to at least a reasonable approximation of the state of affairs that satisfies its principles."<sup>30</sup> As Buchanan writes, a good non-ideal theory

must steer a course between futile utopianism that is oblivious to the limitations of current international law and the formidable obstacles to moral progress erected by vested interests and naked power, on the one hand, and craven capitulation to existing injustices that offers no direction for significant reform, on the other.<sup>31</sup>

For the time being, it seems fair to assume that few if any contemporary governments—and certainly not those most likely to engage in foreign occupation—will endorse a policy of democratic occupation. Given their interests and their ability to protect them, then, it is reasonable to assume further that my arguments lie closer to the "ideal" end of

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<sup>30</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination*, Oxford University Press (2004), p. 61.

<sup>31</sup> *Ibid.*

the ideal/non-ideal continuum. But, first, it would be a mistake to infer from that that democratic occupation amounts to an exercise in “futile utopianism,” because, again, effective representation admits of degrees. Moral progress on this front, as with many others, may require reform to be accomplished in stages, gradually eroding the status quo. While non-voting membership and advisory roles for foreign representatives are far from satisfactory, they would be an improvement over traditional occupation, and could provide leverage for further change. Second, even where the obstacles to change are insurmountable, they are no excuse for ignoring injustice. If my arguments are sound, then an occupied people has a right to effective representation in the occupying government *whether or not that government is inclined to respect it*. Acknowledging this fact should lead us to revise our implicit assumptions about the normative necessity of traditional occupation, and to alter our thinking about *jus post bellum* in general.

With that in mind, I turn from my general argument for democratic occupation to a provocative case in point. I argue that the Iraqi people were (and are) entitled to effective representation in the United States government for the duration of the occupation that began in April of 2003. My purpose here is threefold: to provide a concrete example of the kind and degree of representation needed to satisfy the Principle Affected Interests, to hone the radical implications of democratic occupation to a cutting edge, and to focus potential objections and replies around a familiar example of contemporary and lasting relevance. Needless to say, the foregoing argument may be applied, *mutatis mutandis*, to other cases—the American occupation of Afghanistan and the Israeli occupation of Palestinian lands are two obvious examples—but I trust that the following discussion may be adapted to such cases without too much trouble.

During the nearly seven years since its invasion of Iraq, the US military has exercised direct coercive control over approximately twenty-eight million Iraqi people. Despite recent improvements in the strength and integrity of the fledgling Iraqi government and its security forces and pledges of imminent withdrawal by the Obama administration, the country is likely to remain dependent on American military might for its continued stability, at least for the next several years.<sup>32</sup> To say that the decisions of the US government have had, and will continue to have a significant effect on the most important interests of the average Iraqi comes close to drastic understatement: levels and distribution of funding, troop deployment and procedures, reconstruction priorities, strategies for reconciliation, policies regarding regional powers, and the moment and pace of withdrawal itself each have enormous short- and long-term consequences for the welfare of millions of Iraqis. The Principle of Affected Interests provides a good reason to think that the Iraqi people have had (and, for the duration of the occupation, will continue to have) a right to participate in those decisions—specifically, a right to effective representation in the US government.

What would “effective” representation entail, given the basic structure of American political institutions? One suggestion might be to appoint Iraqi advisors or consultants to act as informal liaisons between the Iraqi people and the various branches, agencies, and committees of the US government. However, I suspect that this would

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<sup>32</sup> Of course, the occupation of Iraq “officially” ended in 2004, but as I noted above, occupation may easily outstrip its legal status as such (n. 5, *supra*). The present target date for withdrawal is 2011, though the United States intends to retain an indefinite “residual” military presence. Predictions about the stability of Iraq and about continued US involvement are fraught with uncertainty; for several recent forays along these lines, see Steven Simon, “The Price of the Surge,” *Foreign Affairs* 87/3 (May/June 2008), pp. 57-76; Biddle, Stephen, Michael O’Hanlon, and Kenneth M. Pollack, “How to Leave a Stable Iraq,” *Foreign Affairs* 87/5 (September/ October 2008), pp. 40-58; and Bennett Ramberg, “The Precedents for Withdrawal,” *Foreign Affairs* 88/2 (March/April 2009), pp. 2-8.

offer Iraqis little more than what virtual representation offered American colonists in British Parliament, because American officials, and therefore the American government, would have little incentive to take the counsel of these representatives seriously. What is needed is a way to ensure that the Iraqi people can (temporarily) exercise the kind of formally protected influence over American political institutions that American citizens enjoy. In short, the simplest—and perhaps the only—way to insert this kind of Iraqi influence over US policy is to extend the system of federalism already built into its constitutional structure, and provide the Iraqi people with representation in the legislative branch.

There can be no direct argument from the Principle of Affected Interests to a specific number of representatives, of course, but for my purposes it will only be necessary to fix a general idea of the kind and degree of influence the principle would require. Offhand, I cannot see any reason to assume from the outset that the inhabitants of an occupied territory are entitled to any fewer representatives (per capita) than are the citizens of the occupying government, so I will proceed on the postulate that Iraqi representation in Congress should be *proportional*, as it is with ordinary states. Given recent population estimates and the methods used to apportion seats, this would leave Iraqis with two Senators and roughly 35 to 40 members in the House of Representatives. Of course, as I said above, practical considerations could mitigate this claim in various ways. But I will leave assessments about the relevant institutional limitations and obstacles to others, and turn now to a range of in-principle, and therefore more potentially damaging, objections to my argument for democratic occupation.

#### 4. OBJECTIONS AND REPLIES

First, it might be argued that under most if not all circumstances an occupier's first duty to the occupied is to withdraw. For instance, many people appear to believe that the United States has had a peremptory obligation to withdraw from Iraq because the initial invasion was unjust. But first, no plausible argument for withdrawal could ignore the potential consequences of such an action.<sup>33</sup> If, at any point, a US withdrawal from Iraq were likely to result in chaos and civil war, then the moral costs of such an action might be too high to justify it, Iraqi self-determination and US interests notwithstanding. Second, speculations about the potential consequences of withdrawal were and still are open to reasonable disagreement: the sheer complexity of the evolving situation on the ground, combined with the obvious ideological biases of policymakers, have created intense controversy over many of the most rudimentary facts of the occupation. These are precisely the conditions under which effective representation on behalf of the affected parties is most important; Iraqi representatives would have a uniquely credible perspective on whether withdrawal would be best for the Iraqi people, and even if they did not, their participation would at least allow the Iraqi people to help decide for themselves the kinds of risks they are willing to take. Finally, the failure to perform a primary obligation can trigger secondary obligations: even if it were uncontroversially true that the US has been violating a peremptory obligation to withdraw, its failure to extend representation rights to the Iraqi people despite its continued occupation would simply compound the injustice of its actions.

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<sup>33</sup> See Darrel Mollendorf, "Jus ex Bello," *Journal of Political Philosophy* 16/2 (2008), pp. 123-36.

Second, it might be argued that the members of a defeated society *deserve* to be occupied, whether because they bear some responsibility for the preceding conflict, or because they remain actual or potential combatants, and that this justifies denying them representation. But these are dubious assumptions. As Walzer points out, the parties directly responsible for a war's being waged are typically not the soldiers fighting it, much less the civilian population.<sup>34</sup> Even during an intense insurgency, only a relatively small percentage of the occupied people could rightly be called combatants. More plausibly, we might think the implicitly *temporary* nature of occupation is what silences the Principle of Affected Interests: perhaps only *permanent* coercive control grounds a right to representation. But it is difficult to see an in-principle reason why the duration of a government's control should matter. First, the individuals subject to control are *always* entitled to respect as free and equal persons. Second, political self-protection becomes more, not less important during periods of occupation, since a foreign military can cause enormous damage in even a brief period of time. Third, it is often impossible to know exactly how temporary an occupation will be in advance—indefinite and permanent “occupations” usually do not start out that way. At least *prima facie*, the reasons to adopt the Principle of Affected Interests in the first place motivate a presumption favoring an *immediate* extension of representation rights to relevantly affected persons.

A third and related objection might deny representation to an occupied people on grounds of membership. According to this view, only the *members* of a political community have a right to participate in its government's decisions, and since occupied peoples are merely the temporary subjects of the occupying government, and not full-

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<sup>34</sup> Walzer, *Just and Unjust Wars*, p. 30.

fledged members in the community it ordinarily governs, they may justifiably be denied representation. I argued above that the temporary nature of occupation does not silence the Principle of Affected Interests because the inhabitants of an occupied territory (1) are always entitled to respect as free and equal persons, (2) may be severely harmed by the occupying government even over a relatively brief period of time, and (3) may be subject to the occupying government for much longer than initially planned. But the membership objection pushes back by emphasizing the distinction between being subject to a political community's government on the one hand, and being a member of it on the other. The justificatory details of this distinction need not detain us; that we generally accept it is made plain by the fact that conditions (1)-(3) hold true for temporary immigrants like guest workers, visiting students, and tourists, yet we do not believe that *they* are entitled to participate in the political affairs of the community, let alone to fully effective representation in the legislature. Why not think that an occupied people stands in precisely the same relation to the occupying government as guest workers do to the government that hosts them?

The crucial disanalogy is that while temporary immigrants have voluntarily chosen to subject themselves to the authority of a foreign government (on the terms that government has offered), and may return to their native country whenever they wish, an occupied population has become subject through an act of coercion without leaving its native country. It seems reasonable to suppose that a government cannot unilaterally vitiate someone's right to representation by forcibly removing her from the authority of her native government and placing her under its own, and then claiming—however truthfully—that her subjection will not be permanent. In terms of the analogy, it would

be as if, rather than waiting for guest workers to arrive and depart of their own free will, a government kidnapped them from a foreign country, gave them all jobs, and then denied them the right to vote because eventually they would all be deported. Whether and to what extent the Principle of Affected Interests might allow affected parties to alienate their own rights to representation is a question I will not pursue here. Had the Iraqi people reached a valid prior agreement with the United States—as legal immigrants do upon entering the host country—perhaps they could have forfeited their right to representation in the US government, and even negated the need for it by spelling out in specific detail how the occupation and reconstruction should proceed. But there was no such agreement, and given the absence of a legitimate Iraqi government before the intervention, it is unclear whether there even could have been. To justify denying the Iraqi people representation on the grounds that they *would* have agreed to forfeit those rights in return for regime change and democratic reconstruction is perhaps overly optimistic. In any case, the possibility of respecting an occupied people's right to representation in the occupying government makes unnecessary such tenuous (if not disingenuous) appeals to its hypothetical forfeiture.

Fourth, the state system ingrained in contemporary international law and practice attributes sovereign rights of territorial integrity and political independence to each state. Another objection might claim that occupying states retain these rights, and that requiring effective representation for foreign populations would violate them. In the present case, the worry is that Iraqi representation in Congress would violate US sovereignty. Whether and how the concept of sovereignty might be justified is a complex and hotly contested subject in political theory, but we do not need a sophisticated understanding of the debate



to see that military occupation, by its very nature, blurs the (already indistinct) line sovereignty is supposed to draw between ‘internal’ and ‘external’ affairs. Yet there is a persistent sense that Iraq and the United States do and should remain separate political entities, in part because they are geographically distant and culturally distinct. American and Iraqi interests have historically formed two largely independent, but internally dense networks. Under such conditions, a suitably qualified Principle of Affected Interests can easily identify two different sets of rights, corresponding to each group’s right to participate in its own government, without supporting either group’s right to participate in the other’s.<sup>35</sup> However, once the United States dissolved the government of Iraq and assumed control over its former citizens, the two previously independent networks of interests became entangled. Iraq and the United States remained geographically and culturally distinct, but Iraqi interests in security and subsistence now hinged crucially on decisions made by a foreign government. Any plausible theory of sovereignty should account for the “rough and ready” correlation (to borrow Goodin’s phrase) between sovereign political units on the one hand, and geographically and culturally distinct communities on the other. But the occupation of one state by another appears to be an exception to this general rule.

Fifth, it might be argued that even if the Iraqi people were entitled to some kind of representation in the US government, proportional membership in Congress would have gone too far. After all, a common addendum to the Principle of Affected Interests is that “only those who are affected by a decision should have a say in it.”<sup>36</sup> Granting Iraqi

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<sup>35</sup> Robert Goodin, “Enfranchising All Affected Interests, and Its Alternatives,” p. 48.

<sup>36</sup> Ibid, n. 25.

representatives roughly 15% of the seats in the legislature would have given them considerable influence over many issues that have little or nothing to do with them. Why should they be entitled to that degree of influence? First, we should note that while proportional representation would certainly have given the Iraqi people significant influence over American policy, it would not have given them anything like the control the American government wields over the lives of Iraqis. Second, and more importantly, Iraqi interests are more closely tied to American interests than some, no doubt, would like to believe. For instance, given that the success or failure of post-conflict reconstruction efforts hinges to a large extent on funding, Iraqi representatives should have effective influence over the distribution of federal resources.<sup>37</sup> But since the distribution of those resources is zero-sum, Iraqis ought to have some influence over any legislation that takes money out of the budget. Third, although it is surely true that some policy issues really do not affect Iraqi interests, there is no fair way to determine which interests these are. If any person or group were able, unilaterally, to decide which policy issues should admit of Iraqi participation, that person or group would hold a kind of veto-power over Iraqi representatives, greatly undermining their ability to protect their people from exploitation. Finally, part of having effective representation in a parliamentary system involves collective bargaining. Since different constituencies care about different issues, representatives can “trade” their votes, garnering support for the issues important to their own constituents by supporting other representatives on issues important to theirs. Denying Iraqi representatives the capacity to bargain by cordoning off the range of issues

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<sup>37</sup> On the empirical correlation between funding and post-conflict reconstruction success, see Dobbins, Jones, Crane, and DeGrasse, *The Beginner's Guide to Nation-Building*, RAND Corporation (2007), available at [[http://www.rand.org/pubs/monographs/2007/RAND\\_MG557.pdf](http://www.rand.org/pubs/monographs/2007/RAND_MG557.pdf)].

over which they would have effective control would diminish their power exponentially, and reduce each Iraqi representative's influence, even over issues pertaining directly to Iraq, to less than that of similarly ranked representatives.

There is another, more general worry about proportional representation: on the one hand, if the occupied society is much more populous than the occupying society, then it looks as if the occupying society's control over its own government could be almost entirely eradicated. On the other hand, if the occupying society is much more populous than the occupied society, then the worry is reversed: proportional representation would leave the occupied people with little or no influence over their own reconstruction. In this respect, my use of Iraq may look like cherry picking. While the suggestion that the Iraqi people be granted proportional representation in the United States government may be radical, it cannot be denied that with 15% of the House of Representatives, Iraqi influence over the US government would be neither overwhelming nor negligible. But what if Iraq had been ten times larger, or ten times smaller? This would shift the balance of representative power significantly in either direction, at least according to my original postulate that representatives should be granted proportional representation.

There are two responses to be made here. First, various institutional arrangements and safeguards can protect minority representation in a way that could prevent large imbalances in population from effacing either party's capacity to influence political decision-making. The most familiar example of such arrangements to most people will be bicameralism. The United States Congress is divided into two houses partly to ensure that high-population states cannot simply override the will of smaller states: while representation in the House of Representatives is granted solely on the basis of state

population, each state has an equal number of Senators. Of course, the objection may still be pressed that in cases of *very* large imbalances, and especially where an occupied country is added to an already-large number of administrative units, their representatives would still lack any significant influence over policy.

The second response, then, must be that these kinds of problems are endemic to all representative systems. As I said above, there can be no direct argument from the Principle of Affected Interests to a specific number of representatives. Not only does the degree of influence had by each representative depend on the actual formal and informal institutions that constitute a state's government, but at this stage the Principle of Affected Interests leaves indeterminate the sum total of influence an occupied people ought to have within the government of their occupiers. I have claimed only that their representation must be effective, and have not tried to specify the relevant threshold of effectivity. I am therefore happy to concede that proportional representation is neither necessary nor sufficient for effective representation, although it still seems to be an appropriate baseline, deviations from which would need to be justified, in practical terms, by the concerns made clear by this objection.

Sixth, it may be wondered whether fears about undue Iraqi influence on American domestic policy could be dispelled by providing Iraqis with effective representation in global governance institutions like the United Nations, or in independent transitional administrations designed specifically to oversee occupation and reconstruction. In principle, these venues could limit the legislative scope of Iraqi influence to only those issues having a direct bearing on their own interests. I am therefore friendly to this suggestion, and concede that at some future date such arrangements might adequately

satisfy the Principle of Affected Interests. However, I do not think that this is a plausible alternative just yet. The problem is not that the basic framework for transnational political institutions does not exist, but that representation therein is unlikely to provide the occupied people with sufficiently effective influence over the occupying government.

On the one hand, the ease with which the US and other major powers shrug off international law and UN mandates when these are incongruent with perceived national interest is discouraging, to say the least. So long as occupying governments may simply disregard the decisions of global governance institutions with relative impunity, representation in those institutions will be ineffective. On the other hand, transitional administrations composed of representatives from both the occupying and occupied societies would likely fall prey to the same kind of ‘veto power’ worries discussed above. Unless the occupying government simply abdicated much of its *de facto* authority and legal jurisdiction over parts of its armed forces to the transitional government, it would be able to countermand any orders it found inconvenient.<sup>38</sup> Moreover, so long as the occupied people has no say over the distribution of the occupier’s financial resources, a transitional government’s efforts at reconstruction could still be hobbled at the occupier’s unilateral discretion. If international law were a more reliable constraint on state behavior, or if existing states were more willing to alienate authority over the use of their financial and military resources, a wide range of institutional arrangements could satisfy

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<sup>38</sup> This worry plagued negotiations surrounding the US-Iraq Status of Forces Agreement. Drafts of the agreement contained provisions which, among other things, would require US armed forces to notify and get permission from the Iraqi government for all military operations, and to place US troops under Iraqi jurisdiction for certain major criminal offenses. But the interpretation of these provisions, the US government’s willingness to abide by them, and the legal status of US forces in the absence of such an agreement were (and remain) uncertain. Moreover, it is not clear that any such agreement could be reached consensually, since the negotiations took place under the implicit threat of American withdrawal.

the Principle of Affected Interests. It is worth pointing out that under such conditions, it would be a mistake to construe the government originally responsible for the intervention, and who remain responsible for supplying resources, as “the occupying government,” since that term should refer to the political entity exercising *de facto* control over the occupying forces—in this context, either a global government or a transitional administration. But in any case, until these conditions obtain, a right to effective representation in the occupying government is the only way to ensure that the occupied people’s political will is given adequate weight in decisions about reconstruction. Given present circumstances, it seems plausible to believe that the only way to have ensured that the Iraqi people had sufficient influence over US forces in Iraq would have been to provide them with substantial representation within the American government itself.

A final and more practically-minded objection notes that in many post-conflict societies, civil disorder could make legitimate representation impossible. Where complete order has yet to be restored, political intimidation, terrorism, and incomplete information can prevent the creation of even rudimentary democratic institutions. The lingering social effects of authoritarian rule may also undermine a society’s collective capacity for public deliberation—the habits of free speech and political association taken for granted in Western democracies may be underdeveloped, if not absent entirely. If Iraqi civil society could not have supported democratic procedures for selecting representatives, it might be argued, then offering them effective representation may be impossible, impractical, or even dangerously divisive. As I suggested above, the right to representation is *pro tanto*, and should not be extended where it would be likely to

exacerbate ethnic tensions or civil unrest. However, as I also suggested, the presumption should favor the right's immediate extension to relevantly affected persons. These two claims amount to the view that the right to representation should be extended to an occupied people *as soon as possible*. If the occupying government is engaged in the political reconstruction of the occupied society—as it should be where disorder makes democratic organization impossible—then the capacity for legitimate representation should increase over time.

Moreover, the benefits of effective representation can accrue even when perfectly functioning democratic institutions cannot be secured. The quality or legitimacy of representation should be viewed along a continuum, instead of as an all-or-nothing affair. During the initial stages of the invasion of Iraq, refugees and expatriates might have served as temporary representatives, to be replaced or supplemented by native secular and religious leaders during the first stages of reconstruction. Of course, both of these options warrant some skepticism, since neither would be selected by or accountable to their constituents through fair procedures. All the same, these leaders could provide a stopgap, since they are far more likely than American politicians to be acquainted with and to defend the needs and preferences of their compatriots. What seems clear, in any case, is that if Iraqis were able to hold reasonably just—or, at least not intolerably unjust—elections for their own nascent government in 2005, they could also have chosen comparably legitimate representatives to the US Congress. There may be no way to avoid completely the undemocratic paternalism involved in occupying and rebuilding an entire political system from the ground up. But in general, as civil disorder becomes less problematic, legitimate representation becomes more feasible.

## CONCLUSION

I have argued that by satisfying the Principle of Affected Interests, democratic occupation can resolve three significant problems inherent to traditional occupation—its threat of unjustified paternalism, its lack of institutional accountability, and its failure to attenuate the indeterminacy of an occupied people's political will. In addition, I argued that effective representation in the occupying government would undermine the legitimacy of insurgency among the occupied people, disincentivize wars which aim at the long-term subjugation of foreign populations, and allow humanitarian occupiers to “show in an open way the nature of their aims and the kind of people they are.” I acknowledged that there are practical worries about the feasibility and accessibility of the idealized model of democratic occupation presumed here (proportional, fully effective representation in the occupying government's legislative branch), at least under present conditions. But I also argued that the feasibility and accessibility of democratic occupation is likely to increase as we move further away from this ideal. Given that partial or imperfect political representation is better than nothing, my arguments have important practical implications even under non-ideal circumstances: if they are sound, we should work to find ways of *approaching* ideal democratic occupation, by gradually improving the kind and degree of representation occupied peoples have in their occupiers' governments. Finally, I have sought to disarm a range of in-principle objections to democratic occupation in the context of its application to the American occupation of Iraq. While it is only natural to look for flaws in any argument which proposes such a fundamental change to the status quo, and while my efforts here can of necessity provide only a first line of defense



against objections from such a variety of sources, I believe I have shown that democratic occupation is, at the very least, a plausible alternative to the traditional model.

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