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EDITORIAL

Individuals, institutions, and the relations between them are of interest across the arts, humanities and social sciences. Such a theme for this years Journal is therefore hoped to be one of interest to many involved in University Education and from the large number of submissions, is clearly a topic in which there is a lot of scope for discussion.

As a result of the Interdisciplinary nature of Groundings this edition features many articles broad both in their scope and interpretation of the assigned theme. Read either collectively or individually it is hoped that they will provide further understanding and contribution to debate in a thought provoking way.

Groundings emerged from within the Glasgow University Dialectic Society. Our campus debating society has, over the centuries, brought together students from all disciplines in a shared pursuit of knowledge through discussion.

Our aim, today, is to further debate on issues of importance to students at Glasgow and other campuses, in interdisciplinary perspective, through the critical insights of talented undergraduate students.

GROUNDINGS EDITORIAL BOARD

A new anti-paternalist theory: autonomy and self

Elouisa M. Leonard

If an agent acts so as to harm only himself, then is state interference with that action ever legitimate? Paternalistic legislation has been the subject of much debate. For John Stuart Mill, the only legitimate ground for state interference was the harm principle: state interference to prevent an actor harming others is legitimate; the state, however, may not interfere with actions which harm only the actor himself. I introduce a distinction between (1) long-term desires and short-term desires and (2) current desires and future desires. I will argue that state interference with current, long-term desires is never legitimate.

When can the state legitimately interfere with exclusively self harming action? The debate over paternalistic legislation has traditionally centred on the concept of harm. For John Stuart Mill, the only legitimate ground for state interference was the harm principle:

*The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.*¹

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¹ John Stuart Mill, *On Liberty* (New York: Cosimo Classics, 2005), 13.

The boundary between acts which harm only the actor, and those which harm others is unclear. In this discussion I will be focussing on the limited range of acts which harm only the actor. Joel Feinberg also favoured autonomy above personal safety. He argued for *soft paternalism*: the only instances where harm to self is a legitimate ground for state interference is where that action is not voluntary enough.² I agree with these anti-paternalist positions. Autonomy should be valued above safety.

However, I disagree that harm to self can ever be a legitimate ground for interference. Harm to self can at best serve to indicate that an individual may not be acting voluntarily. I think the debate needs to be reframed around autonomy. In so doing it will be crucial to discuss personal identity: exactly whose autonomy are we protecting and whose autonomy are we interfering with?

LONG-TERM DESIRES VERSUS SHORT-TERM DESIRES

My first distinction is between long-term desires and short-term desires. A long-term desire is something like our notion of the good life: our goal. It is these long-term desires which I think should be protected. Conversely, our short-term desires are less indicative of our true identity. They tend to fluctuate depending on various factors. A short-term desire need not conflict with a long-term desire, but, where it does, I believe we can legitimately overrule such action in order to preserve the long-term desire and thus the actor's true autonomy.

Imagine Chris does not put on his seatbelt before a car journey. He risks death or severe injury in a crash. Let us assume his actions will not harm others either directly or indirectly. In forcing him to wear a seatbelt, we are interfering with the autonomy of the short-term Chris. It is irrelevant whether his short-term desire is the result of a momentary lapse of concentration, a drunken disregard

² Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1986), 12.

for his safety or a naïve miscalculation of the risk. Nor does it matter if we say he never actually chose at all; his not wearing the seatbelt results from his forgetting that he had a choice. What does matter is that the decision is not indicative of his long-term goal; instead, it opposes it. In forcing Chris to wear his seatbelt, we are preserving the autonomy of the long-term Chris (who does not actually want to risk not wearing a seatbelt). I believe the true self is located in long-term desires and we should respect their autonomy.

Only if Chris had a long-term desire to feel the adrenaline rush of being in a car without a seatbelt, exhilarated in the knowledge that he could be killed at any point, would we have to concede that not wearing a seatbelt was a long-term desire and state interference was illegitimate.

But, what about people who always unwillingly give in to their short-term desires? I am thinking of the alcoholic, the smoker, or the person who overeats. They follow their short-term desires so often that it may reflect a large part of their identity. Should we not value their short-term decisions too? There is not a clear distinction between long-term desires and short-term desires: the two meet in the middle. The more powerful a long-term desire is, the more weight it should be given. Equally, the more short-term a desire is, the easier it is to show that interference with it is justified. But, I think we should always favour a long-term desire over a short-term one.

Furthermore, a smoker may have a long-term desire not to smoke but a short-term desire to smoke. This does not mean we should ban smoking. He may also have a long-term desire to be permitted to smoke, even if he hopes to choose not to. This can be likened to the case of Odysseus who made his men chain him to the rocks to prevent him succumbing to the sirens' song. As long as Odysseus's long-term desire remains unchanged, his men can legitimately interfere with his short-term desire. Deciphering when a long-term desire has changed could well pose evidentiary problems. However, when we know what the long-term desire is, it should be protected.

The distinction between long-term and short-term desires should not be seen as one which always favours safety conscious actions. Imagine Sarah's long-term desire is to be adventurous and go bungee jumping. Unfortunately, when she steps onto the platform, she is terrified and has a short-term desire not to jump. Here her long-term desire is more dangerous than her short-term desire.

CURRENT DESIRES VERSUS FUTURE DESIRES

In the seatbelt example, we have a conflict between two facets of the current self: the short-term desire not to wear a seatbelt and the long-term desire not to assume that risk. I argued that to best serve a person's autonomy we must favour their long-term desire. But, what happens if it seems that a long-term desire will change over time? In these circumstances I believe that we must favour current long-term goals over future long-term goals.

Imagine Paul is a dedicated boxer who loves boxing and chooses to compete voluntarily. Assume his actions do not harm others. He boxes all the time and takes repeated heavy blows to the head. Doctors have warned Paul that if he continues to box he will do himself irreparable, severe mental damage which will only begin to affect him in his old age. Despite being fully aware of these facts and understanding their implications he continues to box. A hard paternalist may still argue that we should prevent him from harming himself. Even if we disregard the superficial physical damage that he incurs in the present (bruising, bleeding, broken noses...etc), a hard paternalist would take issue with the harm his present actions are going to do to him in the future (the same could easily be said of smoking).

However, I think Paul should be allowed to continue boxing because it is his current desire. We must always favour current desires over future desires. There are several reasons why I hold this view.

1 KNOWLEDGE OF CURRENT GOAL

Firstly, Paul can know, with as much certainty as can ever be possible, what it is he currently desires.³ His current long-term goal is to box. For him, safety is secondary. This choice, which is voluntary enough, should not be overruled. The actor himself is best placed to determine his own desires. If we are pluralistic about what can constitute the good life, then we must allow people to choose their own actions and respect their autonomous decisions. It is irrelevant whether the state or majority or any other group prioritises different values. I agree with Joel Feinberg that this autonomy is not valued because it is best placed to bring about personal well-being. It is valuable because it is your autonomous choice: when you are acting voluntarily enough, autonomy reflects your desires.⁴

2 IGNORANCE OF FUTURE GOAL

Secondly, we cannot know for certain what Paul's future goals will be. An obvious objection to this point is that it is highly unlikely that the future Paul will desire to be brain damaged. This is a powerful criticism which I think can be subdivided into two separate concerns. Firstly, the current Paul's actions cause conventional harm to the future Paul (the harm of mental impairment). The autonomous person who engages in the dangerous activity (the young Paul who is a boxer) is, conceptually, a different autonomous person from the older Paul who experiences harm.⁵ Secondly, the current Paul's actions will also limit the future Paul's autonomy. If he suffers mental impairments then he will not be able to do certain things: his pool of choices from which to choose autonomously is limited. Furthermore, many of his decisions may not be deemed 'voluntary enough' because he is not in full possession of his mental faculties.

I will first consider the problem of the current Paul causing *conventional harm* to the future Paul. Let us compare Lisa, who voluntarily chooses to play Russian Roulette. Her actions are voluntary enough and she harms no-one else. In

³ I will not be discussing any sceptical hypothesis about knowledge.

⁴ Feinberg, *Harm to Self*, 48.

⁵ Again, I will set aside the more superficial harm of boxing, bruising, bleeding etc.

playing the game she will either live or die. Imagine in this case she is killed. Which is worse, Paul's case or Lisa's? This question can be answered in two ways. In one sense, Lisa's case is worse: it is worse to die than be injured. However, there seems to be something unjust about Paul's case. The current Paul harms the future Paul who does not want to be disabled. At least when Lisa plays Russian Roulette she takes on the risk when she is young and believes the risk is worth taking, and suffers the consequences at the same time. Her current autonomous act conventionally harms the current Lisa: the same Lisa. She does not suffer the additional harm of having her liberty limited. I believe that a necessary condition for intervention to be legitimate is that both these types of harm occur.

In Paul's case both harms are present. So, why allow the current Paul to conventionally harm the future Paul? I think the personal identity criterion can overcome this objection. The presence of both harms is a necessary but not sufficient justification for interference. Even although the future Paul would potentially have two claims, one of conventional harm and harm from limited autonomy, I still believe we should favour the current Paul. Up until now I have been describing the current and future Pauls as two conceptually separate entities. However, it is clear that they are not as separate as two actually distinct individuals. The current Paul is inextricably linked with the future Paul yet they will never coexist. They are neither one nor completely separate. It would be a mistake to bluntly apply the harm principle to this special relationship. The future Paul's claim may be stronger than the current Paul's, but, since the future Paul does not currently exist to make any claim, and since his existence is wholly dependent on the current Paul, I think the current Paul's claim must take precedence. For most people, their current self acts with an eye to the future, choosing paths that will make life pleasant for them. Yet, this is their choice to make. It is up to the individual to protect their future self from harm, not the state.

I will now consider the impact of Paul's current autonomous actions on his *future autonomy*. His current decision to box impinges on his future autonomy. His autonomy is limited in two ways. Firstly, as I discussed above, he is harmed

against his will, which is in itself an infringement of his autonomy: he would not choose to be harmed. Secondly, if he is brain damaged he can no longer have the choice to, for example, work as a surgeon. His pool of potential choices is limited. Furthermore, many other choices he may wish to make could fail to meet the voluntariness standard because he is not in possession of all his mental faculties. His choice to swim with sharks may be deemed invalid regardless of whether he would have chosen the same without his impairment. Unfortunately, it is impossible to fulfil both Pauls' autonomies. In a direct conflict between current and future autonomy, both might seem to weigh equally, yet we must choose. A hard paternalist would say choose the person who favours safety, thus avoiding conventional harm. Yet, I believe this distinction is arbitrary. Why should we protect the safety conscious person? Does that not simply impose an objective moral standard? Furthermore, we have no definite reason to believe either party will value safety. We would simply be guessing at what the future person's desires will be. Instead, I propose that when it comes to conflicts of autonomy we should always favour current autonomy. An individual can know, with as much certainty as is ever possible, what it is they currently desire. I therefore do not agree that we should overrule current autonomy to preserve a future autonomy deduced from probability and objective views of safety.

What about the critic who argues that paternalistic legislation which preserves Paul's safety will also increase his autonomy in the long-term? I think it is illogical to refer to a future person's autonomy being limited. The future Paul (P1) who is mentally disabled could never be a surgeon. That choice was never available to him. If the current Paul chose not to box then the new future Paul (P2) would not be mentally disabled. P2 could be a surgeon. However, P2 is a different autonomous person from P1. I would also like to return briefly to Lisa's case. When she was killed playing Russian Roulette I argued that only the current Lisa was affected. But, perhaps the future Lisa is also affected. The future Lisa's autonomy was undoubtedly reduced to zero. A dead person cannot make any choices. Yet, I believe there is a logical problem. If a person does not exist then they cannot have their autonomy limited. Nor can they be harmed.

Harm and autonomy cannot exist without a person to exercise that autonomy or feel the harm.⁶

3 ALTERATIONS TO FUTURE GOAL

The decisions Paul makes in the present could impact his future desires. A person who lives a reckless youth may become an old person who suffers ill health as a result. If Paul chooses to continue boxing he may look back in twenty years and regret his choice. However, we can also conceive of the opposite. If paternalistic legislation was enforced which prevented him from boxing it may not benefit anyone despite being introduced to protect the future Paul's autonomy. That future Paul may regret not being allowed to box. He may look back on his life and ask 'Why couldn't I live wildly when I was young?' There is no way to know what a person will want in the future, especially when current decisions can alter future desires. We should therefore protect the current desires of a person in the event of a perceived conflict.

This change in long-term goals need not be related to age. It is not because Paul is older that he has different desires. Instead, desires change based on experiences. We can view Paul's life in three stages:

- (1) A desire to box
- (2) Boxing
- (3) A desire that he had not boxed in the past because of the mental impairment he now suffers

In order to reach stage (3) he must first pass through stages (1) and (2). If paternalistic legislation were to prohibit boxing, he would never experience stage (2). He would therefore never reach stage (3). If he never reaches stage (3) then the paternalistic legislation has not benefited anyone. The paternalistic rule was designed to protect the autonomy of Paul in stage (3) by limiting his

⁶ A similar 'non-identity' argument was made in relation to future generations by Derek Parfit, as discussed in John O'Neill, Alan Holland and Andrew Light, *Environmental Values* (Abingdon, Oxfordshire: Routledge, 2008), 61-62.

autonomy in stage (1). But, because of the paternalistic legislation, stage (2) and (3) will never be reached. No-one's autonomy has been preserved. Paternalistic legislation was designed to protect the autonomy of a hypothetical person in stage (3) who, as a result of legislation, will never exist. There is a catch 22 situation. Paternalism has only succeeded in limiting the autonomy of Paul in stage (1).

It may be possible that even if he had not been allowed to pass through stage (2) and box, maybe the future Paul would still reach stage (3). If he saw people who had boxed and were now brain damaged he may be grateful that he was prevented from harming himself. Unfortunately, there is no way of knowing whether the future Paul will feel this way. All we can be certain of is the desires of the current Paul. We must respect his autonomy.

Thankfully, most people choose to live with an eye to the future. They are relatively careful and do not assume unnecessary risk. A primary reason that people choose not to smoke is to avoid dying of lung cancer (which is not an immediate risk). Their current goal takes into consideration their future goal. I do not think that rejecting hard paternalism will lead to a great increase in harmful actions. It will allow many people to exercise their autonomy.

4 ENDURING VALUE OF CURRENT GOAL

Finally, if Paul does live to be older, it would be unfair *at that point* to continue favouring the decisions of the younger Paul. What I mean is, when you are young the state should favour the young you. When you are old the state should favour the old you. As long as you are able to give valid consent then the state should not interfere with the decisions of the current you.

SLAVERY OBJECTION

Mill limited the harm principle by arguing that people should not be free to voluntarily contract themselves into slavery: we should not value an

autonomous choice to remove autonomy.⁷ Yet, I disagree. This view cannot be reconciled with the idea that a person should be free to limit their autonomy by harming (or killing) themselves.

The notion of a voluntary slave runs contrary to the traditional understanding of what a slave is: a person who is exploited and forced to act against their will. If a person freely chooses to be a slave then it is questionable whether they can be a slave in the traditional sense: by definition a slave is forced to act *against* his will. We need to separate this traditional understanding from that of a voluntary slave. For a choice to be a slave to be voluntary enough, it would need to be made free from pressures (including social and financial pressures). The actor must also be mentally capable. Perhaps people with masochistic-style personality traits would choose to be a slave. If such a person exists, then I think we must respect their choice.

However, the state is not obliged to enforce the rights of the slave master to oppress the slave against his will. If the slave's long-term desire changes (and he no longer desires to be a slave), his identity also changes. The slave owner could not treat this new person as a slave against his will: to do so would violate the harm principle and state interference would therefore be justified. In any dispute between the slave and slave master in respect of the 'contract of sale', the remedy of specific implement would not be available to the slave master.

Yet, slavery could be understood as being an *irrevocable* renunciation of your autonomy. Let us imagine that Planet Slave exists where anyone who chooses to be a slave can go and experience all the brutality of slave life. There is no way to bring them back. To allow an actor to go to Planet Slave, the state would need to satisfy itself that their choice was voluntary enough. However, if the choice was voluntary enough, the would-be slave should be allowed to go. State interference with that choice would be illegitimate. This may sound counterintuitive, but, we must remember that this person's long-term desire is to go to Planet Slave. However, although I stipulated that it was impossible to

⁷ Mill, *On Liberty*, 125.

return, if it was discovered that the actor's long-term goal had changed, the state would be justified in attempting to bring him home (even if this was impossible). In the boxing example, it is not an infringement of the current Paul's autonomy if we allow him to box, but then offer medical help to the future Paul who is mentally disabled.⁸

Mill argued that a person should not be allowed to sell themselves into slavery because doing so would mean giving up their autonomy. For him, this was the exact opposite of what liberty is protected for. However, I see no way that he can square this view about slavery, with a view that a person should be free to severely harm or kill themselves.

EFFECT

Using the personal identity criterion, the state could not legitimately propose an outright ban on any action. When voluntariness is the main consideration, we must acknowledge that some people will voluntarily choose to partake in harmful activities. There is nothing to prevent the state from informing people of the dangers in the hope this may convince them to be more careful. However, they could not legitimately enforce a rule requiring everyone to wear a seatbelt. There may be a person who desperately wants to drive without one. It would be permissible for police cars to stop drivers who were not wearing a seatbelt and remind them of the dangers. The same would hold for dangerous sports. Participants would need to take part voluntarily. Even extreme religious cults which promote self harm could be legitimate as long as their actions are voluntary enough.

CONCLUSION

⁸ I recognise that there may be a distinction between desiring harm for its own sake, and desiring an action which carries a risk of harm. However, I think the argument holds for both cases.

In the case of a conflict between long-term desires and short-term desires, we must always favour a person's long-term desires. In a conflict between current desires and future desires, it is the current desires which should be protected. The division between current and future desires is enough to distinguish two separate identities for the purpose of autonomy.

So, when can the state legitimately interfere with exclusively self harming action? If we apply the personal identity criterion, the state can never legitimately interfere with current long-term desires. They can only delay self harming action for as long as it takes to determine whether that action is voluntary enough.

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WWSD: What Would Socrates Do? The modern dilemma of obedience

Maitiu Corbett

“This is for your own good” is often the aphorism of governments and social institutions in their claims upon our freedoms. Our obedience is framed as collective self-preservation, but can it ever be so simple? Yet philosophical debate often seems to overcomplicate the issue. This article argues that the responsible protection of our rights arises, instead, with a constant reappraisal of citizenship. Freedom and obedience are ultimately two sides of an abacus with objective counters with subjective values; each individual’s calculations must be represented for there to be an accurate model of obligation.

The discourse of obedience has been ongoing for more than two thousand years. Startlingly though, the parameters of the debate have hardly altered since Plato set them out in *Crito* in 360 BC. This ancient account includes all the aspects of political obligation, including duty, gratitude and contract, which embody the arguments for and against obedient citizenship. In many ways, the conclusion of the tale is of negligible importance – it is the debate it has inspired that is its real legacy. Before the twentieth century this debate was rekindled most vividly during the Enlightenment in Europe in the late seventeenth and eighteenth century. Many modern theorists owe the clarity of the debate to consent theorists Hobbes, Locke and Rousseau.

Modern consent theory has generally found its best grounds for political obligation within the democratic model. John Rawls, Harry Beran, H. L. A. Hart, Peter Singer, J. H. Reiman and George Klosko have all supported the

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proposition that obedience to the state is the reasonable and rational price for living in a liberal democracy. Nevertheless, it would be laughable to call this a united front – they certainly aren't all consent theorists. Furthermore, there is a healthy, but no more cohesive, contingent of opposition to this view, ranging from the healthy scepticism of A. John Simmons to the devastating doubt of Robert P. Wolff.

This is far too arbitrary a division though: the debate not only has many shades of grey, but also many and varied approaches. It is not as simple as consent theory versus philosophical anarchism, rights versus duty or pluralism versus monism. In fact, it is all of these, and more, all at the same time, so gaining a foothold in the discussion requires a critical exposition of the main protagonists. Consent theorists believe they can present a convincing, if largely hypothetical, argument. This has been most notably propounded in modern times by John Rawls through his “original position” thought experiment. This is an essentially Hobbesian idea (although Hobbes believed it to be historical fact) in which each person is imagined to have made what might be called the ‘original choice’: to remain free, autonomous and at the mercy of the selfish whims of other free agents; or (what he sees as the rational choice) to forsake one’s own sovereignty, apart from human and political rights, to a protecting authority. In modern democratic terms this would entail a constitution of some sort, and obedience to its laws which draw legitimacy from a democratically elected legislative under the agreed terms of the constitution itself. Voting on this constitution would be the most obvious form of consent.

Therefore, taking this out of the hypothetical realm, Dudley Knowles cites several possible twentieth century examples of the ‘original choice’. These comprise of: De Gaulle’s Fifth Republic in 1958 (and another referendum on modifications to the constitution in 1962); a referendum on Britain’s membership of the EEC in 1975; and the establishment of a devolved parliament in Scotland following a referendum in 1998.¹

¹ Dudley Knowles, *Political Philosophy* (Routledge, London, 2004), 263-264.

However, scrutiny of just one of these reveals problems. The June 1975 referendum cannot be called consent because it was after the fact, Britain having already joined in 1973. It would have been a near diplomatic impossibility to pull out of the EEC by 1975, so the vote *had* to produce a positive result.

To this end, campaigners at the time more or less ‘manufactured consent’, releasing propaganda which skewed the evidence in favour of membership. This is cynically referred to as ‘political campaigning’ but the truth of the matter is that the electorate were not given a balanced education for their decision – major ‘down sides’, like partial loss of sovereignty, were heavily played down and the opposition didn’t have the resources to balance the debate. According to Andy Mullen and Brian Burkitt, the ‘Yes’ campaign was able to “overwhelm” the ‘No’ camp through superior funding and staffing – for publicity, ‘Yes’ officially had over £1.8 million and 163 staff, compared to the ‘No’ campaign’s 6 staff and £133,610.² As a result, between January and March the campaign achieved a 22% swing in public opinion, ensuring a positive outcome in June.³ Taking just this one example it is clear that obedience through contract can be called into question as a realistic proposition in practice – the British public essentially signed a contract without fully reading it.

That being said, although obedience to the state is often a staple point for consent theorists, and others philosophers, the position is argued as much through natural duty and fairness as it is through consent. Rawls is compelled by a natural imperative to uphold mostly-just regimes by obeying their laws. In this he is joined by Singer:

Since obeying the laws of any political system is one way of supporting that system, and any reason one has for favouring a political system is

² Andy Mullen and Brian Burkitt, “Spinning Europe: Pro-European Propaganda Campaigns in Britain, 1962-1975”, *The Political Quarterly*, Vol. 76, No. 1 (2005): 100; *ibid.*, 108.

³ *Ibid.*, 109.

*a reason for supporting it, any feature of a political system of which one approves is a reason for obeying that laws of that system.*⁴

This stems from Singer's view that obedience to a democratically elected authority is the "fair compromise" for not having to live in a more oppressive system. Applied to voting, this means that refusing to accept defeat undermines the very process through which liberty is upheld as "disobedience... implies willingness to *impose* one's views on the association".⁵ In effect, he urges citizens to accept democracy as the best of all available systems, despite occasional (but still significant) injustices. In this he is supported by Beran, who declares that the problem of an unsatisfied losing side "applies to only a small proportion of citizens... if the state in question is sufficiently welfare-promoting, then there will be a natural obligation to obey its law".⁶ Singer is not quite as steadfast as Beran in this conviction, conceding that in cases of civil disobedience, philosophy is too abstract to give an irrefutable judgement.⁷ Reiman too merely urges potential actors to consider the deep moral implications of disobedience.⁸

This default position in favour of obeying a democratic state does not, however, sit well with Wolff. He argues for a paralyzing tension between the duties of state and the duties of each person. His rather monist Kantian position is that it is each man- or woman's moral duty to act autonomously, according to reason.⁹ Conversely he sees the main feature of any state as being authority, by his definition the moral right to direct another person. Thus he sees a conflict of two moral rights because any degree of authority undermines autonomy,

⁴ Peter Singer, *Democracy and Disobedience* (New York: Oxford University Press, 1974), 60.

⁵ *Ibid.*, 36. My emphasis.

⁶ Harry Beran, *The Consent Theory of Political Obligation* (New York: Croom Helm, 1987), 72.

⁷ Singer, *Democracy and Disobedience*, 33-34.

⁸ Jeffrey H. Reiman, *In Defence of Political Philosophy: A Reply to Robert Paul Wolff's 'In Defence of Anarchism'* (New York: Harper Torchbooks, 1972), 57-59.

⁹ Robert Paul Wolff, *In Defence of Anarchism* (New York: Harper Colophon, 1976), 14.

Wolff's sovereign virtue, and therefore "... there would appear to be no state whose subjects have a moral obligation to obey its commands".¹⁰

Taking conscription as a practical example, Simmons is in agreement that the final choice to contribute must be taken by the citizen:

*The responsibility of government in a democracy is not to conscript against an inevitable emergency; it is rather to make military service attractive, to make clear to citizens the value (if any) of a strong deterrent force, and to leave the results to the voluntary decisions of the people whose nation it is.*¹¹

Nevertheless, Simmons is prepared to accept modern democracy as a system merely in need of some new guidelines. Wolff on the other hand completely rejects democracy. Calling to mind Kenneth Arrow's Impossibility Theorem, he argues that unless MPs intend to accurately represent the views of each and every citizen, they are every bit as illegitimate as dictators.¹² To this effect, he argues that "... anarchism is the only political doctrine consistent with the virtue of autonomy".¹³ This view invites a criticism which calls to mind Michael Heseltine's memorable aphorism "*A man alone in the desert is sovereign. He is also powerless*".¹⁴

So, on the one side is the argument to obey the state, on the other that to obey only oneself. Then again, equally valid arguments come from the positions of gratitude and fairness. This contribution was made most notably in Plato's *Crito*, wherein it was argued that obedience to the will of the state was a way of

¹⁰ Ibid., 19.

¹¹ Alan John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, (New York: Cambridge University Press, 2001), 64.

¹² Wolff, *Anarchism*, 30.

¹³ Ibid., 18.

¹⁴ Philip Stephens, "Britain and Europe: An Unforgettable Past and an Unavoidable Future", *The Political Quarterly*, Vol. 71, No. 6 (2005): 18.

showing appreciation for the protection the state has provided you, and the rest of society, even if you (in the case of Socrates) are deemed to be just such a threat. As summed up by Knowles, "... gratitude should be signalled by the citizen's acceptance of their duties", including for Socrates the acceptance of his own death as an outcome of the state's promise to protect society.¹⁵

H. L. A. Hart is the most notable modern advocate of the sister philosophy to gratitude, that of fairness, arguing that:

*When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have the right to a similar submission from those who have benefited from their submission.*¹⁶

This view, essentially one of contract, is endorsed by Klosko in a less contractarian sense. He envisions obligation as fairness, not as a moral question:

*political obligations stem ultimately from the receipt of such [state] benefits provided by the efforts of one's fellow citizens, rather than from moral requirements binding on all human beings.*¹⁷

This is a direct counter-argument to that of Rawls, who charges citizens with the moral obligation to uphold just regimes. Klosko sees this obligation not as a moral imperative, but as a calculated mark of gratitude towards society and therefore the benefits received must equal or out-weigh the cost incurred on autonomy. Rawls, along with Reiman, argues that it is moral duty, not personal costs, which should be weighed. Singer, in concert with Rawls, encourages the citizen to accept and endorse democracy as their best option.

¹⁵ Knowles, *Political Philosophy*, 288.

¹⁶ H. L. A. Hart, "Are there any Natural Rights?", quoted in Knowles, *Political Philosophy*, 283-284.

¹⁷ George Klosko, "Political Obligations and the Natural Duties of Justice", *Philosophy and Public Affairs*, Vol. 23, No. 3 (1994): 253.

One problem with arguments like those of Singer and Rawls is, however, that they seem to admit that philosophy has failed to find an answer. They both amount in sense to ‘hedging your bets’ with democracy and thus place a limit on philosophy, as Singer freely admits.¹⁸ Even still, the main challenge to this, from Wolff, suffers an inverse philosophical haemorrhage, placing such exacting standards of autonomy on the system that even anarchism cannot answer the call. After all, surely autonomy of choice must entail freedom from fear; an anarchistic system (or rather, non-system), which relies so heavily on sound moral judgement on the part of every human being, is wide open to abuse and thus fear of violence. At this point consent theory is extremely attractive.

Even still, actual consent for a political system is hard to come by – not only are modern examples suspect (as in the 1975 referendum) but even explicit consent can be the result of lack of choice, through the development of a dictatorship of the majority. This is illustrated by Knowles in reference to voting. Taken on the basis of one vote, he argues, democracy is relatively sound. Not getting the result you wanted “... is not tyranny; it is just defeat”.¹⁹ The real problems arise, however, from systems of in-built division, usually along religious or ethnic lines, wherein the losing-side of an initial election become increasingly marginalised as the winners pass legislation and appoint sympathetic judges, intent upon entrenching their victory. In this sense “... democracy may serve as a mechanism for quickening as much as expressing social conflict”.²⁰ In support of this he sites trouble in the states of former Yugoslavia. More currently, Kenya displays the same problem, where the prospect of another entrenched Kikuyu government has driven Luos to violence.²¹

¹⁸ Singer, *Democracy and Disobedience*, 33-34.

¹⁹ Knowles, *Political Philosophy*, 319.

²⁰ Ibid.

²¹ “More Mayhem than Mediation”, *The Economist* (London), 2 February 2008, 55-6.

Arguments from fairness and gratitude also suffer problems, not least because they presume that all benefits of democracy are avoidable. Someone with a life-threatening illness but without the money to pay for private care will be forced to embrace the benefits of the NHS. This is not to say they shouldn't be grateful but, as put best by Jean Jacques Rousseau, "*gratitude is a debt to be paid, not a right to be exacted*".²² When it comes to building armed forces therefore, the cultivation of a 'national spirit' of duty is the extent to which a government can morally pursue enrolment, as argued by Simmons. Wolff's proposition of anarchy, however, is a step too far. Nonetheless, it raises important questions to the extent personal judgement should be limited. Referring in this light to political representation, Alec Walen comments that:

*even in an ideal democracy there will be reasonable pluralism, the law may reflect a false view of justice. If it does, then justice may call for the use of illegal force.*²³

Curiously, with the exception of Beran, the majority of those discussed as proposing obedience see cases of civil disobedience as acceptable, given certain provisos. Rawls agrees that if a certain group finds itself consistently the victims of injustice, they have the right to protest in an illegal manner. Singer argues that the violation of rights, political and human, "... invalidates the reasons for obedience" as do certain extreme situations, such as Vietnam.²⁴

There are other tensions here though. Firstly, what if these same reasons were applied to one person only – just to one person conscripted to fight in Vietnam? Wolff would argue that a sole dissenter has as many rights as a group – something which few others properly address. How, in Rawls' model for example, is one person to appeal effectively to the sense of justice of the majority? The problem here is that it is highly impractical (limited access to

²² Rousseau in Knowles, *Political Philosophy*, 289.

²³ Alec Walen, "Reasonable Illegal Force: Justice and Legitimacy in a Pluralist, Liberal Society," *Ethics*, Vol. 11, No. 2 (2001): 366.

²⁴ Singer, *Democracy and Disobedience*, 68; *ibid.*, 63.

money, time, media coverage etc) for a sole dissenter to follow through on his or her feelings in all cases, even if they are proved right. Singer illustrates this difficulty in the court system of the United States. Since the judges of the Supreme Court are appointed alternately by Presidents of two deeply entrenched political parties, the Court itself is majoritarian and thus "... has generally followed [majority] public thinking after a decent interval".²⁵ Even the congressional approval is essentially majoritarian.

The converse tension is that in wanting to better a society, dissenters arguably destabilise it. To this end, Reiman argues that society stands on cooperation and the "duty of reciprocity".²⁶ Therefore, to answer the question of whether the fact of living in a democracy gives a person a special reason for obeying the state, a balance of these tensions must be struck. There is little sense in a monist duty to uphold just systems – this should be a purely practical consideration to preserve a system which, on the whole, preserves rights. The implication made by Rawls and Singer is that democracy should be accepted in principle, while civil disobedience is merely a sometime-necessary evil. However, civil disobedience is not, as Singer claims, the dissenter imposing their views; it is merely a red flag signalling the imposition of others' views in the dissenter. It also reflects the imperfection, as pointed out by Walen, of democracy as a system which can, at times, skew justice.

To return to the question then, democracy gives a person a reason to consider obedience, but so too does it foster situations where disobedience is a reasonable option. There should therefore be no default position, merely a constant reappraisal of one's citizenship and rights.

This could be easier said than done. The global clamp-down on terrorism, and the paranoia that has come with it, has brought citizenship to the fore; the moral abacus is a blur. The government's pursuit of personal information and verification as well as constant knowledge of all our whereabouts has thrown

²⁵ Ibid., 68.

²⁶ Reiman, *Political Philosophy*, 57.

up a series of invasive suggestions from identity cards to armed policemen in airports. The citizen is being forced, with a certain urgency, to make hard choices about his or her rights and duties. This tension is evident in responses to recent government proposals on identity cards and longer detention of terror suspects which remain in deadlock in every forum from internet chat rooms to the House of Commons.

This is just one case in point in which the citizen must weigh up their rights (to privacy) against their citizenship (sacrificing private information to help protect the state and therefore oneself). The primary tension here is that rights are arguably objective whereas citizenship is subjective, being dependent on so many of the above factors like gratitude, duty and contract. This is certainly not to suggest that objective trumps subjective. This is for two reasons: first, even though the concept of rights is itself objective and therefore so is each individual right, what those rights actually are still deserves discussion; second, subjective issues, like perhaps abortion, can be just as riddled with absolutes. In fact, just such a subjective issue illustrates a conflict between objective rights, those of the mother and those of the unborn child.

The objective and subjective therefore must be held in balance when pondering upon obedience to the state. People must put a price on democracy, to be paid for by degrees of liberty. This price should not be set in stone however, but constantly reappraised in what might crudely be described as a liberty market, where control of freedoms is subject to demand, whether that be from terror-war governments or those resorting to civil disobedience. This market must not respond to violence – conclusions should be reached before this end. Finally, obedience must be bought at a price agreed by both parties, and fairly traded.

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The demise of state legitimacy: is globalisation the villain of the piece?

Christopher M. J. Boyd

The legitimacy of the state has traditionally been a core element in how we understand the relationship between individuals and institutions in modernity. Its demise is therefore an important subject of analysis. The concept of globalisation has provided an important theoretical framework which explains many of the profound challenges to the legitimacy, and even existence, of the state. However, this framework risks perpetuating modernity's tendency towards oversimplification by focusing too much on the state in particular and geopolitics in general, over other sites and processes of governance. The complexities of the problems must be reflected in theories proposing to answer them.

INTRODUCTION

The nation-state could be said to be a defining element of the modern era. In theory “the modern state is a sovereign state... internally supreme over the territory it controls”.¹ However, modernity's concept of the state, and even modernity itself, has become problematic, “coming under pressure from claims that we live in a time of globalisation”, and that its “universalizing tendencies and transnational structural transformations” pose significant problems.² It is far

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¹ Mark Beeson, “Sovereignty under Siege: Globalisation and the State in Southeast Asia”, *Third World Quarterly*, Vol. 24, No.2 (2003): 359 (quoting Laski, writing in 1925).

² Scott Veitch, Emiliios A. Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and Concepts* (London: Routledge-Cavendish, 2007), 53; William I. Robinson, “Social

from certain whether the processes “discussed under the rubric of globalisation represent the demise of the paradigm of modernity”, or simply mark a sub-paradigmatical shift *within* modernity.³ In either case, there appear to be definite signs that the concept of the state is undergoing a “legitimation crisis” and in light of this it should be asked what impact the processes of globalisation have had on the legitimation of state power.⁴

THE PROCESSES OF GLOBALISATION

Defining globalisation can be difficult as what it “exactly means, the nature, extent, and importance of the changes bound up with the process, is hotly debated”.⁵ Despite, or perhaps because of, this, an analysis of globalisation is “acquiring a critical importance for the academic” whereas traditionally it has been the domain of the economist or international legal practitioner.⁶ An account of globalisation should not define it purely negatively, in terms of the vacuum left by the decline of the state or the failure of traditional legitimacy, for power – “and Michel Foucault was not the only one to teach us this – fears and despises a vacuum”.⁷ Globalisation exists empirically and conceptually as presence, not absence. David Held defines globalisation as “a process (or set of processes) which embodies a transformation in the spatial organisation of social

Theory and Globalization: The Rise of a Transnational State”, *Theory and Society*, Vol. 30, No. 2. (2001): 157.

³ Veitch et al., *Jurisprudence*, 198-9.

⁴ Manuel Castells, *The Information Age: Economy, Society and Culture – Vol. II: The Power of Identity* 2nd ed. (Oxford: Blackwell, 2004), 334 (quoting Habermas).

⁵ Difficult linguistically, as well as theoretically, for Santos refers to globalisation (singular) throughout his works yet has also claimed that there is no single process: “There are, rather, globalisations, and we should use the term only in the plural”. Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (London: Butterworths Lexisnexis, 2002), 178; Robinson, *Social Theory and Globalization*, 157.

⁶ Robinson, *Social Theory and Globalization*, 157.

⁷ Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000), 13.

relations and transactions... generating transcontinental or interregional flows and networks of activity, interaction, and the exercise of power”.⁸

One such globalising process is identified by Ulrich Beck in his theory of Risk Society as the “*globalisation of contingency*”, the contingency consisting of the end of humanity by the hand of humanity, the exponential increase in the “*self-generated risks of technologised civilisation*”, both real and imagined.⁹ Risk possesses “an *inherent tendency towards globalisation*” because, not being generated by pathological community interactions which may be delineated territorially, it naturally transcends *cæsurae* between national and international, being felt not only at global but also local levels.¹⁰ This led Beck to coin the term ‘glocal’, and indeed this ‘glocality’ is crucial to many analyses of globalisation and its effects on the state. Mathew Dillon’s account of biopolitics is also centred on *contingency* but, *contra* Beck, does not categorise ‘the contingent as risk’ as some “epiphenomen[on] of the social that gives rise to something called risk society”.¹¹ Instead, it is “the very principle of formation for the social” and while Beck argues that the social form itself is at risk, Dillon claims that “almost all of his examples, however, prove to the contrary” as modern capitalism appears capable of incorporating these risks into its logic.¹² This has generated the claim that globalisation is nothing new because

⁸ David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations: Politics, Economics and Culture* (Stanford, California: Stanford University Press, 1999), 16.

⁹ Risk Society is a reflexive second-modernity wherein “the problems and conflicts relating to distribution in a society of scarcity overlap with the problems and conflicts that arise from the production, definition and distribution of techno-scientifically produced risks.” To further complicate matters, the perception of risk may be as important as risk itself. Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992), 19; Ulrich Beck, *Power in the Global Age* (Polity Press, Cambridge, 2005), 250. Emphasis in original; *Ibid.*, 252. Emphasis in original; *Ibid.*, 257.

¹⁰ Beck, *Risk Society*, 36. Emphasis in original; Beck, *Power in the Global Age*, 249.

¹¹ Michael Dillon, “Governing Terror: the State of Emergency of Biopolitical Emergence”, *International Political Sociology* Vol.1, Issue 1 (2007): 9.

¹² *Ibid.*, 9; *ibid.*, 16.

modernity is *inherently* globalising: “capitalism has always functioned as a world economy, and therefore those who clamour about the novelty of its globalization today have only misunderstood its history”.¹³ Nevertheless, transnational interactions have undergone “dramatic intensification” in recent decades and no longer follow “the modernist pattern of globalisation as homogenisation”, now displaying complexification and connectivity with other transformations irreducible to globalisation.¹⁴ Whether this qualitative shift is an “epochal crisis” caused by a violent breaking-away from modernity or simply “structural adjustment within – rather than beyond – the confines of capitalism” is, however, unclear.¹⁵

Globalisation’s ambiguity has led to numerous interpretations of its effects on modernity. Boaventura de Sousa Santos categorises these as belonging to either a *paradigmatic reading* or a *sub-paradigmatic reading*, prompted by two ideal-type audiences; the ‘transformative’ and ‘adaptive’, respectively. The transformative audience is the “more apocalyptic in the evaluation of fears” yet also the “more ambitious as to the range of historical possibilities and choices” that are opening up, although Beck’s thesis, while self-situated within modernity (granted, an altered second-modernity), is both apocalyptic and ambitious.¹⁶ Susan Marks, in contrast, provides a tripartite metatheoretical analysis of ‘strong globalisation’, ‘globalisation scepticism’ and ‘weak globalisation’ theses. ‘Strong globalisation’, asserts only that “the constraints within which national authorities operate have in some respects tightened”, and thus is neither radical nor paradigmatic.¹⁷ ‘Globalisation scepticism’ takes the position that *even this* goes too far in underplaying arguments for the empirical, and desirable, continuation of state power. It considers the ‘strong globalisation’ thesis to be ideological, creating “pathology of over-diminished expectations” to

¹³ Hardt and Negri, *Empire*, 8.

¹⁴ Santos, *New Legal Common Sense*, 165; *ibid.*, 166.

¹⁵ *Ibid.*, 175; *ibid.*, 174.

¹⁶ *Ibid.*, 175; *ibid.*

¹⁷ Susan Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press, 2000), 79.

discredit national strategies in light of international markets.¹⁸ Between these poles, Marks describes the ‘weak globalisation’ thesis which, “while recognising the enduring powers and responsibilities of national governments”, is sensitive to the non-national contexts of state decision and action.¹⁹

Santos, however, recognises that these readings are not necessarily mutually exclusive, and do not coexist merely at the theoretical level. Empirically, some processes are predominantly subparadigmatic and others predominantly paradigmatic, which leads to an element of chaos that mixes “both uncontrollable dangers and unsuspected emancipations”.²⁰ Nevertheless, globalisation produces distinctly non-chaotic results, evident in the repetition of balanced dualisms: *globalised localism* and *localised globalism*, and also the phenomena of *subaltern cosmopolitanism* and the *common heritage of mankind*.²¹ The complexities of interactions between these concepts – they “may apply to different phenomena, but they may also be different dimensions of the same phenomena” – highlight the subtleties involved in a convincing account of globalisation.²²

Santos’ definition of globalisation as “the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local” is at the core of this first dualism.²³ Globalised localism is the process by which a local phenomenon becomes globalised. This necessarily entails other potentially-globalisable phenomena being rendered ‘local’, and one globalised localism being imposed on other localities (which often leads to the criticism that globalisation is neo-colonialism, as the local roots of many globalisms are

¹⁸ Ibid., 80.

¹⁹ Ibid., 80.

²⁰ Santos, *New Legal Common Sense*, 177.

²¹ This term seems more appropriate than ‘dichotomies’ insofar as it reflects the rejection of mutual exclusivity.

²² Santos, *New Legal Common Sense*, 179.

²³ Ibid., 178.

found in Western modernity). This argument is strengthened by the fact that core, Western, countries “specialise in globalised localisms, while upon the peripheral countries is imposed the choice of localised globalisms”.²⁴ Santos therefore claims that globalisation could just as correctly be called *localisation* and that only “because hegemonic scientific discourse tends to prefer the story of the world as told by the winners” do we prefer one term over another.²⁵ Yet is our choice not because globalism is the defining characteristic of globalisation? While local phenomena may exist without globalism, the opposite is not true.

The final dualism, *subaltern cosmopolitanism* and the *common heritage of mankind*, is, conversely, paradigmatic. The former describes “counter-hegemonic practices and discourses” only possible in the progressive coalitions between *local* sites and people in the periphery of the capitalist world-system, though to some extent local sites are no longer distinct and “we continually find the First World in the Third, and Third in the First”.²⁶ ‘Common heritage’ refers to issues which cannot be geographically bounded except at the level of the world as whole and which may create the space for new counter-hegemonic vocabularies of their own. Santos’ fascination with emancipation is also clear when he says that even though globalisation has “created new terrains hospitable to tolerance, ecumenism, world solidarity and cosmopolitanism, it is no less true that new forms of intolerance, chauvinism and imperialism have likewise developed”.²⁷

This imperialism may be seen in Michael Hardt and Antonio Negri’s account of globalisation as ‘empire’. The term is not meant to elicit a simplistic comparison between contemporary globalisation and European colonialism. Neither does it indicate that globalisation is reducible to the present reality of America’s international hegemony, for not even America can control a global order

²⁴ Ibid., 179.

²⁵ Ibid., 178.

²⁶ Ibid., 180; Hardt and Negri, *Empire*, xi-xvi.

²⁷ Santos, *New Legal Common Sense*, 172.

defined by its “acephalous, anonymous and partly deterritorialised character”.²⁸ The term instead indicates the emergent political order involved in the processes of globalisation. This order, this new sovereignty-of-the-whole, “manages hybrid identities, flexible hierarchies, and plural exchanges through modulating networks of command”.²⁹ Santos would describe it as paradigmatic, certainly, but it sits uncomfortably with his dualisms for it is involved in the dissolution of all divisions and boundaries. “Empire posits a regime that effectively encompasses the spatial totality”, reducing nations to locales, the *Other* to the internal-other and the enemy state to the *rogue state*.³⁰ Beyond geopolitics, totality is also present in Empire’s presentation of itself as without temporal boundaries, an order that “suspends history and thereby fixes the existing state of affairs for eternity”.³¹ In keeping with this, totality is always-already in a crisis of coincident construction and corruption (in the classical sense) and is always-already being rendered legitimate in its construction of self-validating “social fabrics that evacuate or render ineffective any contradiction”.³²

LEGITIMATION OF STATE POWER

There are a number of grounds which can be added to Max Weber’s original tripartite exposition of ‘legitimate domination’.³³ Although Weber described the nation-state legitimacy as being of the ‘rational’ type, in many cases appeals to tradition (and claims that globalisation negatively affects such tradition) are also made. Tradition is a factor which has never been unproblematic, and which is not necessarily dependent on globalisation for its decline: the nation-state

²⁸ Susan Marks, “Three Concepts of Empire”, *Leiden Journal of International Law*, Vol.16, Issue 4 (2003): 904.

²⁹ Hardt and Negri, *Empire*, xii-xiii.

³⁰ *Ibid.*, xiv.

³¹ *Ibid.*, xiv-xv.

³² *Ibid.*, 34.

³³ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (2 vols.) (University of California Press, California, 1968), 215. This is the *Rational*, *Traditional* and *Charismatic* forms of authority.

captured “historical time through its appropriation of tradition and the (re)construction of national identity”, though the result is an ‘invented tradition’, incapable of serious legitimation.³⁴

It may also be argued that states “need something other than just democracy on which to ground the legitimacy of their domination”.³⁵ States, according to Fritz W. Scharpf, instead have both democratic ‘input-legitimation’, and ‘output-legitimation’ based on the efficient production of solutions.³⁶ This interpretation is echoed in Ian Loader and Neil Walker’s view of the state as the most democratic *and effective* security-provider, and their wish to foster “virtuous circles within which [democratic] legitimacy and effectiveness become, and are seen as being, mutually reinforcing”.³⁷ Yet, according to Beck, the state is fundamentally unable to guarantee security for its citizens in the face of the “*perceived threat to humanity from the self-generated risks of technologised civilisation*”.³⁸ Legitimation tied to the nation-state undergoes a crisis wherein “the citizens’ duty of obedience *becomes null and void*”.³⁹ At least, insofar as obedience is due to ‘output-legitimation’, for national-democratic legitimacy would appear unaffected by the failure of its, essentially ademocratic and not *necessarily* national, counterpart. That the state is in crisis at all is a claim some authors reject. Loader and Walker distinguish between ‘pedigree’ and ‘priority’, arguing that while there are many pedigree lines – “many forms of original authority” sitting alongside the state – this does not mean that “the state does not possess a stronger pedigree and should not prevail in the final instance”.⁴⁰ Michel Foucault, however, would argue that this fails to

³⁴ See, Eric Hobsbawm and Terence Ranger, ed., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983); Castells, *Information Age*, 303.

³⁵ Beck, *Power in the Global Age*, 252.

³⁶ Input-legitimation is referred to by Scharpf as ‘domination *by* the people’; output-legitimation as ‘domination *for* the people’; *ibid.*

³⁷ Ian Loader and Neil Walker, *Civilising Security* (Cambridge: Cambridge University Press, 2007), 222.

³⁸ *Ibid.*, 252. Emphasis in original.

³⁹ *Ibid.*, 255. Emphasis in original.

⁴⁰ Loader and Walker, *Civilising Security*, 189; *ibid.*, 190.

recognise that the techniques of government are visible in a plurality of relations not restricted to the state. For him the important process of modernity is “not so much the statization [*étatisation*] of our society, as the ‘governmentalization’ of the state” where ‘government’ for Foucault is simply a form of power, having as its object the surveillance and control of complex relations between people and things.⁴¹

That such governmentalisation may be seen in humanitarianism, once the preserve of states but now dominated by NGOs, undermines another possible source of state legitimacy; its place in the struggle for emancipation.⁴² Santos describes this struggle as the tension between the two ‘pillars’ of modernity, emancipation and regulation. Regulation – of which the *state*, *market* and *community* are constitutive elements – functions to guarantee stability, establishing a limit for the possible (and thus legitimate) expectations generated by the vocabularies of emancipation. The collapse of emancipation into regulation, the crisis of modernity, has been brought about partly by the colonisation of emancipation by science/technology, which we know from Beck is fraught with risk, partly by the “overdevelopment of the principle of the market” to the detriment of the state, and partly by the hubris of modernity as a paradigm that seeks to develop both competing pillars in a simultaneous and self-sustaining process of progress.⁴³ As the nation-state becomes unable to “deliver its promise of greater emancipation”, it loses both its legitimacy from effectiveness *and* from its place-in-emancipation.⁴⁴ The resulting increase in generalised contingency renders not only the dialogue between regulation and emancipation untenable, but also regulation itself as an element of state power for reasons which would be recognisable to a subscriber to Risk Society theory.

⁴¹ Michel Foucault “Governmentality”, in *The Foucault Effect*, ed. Graham Burchell, Colin Gordon and Peter Miller (London: Harvester Wheatshear, 1991), 103.

⁴² Insofar as one does not take the Marxist position on emancipation which sees emancipation-through-the-state as only partial, and even potentially harmful, as it does not emancipate man *from* the state. See Karl Marx, “On the Jewish Question”, in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 1977.)

⁴³ Santos, *New Legal Common Sense*, 9.

⁴⁴ Veitch et al., *Jurisprudence*, 199.

For Beck, however, this is not *necessarily* negative for where “experiential spheres and horizons of expectation become separated from one another” the re-opening of emancipation can be found.⁴⁵

THE STATE OF THE STATE

Globalisation has certainly had profound effects on the legitimacy of state power, and on the “state of the state” itself.⁴⁶ The main effect, almost by definition (and it may be that the term ‘globalisation’ itself overdetermines analysis by invoking an inherently anti-national concept), is the displacement of the state from the centre of the global order to a position “in a network of interaction with supranational macro-forces and subnational micro-processes” as well as altogether *anational* processes.⁴⁷ Alongside the state, for example, Santos posits new ‘structural time-spaces’ of “the householdplace, the workplace, the marketplace, the communityplace, the citizenplace and the worldplace” into which politics is relocated.⁴⁸ These places map, to some degree, onto Foucauldian disciplinary institutions, and as well as being propagated by globalisation, are simultaneously rendered problematic by it. It becomes the case that “one is always still in the family, always still in school, always still in prison, and so forth” as these spaces elide, yet “the institutions work even though they are breaking down – and perhaps they work all the better the more they break down”, becoming part of the omnicrisis of Empire.⁴⁹

The effect of globalisation is not only the problematising of *place* (and geopower) but also the emergence of new forms of power, including Achille Mbembe’s ‘necropower’. An important geopolitical dynamic of this is the logic of fragmentation, visible in the occupation of Palestine, which involves rethinking traditional territoriality and embracing the “creation of three-

⁴⁵ Beck, *Power in the Global Age*, 254.

⁴⁶ *Ibid.*, 18.

⁴⁷ Castells, *Information Age*, 365.

⁴⁸ Santos, *New Legal Common Sense*, 17.

⁴⁹ Hardt and Negri, *Empire*, 197; *ibid.*

dimensional boundaries across sovereign bulks”.⁵⁰ This creates a new ‘politics of verticality’ consisting of separations (and contestations) between the separate geographies of airspace, ground and subterrain that are coimposed on the same landscape. Globalisation-age wars become necropolitical *par excellence* as they break radically from the “conquer-and-annex territorial wars of modernity”.⁵¹ Rather than bounded colonies, the resulting political spaces are inextricably tangled patchworks of “overlapping and incomplete rights to rule” in which “plural allegiances, asymmetrical suzerainies, and enclaves abound”.⁵² Finally, the dialectic between outside and inside collapses; globalisation-as-empire “will no longer confront its Other and no longer face its outside, but rather will progressively expand its boundaries to envelop the entire globe as its proper domain” and in so doing reformulate war from seeking-conquest to the service of peace (further strengthening empire’s legitimacy).⁵³

The enemy, therefore, becomes “at once banalized (reduced to an object of routine police repression) and absolutized (as the Enemy, an absolute threat to the ethical order)”.⁵⁴ National armies become, or compete with, *war machines* – “polymorphous and diffuse organisations... characterised by their capacity for metamorphosis” and spatial mobility – while the nation-states themselves are dissolved by globalisation into a plurality of “forms of the state in the second modernity”.⁵⁵ Rather than replacing the nation-state, these sit alongside it and bring with them both insecurities and “opportunities opened up by cooperative transnational sovereignty”, such as the counter-hegemonic globalisations of Santos.⁵⁶ Yet is this really an effect of globalisation? Historically, plurality of form appears the rule, rather than the exception: “the modern nation-state had a number of ‘competitors’ (city-states, trading pacts, empires)... which did not

⁵⁰ Achille Mbembe, “Necropolitics”, *Public Culture* Vol. 15, Issue 1 (2003): 27-28.

⁵¹ *Ibid.*, 31.

⁵² *Ibid.*

⁵³ Hardt and Negri, *Empire*, 189.

⁵⁴ *Ibid.*, 13.

⁵⁵ Mbembe, *Necropolitics*, 32; Beck, *Power in the Global Age*, 257-267.

⁵⁶ *Ibid.*, 262.

disappear, but coexisted with the nation-state throughout its development in the modern age.⁵⁷ Although it has been claimed that the “metamorphosis of ‘the real world’ has generally had surprisingly little impact on the way international relations are conceptualised at a formal, theoretical, level”, the traditional, Westphalian, theory of states as isolated sovereign entities that are the most important actors in the international arena has ceased to be dominant (if indeed it ever was).⁵⁸ Theorising, however, remains important because “the international system is a potentially fluid environment in which even the most seemingly fundamental ‘structures’ are to some extent discursively realised through the inter-subjective generation of meta-norms and values” – to critique globalisation may very well be more than a *merely* theoretical exercise.⁵⁹

Beck also uses globalisation as an argument to extend political legitimacy by including what is necessarily removed from nation-states: the self-generated risks of modernity. Risks provide legitimation where political actors “are able to claim that they are working to avert” them because their shocking nature is “capable of creating a global consensus that in turn creates global power”, though a consensus not tied to participation, and a power of highly ambiguous consequence.⁶⁰ Sufficient pressure is created to close the ‘consensus gap’ in democratic legitimacy; the distance between the difficulty in achieving consensus – which increases precisely as the political actors involved become more numerous – and the need to find such a consensus.⁶¹ Yet this new

⁵⁷ Castells, *Information Age*, 356.

⁵⁸ It is right here for ‘real world’ to appear as a qualified term, for just as traditional Westphalian internationalism is a discourse, so too is its critique, which may be argued has no more possibility of reaching the ‘real’ than what it critiques. As Jacques Derrida has said, *il n’y a pas de hors texte*. Beeson, *Sovereignty under Siege*, 359. Hardt and Negri, *Empire*, 4. See also *The Invention of Tradition*.

⁵⁹ Beeson, *Sovereignty under Siege*, 361.

⁶⁰ Beck, *Power in the Global Age*, 253.

⁶¹ The term ‘political actors’ does not, here, refer only to states, as is the current trend with the term ‘national actors’. The term ‘national actors’ *as state-synonym* is used to contrast states with supranational bodies: “an analytical convenience rather than a

legitimacy is inherently *ad*emocratic, procedurally (because of its ‘globality’) and because – here the ambiguous consequences appear – “as the perceived danger to humanity grows, so too does the people’s willingness to cast off the fetters of democracy”.⁶² In comparison to this new “*global populism of defence against risk*” (where “political decision making has migrated from systems of national governance into economic, technological and scientific domains”) traditional participatory democracy is presented as an idyllic relic.⁶³ Legitimacy-from-risk is also a radical break from legitimacy-from-efficiency, for *inefficiency* not only fails to diminish risk, but also exacerbates and even creates problems, and thus even more legitimacy wherein “a wrong response can cleanse itself of its wrongdoing in the waters of the problems to which it has contributed”.⁶⁴ The continued existence of the state, rather than providing solutions, becomes an active cause of mistakes. Paradoxically, “as the mistakes that multiply people’s woes increase, so too does threatened humanity’s willingness to forgive those mistakes”; possibly even to the extent of forgiving the state’s continued presence.⁶⁵

Shifting bases for legitimation are also seen in the ‘epochal juridification processes’ described by Jürgen Habermas. These have both emancipatory and problematic aspects, for while the earlier epochs display “*freedom-guaranteeing juridification*”, with the advent of what he calls the fourth epoch there is a growing ambivalence: not merely the emergence of unwelcome side-effects, but also inherent problems.⁶⁶ Scott Veitch has identified a possible subsequent fifth epoch in which the ambivalence mentioned above is weakened, not through

genuine erosion of the state”. Nettl, J.P., “The State as a Conceptual Variable” *World Politics*, Vol.20, No.4 (Jul., 1968), 563.

⁶² Beck, *Power in the Global Age*, 253.

⁶³ *Ibid.*, 255. Emphasis in original. Gabe Mythen, *Ulrich Beck: a Critical Introduction to the Risk Society* (Pluto Press, London, 2004), 158.

⁶⁴ Beck, *Power in the Global Age*, 255.

⁶⁵ *Ibid.*

⁶⁶ Jürgen Habermas, *The Theory of Communicative Action vol. 2, Lifeworld and System: A Critique of Fuctionalist Reason* (Cambridge: Polity Press, 1987), 361. Emphasis in original.

solutions having been found to juridification's problems but through a weakening of the "trajectory of freedom-enhancing measures in the pursuit of social or public goods" (what Santos would describe as emancipation) in favour of the economic end of efficiency.⁶⁷ This touches upon not only the legitimacy argument provided by Scharpf, Loader and Walker, but also Foucault's 'governmentality', which is orientated not toward the common good but to the most convenient end for what is governed.

Discussions of sovereignty, unlike governmentality, often focus exclusively on the state's "superordinate status vis-à-vis inferior associations" and thus ignore analysis in light of biopolitics which, while it does not invalidate geopolitical boundaries, utterly reinvents them as sites of biopolitical emergence within and across borders.⁶⁸ Similarly, globalisation is often understood simply as an attack on the state's superordinacy by other geopolitical loci where a different definition ("the idea that national borders are becoming less important to the conduct of social life") can open the conceptual space for biopolitics.⁶⁹ The adjustment from geo- to bio-politics moves from dealing with *distribution* to dealing with *circulation* (from the supra-national to even the 'molecular' level), which characterises "a world understood in terms of the biological structures and functions" and relegates geographic territories to "a locale for the endless watch" on a newly hyper-contingent life form (or more accurately 'life process') of "Being as Becoming" wherein the primary threat is not technological contingency, but instead "the becoming-dangerous of life to life itself".⁷⁰ Despite its radical break from geopolitics, biopolitical government still finds its legitimacy in efficiency, "in the operational competence it displays as a service provider of emergency relief and emergency planner of emergence".⁷¹ However, this competence is tested by the sheer unpredictability it faces and

⁶⁷ Scott Veitch, "Legal Right and Political Amnesia", in *Europe in Search of 'Meaning and Purpose'*, ed. Kimmo Nuotio (Helsinki: University of Helsinki, 2004), 94.

⁶⁸ Nettle, *State*, 562.

⁶⁹ Veitch et al., *Jurisprudence*, 53.

⁷⁰ Dillon, *Governing Terror*, 11; *ibid.*, 19; *ibid.*, 18; *ibid.*

⁷¹ Dillon, *Governing Terror*, 21.

the “hyperbolicisation of security that is so profoundly subverting the democratic politics and institutions of the west.”⁷² Even traditional Foucauldian biopolitics may be rendered problematic “by the many ways in which its very digital and molecular revolutions have transformed what it is to be a living thing in ways some call posthuman and postvital” where the vital sign of information-driven life becomes adaptive emergence, a quality which is no longer restricted to human, or even organic, life.⁷³

Also, it may be argued that, despite all of this, the state exists “and no amount of conceptual restructuring can dissolve it”.⁷⁴ Loader and Walker argue that “the state retains a key role in coordinating its various indispensable functions”, and that its continuation is not only necessary but also *virtuous*.⁷⁵ They insist that the state’s “authority-in-the-last-instance” remains necessary because neither sub- nor supra-state levels have a sufficient sense of community or solid enough institutions to justify priority for such functions.⁷⁶ Of course, many of the public arguments for the state’s continuing importance do not display Loader and Walker’s intellectual rigour, but instead populist oversimplification. These claims are often of a “surge of violence and repression” from states around the world or about their “unprecedented stock of information” and technologies of surveillance.⁷⁷ However, states are unable, even through violence (repression may itself be the state’s death-gasp, a reaction to unalterably diminishing power), of controlling technologies which are also pressed into service for groups engaged in *subaltern cosmopolitanism*. Simplistic arguments fail to recognise “surveillance way beyond the boundaries of the state” not solely *by* the state: it is a feature of government in the Foucauldian sense.⁷⁸

⁷² Ibid., 11.

⁷³ Ibid., 21.

⁷⁴ Nettl, *State*, 559.

⁷⁵ Loader and Walker, *Civilising Security*, 189.

⁷⁶ Ibid.

⁷⁷ Castells, *Information Age*, 340; *ibid.*; technologies of surveillance are critiqued in the chapter “the state as idiot” in Loader and Walker, *Civilising Security*, 117 onwards.

⁷⁸ Castells, *Information Age*, 342.

CONCLUSION

“The concept of globalisation has generated heated debate and a voluminous literature” without conclusively answering to what extent the processes of globalisation have affected state legitimacy.⁷⁹ This concept has, however, made it possible to speak about many of the problematic changes facing the state-in-modernity, and modernity itself, and has raised important questions about how power is held to account. Nevertheless, accounts of power cannot fully be captured by such a concept. To concentrate too closely upon the state’s demise is as limiting as concentrating on its continuance and threatens to close off the theoretical space in which other important processes may be situated.

States face further problems in their attempts to reintroduce legitimacy. Looking inward by enacting processes of democratic decentralisation simply “reinforces centrifugal tendencies by bringing citizens closer to government but increasing their aloofness toward the nation state”.⁸⁰ However, looking outward by seeking to provide “legitimacy for and ensuring the accountability of supranational and subnational governance mechanisms” remains outwith the state’s reach.⁸¹ Even to accept “systemic erosion of their power in exchange for their durability” will leave states with no means to protect their durability when it is next challenged.⁸²

These problems will increase rather than diminish and the legitimacy of state power will face further challenges as the processes of globalisation follow their totalising logic either within (albeit ‘late’) modernity or into a new paradigm altogether. However, it is important not to let the state narrow our investigations into the processes of globalisation, nor to reduce the problems of

⁷⁹ Beeson, *Sovereignty under Siege*, 361.

⁸⁰ Castells, *Information Age*, 303.

⁸¹ *Ibid.*, 357. Quoting Paul Hirst and GrahameThompson, *Globalization in Question : the International Economy and the Possibilities of Governance* (Oxford: Polity Press/Blackwell, 1996), 171.

⁸² Castells, *Information Age*, 331.

the state to the effects of these processes. The state has always been a problematic entity, and globalisation, while it may emphasise or exacerbate its problems, it is not the only villain of the piece.

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The legacy of sovereignty: how the interwar years have shaped democratic transition in Lithuania and Belarus

Benjamin Hiscox

The study of democratic transition, or what makes some nations more conducive to the rise of democratic institutions than others, is vitally important in the modern world. Lithuania and Belarus are generally overlooked by literature on the subject of democratisation, but, due to their long historical ties and very different political paths since they established independence from the USSR, they provide an interesting case study into the historical reasons for the adoption of certain political systems. In brief, this article will deal with why since 1991 Lithuania has become democratic, whilst Belarus has become increasingly autocratic. To do this I compared the historical legacy of the interwar years in both states and focussed on the effects this period had on post-independence politics. This research revealed crucial differences, in that Lithuania's experience of independent statehood laid the foundations for the later transition to democracy, whilst the failure to establish a sovereign Belarusian state made continued authoritarian rule far more likely. Overall this showed the importance of historical legacies when attempting to establish democracy.

Since the collapse of the Soviet Union massive changes have swept Central and Eastern Europe. Whilst all of the states in this area have been affected, there has been a great deal of disparity in how they have adapted to these new circumstances. This is especially true within the successor states of the USSR itself, where different situations have led to the emergence of very different

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political regimes. Over the course of this paper I shall compare how two of these nations, Lithuania and Belarus, have coped with these changes, and examine how the events of the twentieth century, and in particular the interwar period of 1918 to 1939, have shaped their different political development. Whilst these countries have a large amount of shared history, not just in their mid-twentieth century dominance by the Soviet Union, but also previously in the medieval Grand Duchy of Lithuania and Rus' and later in the Polish-Lithuanian Commonwealth and the Tsarist Russian Empire, they seem to have taken very divergent political paths since they gained independence in 1991. Whilst Lithuania has become oriented towards the "West", gaining membership of organisations such as the EU and NATO and attempting to portray itself as a model Central European democracy, Belarus has become something of a pariah state, described as "the last dictatorship in Europe"¹, and with far closer ties to the Russian Federation than any of its neighbours. In this paper I will look at how different the political outlooks of these two states really are, as well as how much the very different experiences of the twentieth century have affected this.

Perhaps the biggest political difference between Lithuania and Belarus is the fact that the former is considered a "democracy", and is thus admitted as an equal to a large number of international organisations, whilst the latter is not. However, before looking at the reasons for this, we must first define exactly what a democracy is, and to what extent the two nations adhere to this ideal. In his study of the "wave of democratisation" that occurred across the globe between 1974 and 1990, *The Third Wave*, Samuel Huntington provides a working description of democracy that will form the basis of my comparative judgements in this article. He claims that a state has achieved transition to a democratic system when

¹ David Marples, "Belarus: The Last European Dictatorship?", in *The EU and Belarus: Between Moscow & Brussels*, ed. Ann Lewis (London: Federal Trust for Education and Research, 2002), 31-49.

Its most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote. So defined, democracy involves the two dimensions - contestation and participation - that Robert Dahl saw as critical to his realistic democracy or polyarchy. It also implies the existence of those civil and political freedoms to speak, publish, assemble, and organise that are necessary to political debate and the conduct of electoral campaigns.¹

This definition provides a number of benchmarks that can easily be compared between the two states, most notably the contestability and fairness of elections, but also the existence of the civil and political freedoms required for these to exist.

In their final election observation mission to Lithuania in 1996, the Organisation for Society and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) declared the parliamentary elections held in that year to have been “generally efficient” and conducted under “democratic spirit”.² In 1997 the European Commission supported this view, declaring that “Lithuania demonstrates the characteristics of a democracy, with stable institutions guaranteeing the rule of law, human rights and respect for and protection of minorities,” and thus passed the political requirements for EU membership as laid out in the Copenhagen criteria.³ In contrast, Belarus has failed to meet even the most basic democratic

¹ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1993), 7.

² OSCE/ODIHR Election Observation Mission, “Final Report on the Parliamentary Elections in Lithuania, 20 October and 10 November 1996”, Office for Democratic Institutions and Human Rights, <http://www.osce.org/odihr> (accessed 10 June 2008), 2.

³ European Commission, “Agenda 2000 – Commission Opinion on Lithuania’s Application for Membership of the European Union”, European Commission.

standards. In the most recent elections of 2006, when Belarus' authoritarian president, Aleksandr Lukashenko, claimed to have received 82.6% of the votes cast, the OSCE criticised almost all aspects of the election campaign.⁴ The election therefore had none of the elements of a democratic contest as described by Huntington. There was never really even a pretence of contestability, as opposition candidates were harassed, and even arrested, and the odds were stacked steeply in Lukashenko's favour. Meanwhile, the participation of the electorate was negated by the irregularities in the voting procedure that made it impossible to tell whether the votes had been counted in a legitimate fashion. Finally the "civil and political freedoms" that Huntington claimed were necessary in an electoral campaign, such as the freedoms to "speak, publish, assemble, and organise" were almost entirely absent, as the state clamped down on any overt sign of opposition. Whilst this election was perhaps the most blatantly biased to have occurred in Belarus, it is indicative of the lack of democracy that exists there at present, and is simply one more step down the authoritarian path that began with Lukashenko's election in 1994. This difference is supported by other literature, most notably Freedom House's *Nations in Transit* series, which describes Lithuania as a "Consolidated Democracy"⁵, whilst Belarus is said to be a "Consolidated Authoritarian Regime", with exceptionally low ratings for both National Governance and Electoral Process, two of the most important aspects of democratisation⁶.

Lukashenko gained the presidency unexpectedly in 1994, defeating both the nationalist and Communist candidates by a large margin thanks to public

http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/lithuania/li-op_en.pdf (accessed 10 June 2008), 15.

⁴ OSCE/ODIHR Election Observation Mission, "Republic of Belarus Presidential Elections, 19 March 2006: OSCE/ODIHR Election Observation Mission Report", Office for Democratic Institutions and Human Rights, http://www.osce.org/documents/odihr/2006/06/19393_en.pdf (accessed 10 June 2008).

⁵ Freedom House, "Nations in Transit 2006 – Lithuania," Freedom House Europe, <http://www.freedomhouse.hu/pdfdocs/lithuania2006.pdf> (accessed 10 June 2008), 1.

⁶ Freedom House, "Nations in Transit 2006 – Belauris," Freedom House Europe, <http://www.freedomhouse.hu/pdfdocs/belarus2006.pdf> (accessed 10 June 2008), 2.

dissatisfaction with the political elites, an unashamedly populist manifesto, and skilful manipulation of his role as the head of the parliamentary special anti-corruption committee, which gave him remarkable scope to attack his opponents. Following his election, he managed to secure an unassailable position in Belarusian politics, using the strong presidency, which had been created by the Communist-dominated legislature under the assumption that it would be Kebich, one of their own, who would be elected, to his advantage. Using populist rhetoric, as well as undoubted grievances amongst the Belarusian population, Lukashenko held a number of referenda which aimed to strengthen his position and weaken his opponents. These included polls concerning bringing back slightly modified versions of the Soviet flag and emblem, reinstating Russian as one of Belarus' official languages and for creating a union with the Russian Federation. The results of these referenda, all of which were convincing victories for the new president, effectively removed the opposition as a political force, revealing their lack of popularity amongst the electorate and reversing even the modest changes that they had brought about since the late 1980s. Lukashenko also used referenda to maintain his hold on the presidency in other ways, using them as a popular mandate to lengthen presidential terms and eventually to change the constitution to allow incumbent presidents to run for unlimited terms in office. Together with his complete control of the state bureaucracy and media as well as the lack of competitive elections in Belarus, this has allowed him to become an authoritarian ruler who has proved very resistant to any changes or attempts to replace him.

By contrast, Lithuania rapidly adapted to a democratic system, and one commentator wrote that

By the end of 1994, the mechanisms of democratic government had been reinstated and Lithuania did not seem to be heading towards the imposition of an authoritarian or nationalistic regime. Lithuania's government and legislature were elected by the process of free and fair elections; when necessary, her leaders

*admitted defeat gracefully and campaigned ethically for re-election.*⁷

Complaints have been levelled about the stability of the party political system, as the simple left-right cleavage of the early 1990s, between the ex-communist Lithuanian Democratic Labour Party (LDLP) and the Homeland Union, a conservative party created from the Sajūdis independence movement, fell apart in the late 1990s and early 2000s. This was due to the conservatives' increased fragmentation as well as the appearance of populist parties, such as the Labour Party, who capitalised on the increasing disillusionment of the electorate.⁸ This was a common occurrence across Central Europe at this time, however, as the umbrella organisations who had been instrumental in pushing for independence, such as Sajūdis in Lithuania or *Solidarność* in Poland, lacked the ideological unity to survive as a single political force after Communism's collapse, whilst the hardships associated with transition drove many to seek answers from parties outside the traditional spectrum. One area where Lithuania can be seen as coping much better than Belarus is in how it deals with these charismatic, populist politicians. Whilst figures such as Rolandas Paksas, the surprise winner of the 2003 presidential election, or Viktor Uspaskich, the founder of the populist Labour Party which gained the highest number of seats of any political party in the 2004 parliamentary elections, may have had the potential to damage the democratic system in Lithuania in the same way the charismatic outsider Lukashenko did after his 1994 victory in Belarus, in both cases the system was strong enough to endure. In Paksas' case investigations into allegations of ties between him and a "controversial Russian-born businessman", Yuri Borisov, as well as to Russia's foreign intelligence service, led to his impeachment in 2004, making him the first European head of

⁷ Alexandra Ashbourne, *Lithuania: The Rebirth of a Nation 1991-1994* (Lanham, Maryland: Lexington Books, 1999), 167.

⁸ Ainė Ramonaitė, "The Development of the Lithuanian Party System: From Stability to Perturbation", in *Post-Communist EU Member States: Party and Party Systems*, ed. Susanne Jungerstam-Mulders (Aldershot, Hampshire: Ashgate, 2006), 69.

state to be removed from office in this way.⁹ Uspaskich, meanwhile, left the Labour Party and subsequently fled the country in 2006, following a series of financial scandals that resulted in the authorities issuing a warrant for his arrest, should he return to Lithuania.¹⁰ Whilst both cases reveal the flaws in Lithuania's democratic system, especially with regards to corruption, they at least show that people are prepared to investigate and challenge those in power, unlike in Belarus.

Overall, we can conclude that whilst Lithuania has made the transition to a relatively consolidated, if still somewhat flawed, democracy, Belarus has become ever more authoritarian since Lukashenko's rise to power in 1994. In this article I shall attempt to examine precisely why this has been the case, and, especially, what role the events of the twentieth century have had in shaping this divergent political development. I have chosen the twentieth century as a focus for my study as although both nations gained a degree of national consciousness in the nineteenth century, it was only after the defeat of the Russian Empire in the First World War that either had a chance to assert their national independence. Some crucial differences did exist though, most notably the fact that Lithuanian is a Baltic language and Belarusian a Slavonic one. This, coupled with the dominance of the Roman Catholic Church in Lithuania and the Russian Orthodox Church in Belarus, meant that Belarusians were far more culturally and linguistically susceptible to Russification than their Baltic neighbours.

My study shall focus on the interwar years as perhaps the difference between Lithuania and Belarus that proved most critical for their later political developments was their experience of independence in the this period. In

⁹ Freedom House, "Nations in Transit 2005 – Lithuania," Freedom House Europe, <http://www.freedomhouse.hu/pdfdocs/lithuania2005.pdf> (accessed 10 June 2008), 388.

¹⁰ BBC News Online, "Lithuania Seeks Minister's Arrest, 30 August 2006," British Broadcasting Corporation, <http://news.bbc.co.uk/2/hi/europe/5299786.stm> (accessed 10 June 2008).

Lithuania's case, the chaos caused by the First World War and the Russian Revolutions of 1917 allowed for the creation of a *Taryba*, or national council, which was initially formed in Petrograd in March, but quickly became disillusioned by the Russian provisional government's stance on Lithuanian independence. The centre of the Lithuanian nationalist movement subsequently shifted to German territory, both because Germany was moderately more sympathetic to the idea of independence and due to the pragmatic reason that at that point much of Lithuania was under German control at that time. The *Taryba* unanimously passed a Lithuanian Act of Independence on February 16, 1918, marking Lithuania's reappearance on the map of Europe.¹¹ In Belarusian territory corresponding organisations, a Rada and an All-Belorussian National Congress, were established in Russian-controlled Minsk, but were rapidly driven underground by the Bolsheviks following the October Revolution. The partitioning of Belarusian lands in the Treaty of Brest-Litovsk allowed the Congress to re-emerge, however, as Minsk was transferred to German control, allowing for the declaration of independence of a Belorussian National Republic (BNR) on March 25, 1918.¹²

By the spring of 1918, therefore, Belarus (Belorussia) and Lithuania nominally existed as independent states within the German-controlled territories of Eastern Europe. However, both states were in a perilous position, as the international atmosphere into which they emerged was not conducive to the survival of small, independent states in their location. Whilst the Germans had grudgingly accepted both states' declarations of independence, they were not inclined to grant them complete independence, seeking instead a buffer between themselves and Bolshevik Russia, and reforms were very rapidly undertaken that would have led to both Lithuania and Belarus becoming little more than German vassal states, including the election of a German Prince as King Mindaugas II of Lithuania. In Russia both the Red and White forces in the ongoing Civil War represented threats to the states' nascent independence,

¹¹ Zigmantas Kiaupa, *The History of Lithuania* (Vilnius: Baltos Lankos, 2004), 235-239.

¹² Ivan S. Lubachko, *Belorussia Under Soviet Rule 1917-1957* (Lexington: University Press of Kentucky), 12-24.

whether in terms of a resurgent Tsarist Russian Empire, keen to re-establish control of Russia's Western borders, or an expansionist Communist state. Meanwhile, to the West, the re-emergence of Poland created further dangers, as figures within the Polish government considered Belarusian and Lithuanian territories to be a part of a greater Poland, based on the Lublin Union of 1569. The Western powers of France, the UK and the USA were happy to appease Polish sentiments, as they sought to establish a strong Poland as a buffer to Bolshevik Russia and had no reason to support what they saw as Germany's client states in the East. For both nations the immediate situation was bleak, and eventually only Lithuania would survive as a sovereign state.

Shortly after Belarus' declaration of independence, Germany's defeat on the Western Front meant that all German forces had to be withdrawn from the former territories of the Russian Empire in Eastern Europe, an event that led the Soviet government to declare the Brest-Litovsk treaty null and void and to re-occupy the BNR. Lenin's government had pursued a relatively pragmatic line on the nationalities policy from early on in the Russian Revolution, seeking to use nationalism as a way to create alliances with other groups within both the Russian and German Empires, and to create client states that could ultimately be sovietised. However, many members of the BNR government chose to withdraw alongside the German troops, and after invading Belarusian territory the Soviets rapidly moulded the BNR into a Communist state. The Belorussian Soviet Socialist Republic (the BSSR) was created on February 5, 1919, only two months after Soviet troops had entered Minsk. Whilst the BSSR was nominally an independent state, with a constitution of its own that did not mention Russia and recognition from its large Eastern neighbour, the dominance of Russians within the Belorussian Communist Party meant that this sovereignty was very limited in real terms. Subsequent wars between Russia and Poland led to the Belarusian nation again being partitioned by the rival powers as a part of the Treaty of Riga on March 18, 1921. From then until the outbreak of World War Two in 1939, which again altered the borders in Eastern Europe, the Belarusian nation was divided between Poland and the Soviet Union, two powers which, for much of the period, were openly hostile to ideas of Belarusian nationalism. In Poland, the Western Belarusians suffered harsh repressions from 1924

onwards, under the increasingly nationalistic rule of the authoritarian Józef Piłsudski, and throughout the late 1920s and 1930s Belarusian political, cultural and religious organisations were suppressed. By 1939 the Belarusians were still “largely unpoliticised”, making the creation of any mass nationalist movements very difficult, and calling into question the existence of a true Belarusian nation beyond the nationalist intelligentsia.¹³

Things proved even worse on the Eastern side of the partition. After participating in the creation of the USSR in 1922, Belarusian nationalism underwent a brief “golden age” under the relative liberalism of the New Economic Policy (NEP). An era of “Belarusification” occurred, as the growth of Belarusian language and culture occurred on all levels of society. Reconciliation even occurred with those members of the BNR who had fled with the German troops in 1918, who dissolved their government in exile and returned to their homeland. Despite its inauspicious beginnings, for a while in the 1920s it looked as though the BSSR could have evolved into a *de facto* nation state, albeit in a Soviet context. Aleksandr Tsvikevich, a former President of the BNR, captured the optimistic mood, saying “it looks as if all of us felt that there in the East, including Soviet Belorussia, together with tremendous destruction, in a fog of the bloody struggle, the real truth is shining through.”¹⁴ This was not to last long, however. Stalin’s accession to power by 1928 led to a new phase of harsh repressions against Belarusian nationalists, many of whom also had the misfortune to be proponents of the NEP’s economic liberalism. Those BNR members who had returned from exile were executed as Polish spies, whilst the Belarusian education system was decimated. By the end of 1929 the whole Belorussian nationalist leadership had been arrested,¹⁵ and by 1934 Belarusian

¹³ Norman Davies, *God’s Playground: A History of Poland. Volume II: 1795 to the Present* (Oxford: Oxford University Press, 2005), 303.

¹⁴ Ivan S. Lubachko, *Belorussia Under Soviet Rule 1917-1957* (Lexington: The University Press of Kentucky, 1972), 83.

¹⁵ Nicholas Platonovich Vakar, *Belorussia: The Making of a Nation*, (Cambridge, Massachusetts: Harvard University Press, 1956), 146.

nationalism had been effectively destroyed.¹⁶ By annihilating virtually the entire intelligentsia in the BSSR, including almost all of the Belarusian nationalists, Stalin dealt a severe blow to the nationalist cause, from which it would prove very difficult to recover.

Events over the same period in Lithuania provided much more fertile grounds for the nationalist movement. Unlike Belarus, Lithuania managed to preserve her independence against the large number of threats ranged against her, including the Soviet Russians, German Bermondists seeking to re-establish a German *Reich* in the East, and, perhaps most dangerously of all, a Poland nostalgic for the days of the Commonwealth which wanted to reunite the states, by force if necessary. Although Lithuania did not survive with her territorial integrity intact, as Vilnius, her historic capital, and the areas around it were lost to the Polish troops of General Lucjan Żeligowski in 1920, at least a large rump section remained independent during the inter-war period. From 1926 onwards the increasingly authoritarian rule of Antanas Smetona alienated many Lithuanians, but did little to suppress Lithuanian culture and education. This led to the growth of patriotism throughout the nation, as a feeling of Lithuanian identity shifted from an elite to a far more popular level, away from the intelligentsia who had pushed for independence throughout the nineteenth and early twentieth centuries, to the general populace. There can be little doubt that the availability of Lithuanian language education, from primary to tertiary levels, was influential in this movement, as was the widespread availability of Lithuanian language literature, theatre and other examples of Lithuanian culture. As one commentator has said, “within a very short period – twenty years – Lithuania became Lithuanian”, transforming into a genuine nation state.¹⁷ Whilst the Soviet annexation of Lithuania in 1939-1940 brought this period to an end, it at least gave people something concrete with which they could compare life in the USSR, and a national myth they could hark back to.

¹⁶ Lubachko, *Belorussia Under Soviet Rule*, 118.

¹⁷ Alfonsas Eidintas, Vytautas Žalys and Alfred Erich Senn, *Lithuania in European Politics: The Years of the First Republic, 1918-1940* (Houndmills, Hampshire: Macmillan Press), 129.

On the eve of the Second World War Lithuania was a consolidated nation state, something Belarus was not.

These two very different experiences of nationhood in the interwar period led Lithuania and Belarus down very different paths after independence in the 1990s. As well as providing pro-independence groups, such as *Sajūdis*, with something definite to aim for in the years leading up to independence, the fact that a sovereign Lithuanian state had existed within living memory meant that the Lithuanian nationalists had a large group of supporters within the general population. Belarus, by contrast, had no historical memories of independence that could be drawn upon. Whilst a Belarusian state had never existed for any significant period of time outside the Russian, or latterly Soviet, sphere of influence, the Lithuanians had this to look back on, and although the democratic Lithuanian state had been relatively short-lived, it still gave them more experience of democratic systems than Belarusians. Past experiences also allowed Lithuania to learn from their mistakes, as although the Smetona dictatorship appeared benign when compared to the subsequent five decades of Soviet rule, the seizure of power that occurred in 1926 revealed the dangers of an overly-powerful presidency, whilst the rapid capitulation to Soviet threats in 1940 showed that authoritarian leadership did not always equate to strong leadership. Although it is difficult to judge the exact effects this had, the rise of Smetona in the 1920s may well have meant that the Lithuanians were less likely to sleepwalk into a dictatorship in the 1990s by handing over too much power to an executive figure. By contrast, the Belarusian people had only ever experienced the totalitarianism of the Tsarist and Soviet systems in the twentieth century, and were thus more accepting of a strong presidential system, a difference that can be seen throughout the post-communist world. The existence of an independent Lithuania also gave people something to compare the USSR against, which revealed that similar improvements could be achieved without the repression present in the Soviet system. This meant that Lithuanians had far less nostalgia for the Soviet past than the Belarusians, and were less likely to give up on reforms when they began to cause hardships.

The events of the interwar period also had very different effects on the nationalist movements in both states: whilst in Lithuania the nationalists went from strength to strength, in Belarus they were almost wiped out by the Stalinist purges. The return of the BNR leadership to the BSSR and their subsequent liquidation meant the end of a diaspora organisation that could have maintained a nationalist community outside Belarusian territory which could have provided assistance once independence was re-established. The gradual Soviet takeover of Lithuania, on the other hand, gave many nationalists the chance to escape to Germany and then travel on to other countries, especially Canada and the USA, forming a large and patriotic diaspora community which would provide Lithuania with valuable resources, both economic and human, once independence was reclaimed.

There can be little doubt that Belarus and Lithuania have taken very different political paths since they achieved independence in the early 1990s. Whilst Lithuania has become a functioning democracy, and has joined international organisations such as NATO and the EU, Belarus remains an international pariah, with strong links to the Russian Federation but almost nowhere else. Whilst this can partly be explained by cultural and religious differences, as Belarus is a Slavic Orthodox state, and thus has more in common with Russia than the primarily Catholic Lithuania, there can be little doubt that the experiences of both countries during the interwar period have played a crucial role in shaping post-independence politics. Later experiences, notably the partisan wars that occurred in both countries during and immediately after the Second World War and the rise of independence movements during the era of *perestroika* in the 1980s, would play a role in the countries' democratisation, or lack thereof, but the years from 1918 to 1939 would remain the foundation for these changes. Although the establishment of a democratic system in Lithuania was by no means inevitable, historical experiences during the interwar period meant that it was far more likely to occur than in Belarus.

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Positive liberty: a foundation for modern democracy

David P. Macpherson

Freedom is a word we hear a lot. Yet it is often unclear what is meant by it. Recent anti-terrorism laws have been argued by some as safeguarding freedoms and argued by others as restricting them. In this paper, I aim to create and defend an explanation of the nature of freedom that is practical and useful. Through offering a set of criteria, and answering potential criticisms, I conclude that “freedom” must consider people’s strongest desires and take into account the multitude of internal barriers to the fulfilment of these desires. Such a definition will hopefully help us gain a clearer understanding of when our liberty is under threat: putting us in a better position to defend it.

Few words can stir the emotions of a crowd like freedom. Wars are fought to protect it, to extend it and to bring it to those who need it. People die in its name. It can turn a march into a movement and a movement into a government. All of us would agree freedom is a good thing but what does it consist of. What is freedom?

The common answer is- to be free is to not be physically stopped from doing what you want. But what about phobias, or addictions? Is the alcoholic free to go to the pub, is the agoraphobic free to go to the park. What about social and cultural rules? Does the stigma of being an ex-criminal restrict a man's freedom to work in a job he likes? Does the sexuality often involved in modern advertising restrict the freedom of the Muslim to practice his faith? Does the

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paternalism of health and safety regulations impact on our freedom? It seems freedom is much more than not being stopped from doing what you want.

In Isaiah Berlin's celebrated essay "Two Concepts of Liberty" he famously separated freedom into two categories, negative liberty and positive liberty. Negative liberty concerns the area in which people should be left alone to do as they wish.¹ It focuses mainly on physical restrictions. Positive liberty is concerned with being in control of your own actions. It focuses on creating an environment where the agent can satisfy their desires.² Berlin argued only a government set up to uphold negative freedom could truly capture freedom's meaning and importance. He called positive liberty a train ride to totalitarianism that once you got on you could not get off. His objection was that if you concede that someone else knows what is good for you, eventually you will let them make all your decisions and before you know it you will wake up in a totalitarian state.³ The model for this state would be Mussolini's Italy where the state "is the conscience and universal will of man".

However I believe Berlin dismisses positive liberty too quickly. It can provide a stable foundation for democracy. We should not surrender the importance of positive liberty so easily. Remember positive liberty is about being in control of your actions. To deny it is to say the alcoholic is free, so is the ex-criminal and so is the child who is stopped from playing conkers by the health and safety bubble wrap patrol.

I will argue that a democracy can be based around the promotion of positive liberty. To do this I will first establish a set of criteria that an account of positive liberty must meet to be considered coherent. Then I will argue that my theory of significant action meets all these criteria. Finally I will consider possible attacks on this theory, including Isaiah Berlin's totalitarian objection. Once these objections have been dealt with, it will be clear that it is possible to

¹ Isaiah Berlin, *Two Concepts of Liberty* (Oxford: Oxford University Press, 1958), 7.

² *Ibid.*

³ *Ibid.*, 18.

create a coherent theory of positive liberty that represents the values of a modern democracy. I will not be discussing any aspect of negative freedom.

Isaiah Berlin explained that theories of positive liberty answer the question “What or who is the source of control or influence, that can determine someone to do or be, one thing rather than the other?”⁴ He went on to add “The “positive” sense of the word “liberty” derives from the wish on the part of the individual to be his own master”.⁵ To *be* free then, in this sense, (that is not to say this is the only possible sense but it is the one being discussed) is to be my own source of control or influence. (It is important to note this is the meaning of freedom not the value of freedom.) This is the first criterion any clear theory of positive liberty must meet; it must prescribe to be one’s own master is to be free.

But master of what? The answer is motivations to action. To be free requires control over your motivations for if you do not have control over your motivations to action you are not your own source of control or influence. I assume that the only motivations to action are, as argued by David Hume, desires. When an agent has conflicting desires (by conflicting I mean desires that cannot both be satisfied at once) that agent is constrained. However this does not mean both desires must be constraining. On the contrary in most cases one desire will have the ability to liberate the agent from the restraint imposed by the other. That is to say by following this liberating desire the agent will be acting freely. In some cases there is no liberating desire therefore the agent cannot act freely. If there is no constraining desire the agent has a free choice. This then is the second criterion a theory of positive liberty must follow. In a case of a conflict between desires, for liberation to be possible, one desire must liberate, the other constrain.

The liberating desire must be identified with the “true self” or there is nothing being liberated from the constraining desire, there must be a master to do the

⁴ Ibid., 7.

⁵ Ibid., 16.

mastering. Frithjof Bergmann asserts “When we say “He did not want to drink, his thirst overcame him,” we nonchalantly split one thing in two. We speak of the man and his thirst as if the thirst were a separate thing.”⁶ For any clear account of positive liberty this split must be possible. Otherwise to talk of internal barriers will become non-sense. Any discussion of positive liberty that fails to do this will be as “worthless as sausages without mustard.”⁷ Mastery requires a master, a true self. This then is the last criterion, the liberating desire must identify with the true self.

Therefore a clear account of positive liberty must claim: to be free, an agent’s source of control and influence must be the liberating desire for this is the one identified with the true self. A clear account of positive liberty must meet these criteria (that is *not* to say if a theory doesn’t meet these criteria it is not a theory of freedom, it is just not a theory of positive freedom). (It is also *not* to say if a theory meets these criteria it is plausible, just that it is clear.)

Now I will explain my theory of positive liberty and show that it does meet these criteria. That theory is based on Charles Taylor’s thesis, which I will refer to as the theory of significant action, with one important addition. He explains his theory is concerned “with a view of freedom which involves essentially the exercising of control over one’s life.”⁸ He then adds “an exercise (positive) concept of freedom requires that we discriminate among motivations.”⁹ It should be obvious from these statements that Taylor’s thesis ticks the boxes for the first and second criteria. He has defined being free as controlling one’s life and explained this requires discriminating between liberating motivations and constraining ones. To this extent he has so far presented a clear account of positive liberty.

⁶ Frithjof Bergmann, *On Being Free* (Notre Dame, Indiana: University of Notre Dame Press, 1977), 26.

⁷ Shakespeare’s Henry V discussing war without fire.

⁸ Charles Taylor, “What’s wrong with negative liberty?”, in *The Idea of Freedom Essays in Honour of Isaiah Berlin*, ed. Alan Ryan (Oxford University Press 1979 Oxford), 177.

⁹ *Ibid.*, 179.

Taylor's connection to the true self is less obvious. He actually argues positive liberty does not have to be tied to a higher and lower self. He claims that ideas about doing what your true self wants "may mislead, by making us think exercise concepts of freedom are tied to some particular metaphysic, in particular that of a higher and lower self."¹⁰ He makes it clear he does not believe positive theories of freedom need this tie. He is, as was argued above, wrong in that respect. However, when he distinguishes between motivations, it is clear that this is exactly what he has in mind. Taylor's view is that desires can constrain action. For him there are two types of desire, higher desires, which liberate, and lower desires, which constrain. Lower desires constrain because they are "not really mine".¹¹ Furthermore when an agent is liberated from lower desires he will be free and so will be able to accomplish significant actions and goals. I will discuss significant actions and goals later but first consider Taylor's description of constraining desires. He asks "But what is it to feel a desire is not really mine? Presumably, I feel that I should be better off without it, that I don't lose anything in getting rid of it."¹² This last phrase is crucial, if I don't lose anything in getting rid of my desire then it follows it cannot be part of *me*-my true self. So despite saying he does not think of true selves it is obvious he in fact does. And a good thing too or I would be forced to ask what is being constrained by lower desires? If there is no true self what is the being that is trying to exert mastery over the lower desires? Without linking the liberating desire to the true self there is no answer.

This is the point where my theory of significant action must differ from Taylor's. Having denied the existence of a true self makes his argument inconsistent. My theory of significant action differs to Taylor's in this respect and so I will briefly explain the entity being referred to as the true self. As mentioned above there are two kinds, or levels, of desire; higher and lower. The true self is embodied by neither of these. It resides in a third level of desire, for

¹⁰ Ibid., 180.

¹¹ Ibid., 188.

¹² Ibid.

simplicity's sake call it highest desire. These highest desires are concerned with the achieving of the agent's conception of the good. They are desires like the desire to be part of a loving relationship or the desire to live according to a set of religious or moral rules, desires to understand the world, desires to make a difference to that world, or desires to raise a family. They could be called end state desires, ones which the agent wants solely for their own value not for any opportunity they create. Imagine normal desires are the rungs on a ladder; the agent wants them because they allow him to reach the next step. Highest or end-state desires are what is at the top of the ladder. Once the agent gets to them they stop climbing. The true self is embodied in these highest desires. Consider the alcoholic. He wants to have a drink. This is his lower desire. He also wants not to be an alcoholic. This is his higher desire. The reason he doesn't want to be an alcoholic is presumably because it conflicts with the significant goals in his life. Perhaps his significant goal is to be a good father to his children. These significant goals are his highest desires and are identical to the wishes of his true self. Low desires are constraining because they block the achievement of highest desires, high desires are liberating because they create opportunity, by eliminating lower "blocking" desires, to achieve highest desires and so achieve the wishes of the true self. Therefore lower desires can be seen as "not really mine" because they block the wishes of the true self. Thus this new significant action theory does link the liberating desire with the true self and so it meets the last criterion. Therefore it has been proved it is at least possible to articulate a clear account of positive liberty. An agent is free when they are motivated by their liberating desire to act in such a way that is in keeping with their highest desires i.e. their true self.

But is this account plausible? What are its practical implications? Are there any justified objections? Only if these implications are coherent and these objections unfounded can the theory be called plausible. Consider one of the questions posed at the start: does the sexuality often involved in modern advertising restrict the freedom of some Muslims to practice their faith? One of the Muslim's significant goals could be to live strictly adhering to religious laws, including not to view sexually explicit images. If these images were impossible to avoid one could understandably argue such a person's freedom is being

restricted. His high desire not to view such images is blocked by their unavoidable nature and so he has no opportunity to achieve his significant goals. Although the theory of significant action cannot settle disputes like this (perhaps the sacrifice of a minority's freedom to increase that of the majority is justified, perhaps not) it can make them easier to understand. It allows us to trade between freedoms rather than getting mixed up in religion/rights/aesthetics/prejudices etc. When a population is considering an important matter this theory allows them to get right to the heart of the problem. For example if a government was considering banning vehicles which cause high levels of pollution from cities we could imagine there would be a great deal of debate, with arguments ranging over a whole host of values from rights to ownership to environmental ethics. Such a debate would prove very difficult settle because of the conflicting values. However using this theory of positive liberty we could reduce the debate to just two values and ask which is more significant; the freedom to own the car you wish or the freedom to live in a cleaner, safer city. This would at least allow us to debate one issue rather than a multitude. This is just one of the practical uses of the theory.

The most frequently used objection to positive liberty theories is that they create room for totalitarianism to flourish and a coherent theory of freedom cannot endorse totalitarianism. It is argued, by saying that an agent's desires do not always reflect what they really want, it would be possible for a tyrant to oppress his people by claiming he does know what they really want. Because of this knowledge by controlling their lives he can help them achieve their significant goals. Therefore he is justified in controlling people's lives. Taylor himself called this objection "an absurd caricature" of positive liberty theories.¹³ The theory of significant-action easily avoids it. The value of freedom in a significant-action theory is that the liberated self will be able to complete significant actions and achieve significant goals. It is here important to ask who decides which goals and actions are significant. Taylor quickly dismisses this question simply stating "we have a background understanding too obvious to spell out, of some activities and goals as highly significant for human beings and

¹³ Ibid., 175.

others less so.”¹⁴ However it seems to me not obvious at all which actions are significant and which are not. Which is more significant, a life spent helping others or a life spent trying to attain total spiritual enlightenment? Certainly I can answer this question for myself, but I could only guess at anyone else’s answer. Only by self-assessment of the actions can I determine which is more significant to me and so only by self assessment can I choose which to do or not to do. Therefore the true self decides on which actions are significant, by self assessment, and uses liberating desires to conquer any lower desires which are hindrances to this action.

Because the actions are chosen by the true self via self assessment no outside agency, in this case “the tyrant”, can be sure which actions are significant to me. Therefore he cannot create a system to maximize my ability to achieve significant goals/ do significant actions. However through voting a government can be made aware of the population’s significant goals. Consequently a democracy *could* set up a system to maximize the agent’s ability to achieve their significant goals. Finally it is important to remember self assessments can change over time; my significant goals as a ten year old were different to my significant goals as a twenty year old. Therefore states which proclaim to safeguard an agent’s freedom must be able to respond to changes in self assessment of goals. In a democracy, through voting, recognition of changing significant goals is possible. This clearly shows that positive freedom can safeguard the values of a modern democracy. It also shows the theory of significant action cannot lead to totalitarianism and so is on that account plausible.

An objection is often raised on these grounds. Suppose someone is forced to make a terrible choice. The bank manager must decide whether to hand over the key to a bank vault or have his employee’s brutally murdered. It may seem at a glance that if the manager makes his decision based on which ever outcome he sees as most desirable he has made a free choice. He has subdued the lower desire to safeguard the money and satisfied his high desire to save his employees

¹⁴ Ibid., 182.

therefore he has made a free choice. It would seem you can be forced to make a free choice, but this objection is incoherent. Notice this makes no mention of the highest desires, those of the true self. Neither course of action, in this case, would create opportunity to further his highest desires and so neither desire is a liberating desire. Because of this he cannot act freely. It should be equally apparent that if there is no constraining desire (as in a very nice or trivial decision; i.e. what would you like for dessert, chocolate cake or ice cream?) then both desires are liberating and so a free choice is possible.

Another objection to the plausibility of this thesis is as follows. Consider the paedophile whose significant goal is to satisfy his sexual needs. He, by self assessment, decides this goal is significant and totally subdues his desires to live a normal life to achieve this. His every decision is aimed at achieving his goal. By the theory of significant action he has achieved a very high level of freedom. The objection is surely he cannot be a free person, freedom cannot allow for such actions! My answer is simply why not? Freedom is not morality. The paedophile's actions are definitely wrong but this does not mean they are un-free.

This objection rests on a concept of freedom that includes the premise only morally good actions can be considered free. This is not the conception of freedom being discussed in a theory of significant action. Being free in this sense is simply being in control of your actions so you can achieve self determined significant goals. It makes no attempt to show these goals are necessarily good or fit within some moral code of practice. To be free is to be able to do actions your true self finds important, not which your true self finds important and are considered good by some independent external moral judge.

The paedophile acting freely does not somehow make him un-punishable or acceptable. In fact in law free actions tend to incur heavier punishments than un-free acts, but it is still the specific action that is wrong not that it was done freely. He should be restricted or punished because what he does is morally/legally wrong not because he is free to do it. While his positive freedom cannot be restricted, his negative freedom (that is the area within which he should be able to act without interference by other people) could

justifiably be restricted. He should remain in control of his motivations for action however the range actions available to him should be greatly reduced by suitable punishment. To show that the paedophile should be punished for acting immorally/illegally rather than for acting freely consider the following; you would not punish someone for acting freely unless what they did was morally or legally wrong. Therefore the objection makes no impact on the plausibility of the theory of significant action. The pedophile would be acting freely, because of this the breaking of the law would be entirely his own fault therefore it would seem a heavier punishment is appropriate. What he does may be wrong, but it being wrong doesn't mean it cannot be free. A theory of freedom must allow that sometimes some people will abuse their freedom. Thus I have proved that this theory of freedom does not have any in-coherent implications and hence it is plausible.

It should be apparent from the above that it is possible to articulate a clear and plausible theory of positive liberty, the theory of significant action. By reference to the criteria laid out, I have shown that the theory of significant action is a clear, understandable conception of positive liberty. Furthermore I have shown the strongest attacks on positive liberty theories do not affect the theory of significant action, therefore it is plausible. It offers a way to understand many of the questions posed at the start and can be used to defend the goals people think of as most important from any constraining influence. By thinking of freedom in this way we can gain a clearer understanding of when our liberty is under threat. When governments stop listening to a population's significant goals we can prove they are attacking freedom and so we will be in a better position to defend it.

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Political representation and revolution: reconciling law, political will and constitutional reason

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At the heart of the idea of constitutionalism lies a paradox: on the one hand, the legitimacy of governmental power rests on the consent of individuals; on the other, such consent can only be expressed indirectly through already-established institutional forms. The political will, whether as a product of political representation, or as a rare moment of revolution, seems to be in a relationship of mutual antagonism with individual liberties. But if the moral reasoning underlying rights can only be the product of politics, then it is clear that politics must prevail over law and constitutional reason.

*A spectre is haunting eastern Europe: the spectre of what in the West is called 'dissent'. This spectre has not appeared out of thin air. It is a natural and inevitable consequence of the present historical phase of the system it is haunting... The system has become so ossified politically that there is practically no way for such nonconformity to be implemented within its official structures.*¹

The year 1989 – the bicentenary of both the French Revolution and the ratification of the U.S. Constitution – marked the decisive end of totalitarian regimes in eastern Europe. The collapse of the Soviet empire would soon follow. As far as communist rule was concerned, the owl of Minerva was beginning to spread its wings (to use, as we shall later see, a rather apposite

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¹ Václav Havel, "The Power of the Powerless", in *Open Letters: Selected Writings, 1965-1990*, ed. Václav Havel, 125-214 (New York: Vintage Books, 1992), 127.

cliché).² It is easy to forget – and sobering to remember – the magnitude of what happened that year. It was an example of that rare event: a ‘constitutional moment’.³ It was the result of the ‘will of the people’ breaking through and effecting change, even though it lacked the power to do so within the system. It was the culmination of incremental acts of ‘dissent’, when the people were finally able to express its constituent power and generate the dissolution of the constitutional order. It was, in a word, a revolution.

World-historical events like this may be exhilarating, but they are exceptional; the Berlin Wall is not stormed every day. One thing these moments demonstrate is that constituent power is real, and not merely a legitimising concept. In normal times, however, constituent power must find expression through representational form. This is not only for prudential reasons, but because constitutional forms enable the formation of political will and the management of political conflict.⁴ That, of course, is not to say that law, political will and constitutional reason are reconcilable through some idea of mutual enablement. However, it does suggest that a conception of constitutionalism as a set of constraints on the democratic will is insufficient. But, ultimately, law and politics are only reconcilable if one is subordinated to the other. In this essay, I will argue that, taking a nuanced approach to political representation, the political must, and inevitably will, prevail over law and constitutional reason.

POLITICAL REPRESENTATION

Carl Schmitt claimed that constituent power should triumph over constituted power, democracy over constitutionalism, and politics over law. He did so out

² Hegel, Georg Wilhelm Friedrichl, *Philosophy of Right*, trans. And ed. Thomas M. Knox. Oxford: Clarendon Press, 1942.

³ See, e.g., Bruce Ackerman, *We the People: Foundations* (Cambridge, Massachusetts: Belknap Press, 1991).

⁴ See Niccolò Machiavelli, *The Discourses*, trans. Leslie J. Walker, ed. Bernard Crick (Harmondsworth, Middlesex: Penguin, 1983), i:4.

of a belief that “the concrete existence of the politically unified people is prior to every norm”.⁵ Political will, in Schmitt’s view, does not depend on political representation for its existence. Indeed, “the notion of representation contradicts the democratic principle of the identity of the people that is present to itself as a political unity”.⁶ Against this, Hans Kelsen, and Kant before him, argued that the will of the people has no unity until it is constituted in a legal order.⁷ The Kelsen-Schmitt debate highlights the centrality of the idea of representation to the tension between law and political will. It is my submission that, contra Schmitt, one should accept and embrace political representation. However, pace Kelsen, constituent power nonetheless retains a crucial role in the constitution of the polity.

This view – that constituent power vests in the people but must be exercised through political representation – can be seen in the work of Abbé Sieyès.⁸ Writing during the French Revolution, a time when the idea of constituent power moved from theory into practice, Sieyès sought to draw a sharp distinction between constituent and constituted power. The constituent power of the people, or ‘the nation’, as Sieyès preferred, is not only “not subject to a constitution”, he argued, “but it *cannot* and *must not* be”.⁹ However, while, in common with Schmitt, Sieyès believed “the nation is prior to everything”,¹⁰ he also recognised that the people could not govern without some form of constituted power. There is obviously a tension here. Sieyès resolved this tension through his analysis of political representation. As he saw it, political

⁵ Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1993), 121.

⁶ *Ibid.*, 262.

⁷ Hans Kelsen, *The Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1970), 291.

⁸ Emmanuel Joseph Sieyès, *What is the Third Estate?*, trans. M. Blondel (London: Pall Mall Press, 1963).

⁹ *Ibid.*, 126. Emphasis in original.

¹⁰ *Ibid.*, 124.

representation was “a permanent necessity in any large and populous country in which it was virtually impossible to unite the voice of the people directly”.¹¹

Although for Sieyès political representation is required for the expression of constituent power, this does not mean that, once constituted, the people are bound by the constitutional form. That would be to follow the approach of Thomas Hobbes. Starting from an idea of the state of nature as a war of every man against every man”, Hobbes explained that, in the pursuit of peace and security, everyone would covenant to relinquish their natural rights and submit to a sovereign authority.¹² Like Sieyès, Hobbes believed that ‘the people’ only become united once represented by a sovereign authority.¹³ However, whereas the Hobbesian Sovereign is the people’s ‘Representative unlimited’,¹⁴ “contrary to Hobbes... Sieyès argued that the people never leave the state of nature and thus retain the possibility of re-acquiring constituent power”.¹⁵ This demonstrates the ability of the constituted power to remain responsive to constituent power.¹⁶

So, although democracy is made possible by political representation, that constituted framework is provisional in nature, it is ‘conditional rather than

¹¹ Istvan Hont, “The Permanent Crisis of a Divided Mankind: ‘Contemporary Crisis of the Nation State’ in Historical Perspective”, in *Contemporary Crisis of the Nation State?*, ed. John Dunn (Oxford: Blackwell, 1995), 198.

¹² Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), 88, 120-121.

¹³ “Prior to the formation of a commonwealth a *People* does not exist, since it was not then a person but a crowd of individual persons.” Thomas Hobbes, *On the Citizen*, trans. Richard Tuck and Michael Silverthorne. (Cambridge: Cambridge University Press, 1998), 95.

¹⁴ Hobbes, *Leviathan*, 156.

¹⁵ Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), 63.

¹⁶ For a discussion of Sieyès’ arguments, see Lucien Jaume, “Constituent Power in France: The Revolution and its Consequences” in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 68-71.

absolute', and must take account of political pressure from constituent power.¹⁷ As Schmitt said, the norm ultimately rests on the exception.¹⁸ Therefore, while it may appear at first glance that the political depends on the legal, we must never lose sight of the fact that the legal order is founded on the political, and the latter may alter the former. I will return to this, and the extent to which constitutional form 'contains' the political, after exploring the impact of this idea of political representation on the tension between law, political will and constitutional reason.

LAW, POLITICAL WILL AND CONSTITUTIONAL REASON

From the above, we can begin to understand that constitutionalism is not simply a set of constraints on political will. Rather, it is a means of organising and generating political will. Moreover, political representation is a "preferable form of government" because it allows for the management of conflict.¹⁹ Crucial to Schmitt's understanding of 'the political' was a distinction between friend and enemy, which produced "the ever present possibility of conflict".²⁰ If we develop this further by drawing a distinction between 'the political' (the first order) and 'politics' (the second order), the latter can be understood as the practice of managing the conflicts of the former.²¹ Following on from the previous section, we might say, tentatively, that 'the political' belongs to the realm of constituent power and 'politics' belongs to the realm of constituted

¹⁷ Loughlin, *Public Law*, 68.

¹⁸ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, Mass.: MIT Press, 1988), ch. 1.

¹⁹ Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), 41.

²⁰ Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), 26-29.

²¹ "Politics, then, can be simply defined as the activity by which differing interests within a given unit of rule are *conciliated* by giving them a share in power." Emphasis added. See, e.g., Bernard Crick, *In Defence of Politics*, 5th edition (London: Continuum, 2005); See also Machiavelli, *Discourses*, n. 4, i:4.

power.²² Without the practice of politics, the conflict of the political would be unmanageable. Therefore, and paradoxically, political representation can be said to be an important mechanism through which the people express their political will.

But this does not necessarily mean that constitutionalism enables democracy, that reason enables will, that law enables politics. For, ultimately, one side would have to give way to the other. Either constitutionalism must give way to democracy, reason to will, law to politics, or vice versa.²³ After all, once the expression of political will is enabled by political representation, the perennial question still remains: in a democracy, how are the rights of the citizen to be protected against the sovereign's will? If political will goes unconstrained, the sovereign authority could act to restrict individual liberties and the rights of minorities, in turn curtailing the exercise of constituent power. Before looking at the difficult question of the merits and demerits of both sides of the debate, we must turn our attention to those who deny the need to take sides at all.

1 MUTUAL ENABLEMENT

Those who argue that law and politics are mutually enabling usually do so out of a belief that they have an internal relationship.²⁴ Indeed, Jürgen Habermas, who has provided the most sophisticated attempt to reconcile law and politics, claims that rights and democracy are 'co-original'.²⁵ Arguing against liberals,²⁶

²² For an analysis of the distinction between the different orders of the political, see Loughlin, *Public Law*, ch. 3.

²³ "What is clear is that normative theories of public law that promote one mode to the exclusion of the other will fail to address a central aspect of the situation and should be rejected"; *ibid.*, 154.

²⁴ See Jürgen Habermas, "On the Internal Relation between the Rule of Law and Democracy" in *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Grieff (Cambridge, Mass.: MIT Press, 1998), ch. 10.

²⁵ See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996).

who seek to place rights above democracy, and (to a lesser extent) against republicans, who seek the subordination of rights to democracy, Habermas argues that a “discourse-theoretic understanding of the system of rights directs our attention to *both sides*”.²⁷

Here, Habermas uses two concepts to justify his position: firstly, the system of rights, which “gives *equal weight* to both the private and the public autonomy of the citizen”.²⁸ This system consists of those basic rights that “citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law”.²⁹ Secondly, he uses the discourse theory to confer democratic legitimacy on the general right to liberties. As Habermas puts it: “by means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape”.³⁰ This is incredibly important to Habermas’s theory of law. It explains how basic rights – which enable citizens to participate in the democratic process – and the democratic principle – which will *over time* develop and thus legitimize basic rights – are “*co-originally* constituted”.³¹ They are mutually enabling: without law, democracy can be circumvented, but without democracy, law loses its legitimacy.

On this understanding, Habermas’s project in *Between Facts and Norms* can be seen as an attempt “to integrate what is most attractive about theories such as those of Rawls, Dworkin, and Michelman without falling prey to their

²⁶ See, e.g., John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

²⁷ See, e.g., Frank Michelman, “Law’s Republic”, *Yale Law Journal*, Volume 97 (1998): 1493; Habermas, *Between Facts and Norms*, n. 25, 131. Emphasis added.

²⁸ *Ibid.*, 118. Emphasis in original.

²⁹ *Ibid.*, 122.

³⁰ *Ibid.*, 121.

³¹ *Ibid.*, 121-122. Emphasis in original.

respective shortcomings”.³² By opting for a procedural conception of law, which is neither an appeal to higher moral standards nor merely the will of the democratic legislator, Habermas attempts to move away from the dichotomy of natural and positive law. Laws are legitimate if they are made in accordance with procedures under which everyone could participate on an equal basis, and if they meet with everyone’s consent. This last part – *quod omnes tangit, omnibus tractari et approbari debet* – is particularly important for Habermas because he does not wish to subordinate law to morality.³³ Immanuel Kant, who took a similar view, argued that ‘everyone’s consent’ does not mean everyone would agree if actually consulted, but that they would agree if they acted according to a higher moral norm.³⁴ Keen to depart from this moral aspect, Habermas specifically calls for the “agreement of all those possibly affected”.³⁵ However, such universal agreement (especially of unborn generations) is impossible.³⁶

It follows, in my view, that even conceptions of law based on a procedural paradigm are grounded in substantive values. As with the Rawlsian veil of ignorance, Habermas’s system of rights presupposes rational agreement on pre-political moral standards, which (as we shall see) can only be understood as political.³⁷ Michel Rosenfeld argues that ‘even Habermas’s more nuanced and versatile proceduralism ultimately confronts the need to embrace contestable

³² Michel Rosenfeld and Andrew Arato, “Introduction”, in *Habermas on Law and Democracy: Critical Exchanges*, ed. Michel Rosenfeld and Andrew Arato (Berkeley: University of California Press, 1998), 5.

³³ Translated as “all those affected should be heard and agree”.

³⁴ Immanuel Kant, *Political Writings*, 2nd edition, Hans Reiss (Cambridge: Cambridge University Press, 1991), 78-80.

³⁵ Habermas, *Between Facts and Norms*, 104.

³⁶ See generally Niklas Luhmann, “*Quod Omnes Tangit*: Remarks on Jürgen Habermas’s Legal Theory” in *Habermas on Law and Democracy: Critical Exchanges*, ed. Michel Rosenfeld and Andrew Arato (Berkeley: University of California Press), 157-172.

³⁷ Rawls, *Theory of Justice*, 136-142. Indeed, in his later work, Rawls accepted this as political: see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

substantive normative assumptions'.³⁸ On the other hand (some would say, paradoxically), Habermas's system of rights seemingly leaves infinite room available for the democratic legislator to hollow out the basic rights through a "politically autonomous elaboration".³⁹ Unable to cloak basic rights with the force of law, Habermas comes down, in the last analysis, on the side of democracy. Hence, even the most sophisticated attempt to reconcile law and democracy, in the end, fails.⁴⁰

2 LAW, POLITICS AND MORALITY

Let us return, then, to the question of whether law transcends politics, or whether politics must ultimately prevail over law. This debate is often characterised as one between liberals and republicans. However, these labels can often be unhelpful. For example, Ronald Dworkin, who most would see as a liberal, has been lumped in with republicans on account of his use of law "as a lever for politics".⁴¹ Similarly, Frank Michelman and Cass Sunstein, two prominent republicans, saw republicanism as merely a variant of liberalism, and focussed more on the role of the courts than on the popular participation usually associated with republicanism.⁴² Therefore, and for clarity and brevity, I will resist those labels, and will frame the debate as follows: on one side, there are those – such as Kant, Rawls and Dworkin – who conceptualize law as a form of moral reasoning, sheltered from the political. On the other side, there are

³⁸ Michel Rosenfeld, "Can Rights, Democracy, and Justice be Reconciled through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law", in *Habermas on Law and Democracy: Critical Exchanges*, ed. Michel Rosenfeld and Andrew Arato (Berkeley: University of California Press), 82-112.

³⁹ Habermas, *Between Facts and Norms*, 122.

⁴⁰ For a defence of Habermas's position, see: Ingeborg Maus, "Individual Liberties and Popolar Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights", *Cardozo Law Review*, Vol. 17, Issue 4 (1996): 825.

⁴¹ Emilios A. Christodoulidis, *Law and Reflexive Politics* (Dordrecht, Netherlands: Kluwer, 1998), 52-60.

⁴² See Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005), 42-46; See Kathryn Abrams, "Law's Republicanism", *Yale Law Journal*, Vol. 97, No. 8 (1988): 1591.

those who locate morality firmly within the political domain, and therefore conceptualise law as the product of political will.

For Kantian moralists, the idea of constitutional reason is in essence a “fusion of constitutional law and moral theory”.⁴³ Grounded in morality, so the argument goes, the common law “is sometimes superior to legislation as a means of resolving questions of justice, even when the latter is proceeded by wide consultation to ascertain public opinion”.⁴⁴ Even when this moralist account of constitutional reason is recognised as “political not metaphysical”, and “the expression of the people’s constituent power”, a special role is nevertheless afforded to the courts, which is “the exemplar of public reason”.⁴⁵ According to this view, in Judith Shklar’s words, “politics is regarded not only as something apart from law, but as inferior to law”.⁴⁶ The appeal to a universal set of morals, safeguarded by the courts, therefore acts as a bulwark against politics, “the uncontrolled child of competing interests and ideologies”.⁴⁷

What most of these claims fail to acknowledge, and what Rawls pays lip service to, is that there will always be conflicting views of the good life – that is, morality is always, unavoidably political – and that this conflict can only be settled through politics, not some neutral law. These Kantian moralists “[equate] the moral point of view with that of impartiality”, and fail to realise that it is precisely the opposite. By further equating moral reasoning with legal reasoning, we see the “politicization of law”, the result of which is that ‘judicial institutions have become arenas of political struggle’.⁴⁸ One obvious danger in

⁴³ Dworkin, *Taking Rights Seriously*, 149.

⁴⁴ Trevor R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), 292.

⁴⁵ John Rawls, “Justice as Fairness: Political not Metaphysical”, *Philosophy and Public Affairs*, Vol. 14 (1985): 223; Rawls, *Political Liberalism*, 231; *ibid.*, 236.

⁴⁶ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964), 111.

⁴⁷ *Ibid.*, 111.

⁴⁸ John Gray, *Enlightenment’s Wake: Politics and Culture at the Close of the Modern Age*, rev. ed. (London: Routledge, 2007), 6-7. It should be noted that not all liberals

this is that courts are not politically representative. In countering this criticism, Dworkin has argued for a distinction between questions of policy and matters of principle; only the latter may be decided by the courts.⁴⁹ But such an arbitrary distinction fails to take account of the fact that what is political is itself a political question. The decision to treat a question as a matter of principle, rather than policy, “is nothing more than mere political preference”.⁵⁰

Morality, then, does not operate, as it were, on a higher plane than the political. With that realisation, we must also acknowledge that “law is not and cannot be a substitute for politics”.⁵¹ Moreover, allowing “a supreme court to make certain kinds of political decision does not make those decisions any less political”.⁵² Does that mean that law and politics will be irreconcilable? I do not think it does; instead, it merely means that politics should triumph over law. As we saw earlier, there will always be a role for law in the public realm of representative democracy – laws to ensure popular participation in free and fair elections, for example, or to police the process of representation.⁵³ That is not to say that law and politics are mutually enabling; the conception of law here is minimalistic, always malleable and subject to revision, a necessary by-product of political representation, but nevertheless external to politics. After all, in addition to law, other *political* practices – described by some as *droit politique* or *raison d’etat*, but, in Britain, more commonly referred to as ‘constitutional conventions’ – also make representative democracy possible.⁵⁴

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equal moral reasoning with legal reasoning, see, e.g., see, e.g., Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999); Gray, *Enlightenment’s Wake*, 115.

⁴⁹ See generally, Dworkin, *Taking Rights Seriously*, ch. 4.

⁵⁰ Tomkins, *Our Republican Constitution*, 24.

⁵¹ John A. G. Griffith, “The Political Constitution”, *Modern Law Review*, Vol. 42, No. 1(1979): 16.

⁵² *Ibid.*

⁵³ See John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

⁵⁴ See Loughlin, *Public Law*, especially ch. 8.

So far, I have tried to argue that constituent power requires constituted power, that political will (albeit to a limited extent) requires law, and that the tension between the two is resolved through the idea of political representation. It is important, however, to be clear about what I am not suggesting: I am not suggesting that constituent power can be reduced to constituted power; that the political can be reduced to politics. This is the error Emiliios Christodoulidis makes in his “containment thesis”.⁵⁵ He would argue that my argument represents the “false necessity” of the “assimilation of the political to the legal”, and would argue instead for “an anarchy of political commitment”, undistorted by any ‘containment’ within legal institutions, which would allow for “opposition to the democratic community”.⁵⁶ Moreover, “the collapse of the moment of the ‘constituent’ into its institutional forms”, Christodoulidis argues, inhibits “what could be *otherwise*, an event of rupture”.⁵⁷ There is a difference, however, between saying, on the one hand, that constituent power is *represented* by constituted power and, on the other, saying that constituent power *is* constituted power.

There is certainly much to be gained from Christodoulidis’ invigorating defence of the political. It is my argument that, even when represented (which it must be), constituent power remains always present, and always real, ready to break through in a moment of revolution and generate a change in the constituted order. There is certainly something ‘exhilarating’ about that possibility.⁵⁸ Where I disagree with Christodoulidis is in my belief that the political can bring about change even when given representational form. Indeed, the ability of the political, through ‘dissent’, to irritate the constituted power – and

⁵⁵ Christodoulidis, *Law and Reflexive Politics*, ch. 6.

⁵⁶ *Ibid.*, 68; *ibid.*, 65.

⁵⁷ See Emiliios A. Christodoulidis, “Against Substitution: The Constitutional Thinking of Dissensus” in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press), 207; *ibid.*, 194.

⁵⁸ Hannah Arendt, *On Revolution* (Harmondsworth: Penguin, 1977), 223.

therefore to break free from its containment – is true empirically, as well as in theory.

Take, just for an example, Václav Havel's essay, *The Power of the Powerless*,⁵⁹ in which he described the impossibility of 'resistance' and 'dissent' within the system of communist Eastern Europe.⁶⁰ He proposed living 'as if' he were in a free society. Havel's famous greengrocer – who displays a shop-window slogan proclaiming, 'Workers of the world, unite!', and does so, not out of support, but obedience – is capable, by ceasing to display the slogan, of triggering a revolt. The incremental effect of living 'as if' is what Havel meant by 'the power of the powerless', of 'living outside the lie'. Similarly, in the 1960s, Rosa Parks resolved to act 'as if' a black woman could sit on a bus in the Deep South. Aleksandr Solzhenitsyn wrote 'as if' a historian could publish his findings in Russia. These moments represent instances "when the crust cracks and the lava of life roles out".⁶¹ They are, to all intents and purposes, moments of 'rupture', of acting on what could be otherwise, of constituent power.

In this way, constituent power, even when represented within a constitutional order, retains – as Locke put it – a residual right of rebellion.⁶² It adds weight to Sieyès' claim that the multitude never leaves the state of nature. Indeed, even Kant, who argued that 'there is no right to sedition, much less a right to revolution', implicitly accepted the revolutionary capacity of constituent power when he acknowledged that, 'the lack of legitimacy with which [a revolution] began ... cannot release the subjects from the obligation to comply with the new order'.⁶³ But these moments are, as Schmitt would say, exceptional, and only go to reinforce the constituted order that normally represents the political.

⁵⁹ Havel, *Power of the Powerless*, 125-214.

⁶⁰ Ibid.

⁶¹ Václav Havel, "Dear Dr. Husak", in *Open Letters: Selected Writings, 1965-1990*, ed. Václav Havel (New York: Vintage Books, 1992), 79.

⁶² John Locke, *Two Treatises on Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

⁶³ Immanuel Kant, *The Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge, Cambridge University Press, 1996), 98.

CONCLUSION

To the question – How are rights to be safeguarded against the “excesses of democracy?” – we can answer that, to the extent that individuals have rights, they are the product of democracy.⁶⁴ As with the fall of religion as the moral source of rights, this answer can leave people feeling uneasy. But the ‘tyranny of the majority’ becomes less of a problem when we conceive of political representation as the mechanism through which the Hegelian dialectic can be achieved – that is, the mechanism for progress. Hegel argued that, through the process of conflict, systems of thought engage in a dialogue, after which the less self-contradictory side wins. In this way, generations can build on the achievements of previous ones, resulting in progress.⁶⁵ We may disagree about whether there is an endpoint to this process, but that is not what is important.⁶⁶ Progress is empirically true. What, if not progress, is the movement from feudal baronies to universal suffrage?

It is clear that this dialectical process belongs to the realm of politics, not some fixed, impartial law. And it is through political representation that the conflicts in the process can be adequately expressed and managed. True, in extreme situations, constituent power can, in a moment of revolution, exert change to the constitutional form. The people have a power – the power of the powerless – to rupture the system by demonstrating its self-contradictions. Representation and revolution are, in my view, both examples of the Hegelian dialectic. What we must ensure is that the progress enabled by political representation and

⁶⁴ Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve, vol. 1 (New York: Vintage Books, 1990), 272.

⁶⁵ See Georg Wilhelm Friedrich Hegel, *The Philosophy of History*, trans. John Sibree. (New York: Dover, 1956). See also Terry P. Pinkard, *Hegel's Dialectic: The Explanation of Possibility* (Philadelphia: Temple University Press, 1988).

⁶⁶ See Francis Fukuyama, *The End of History and the Last Man* (Harmondsworth, Middlesex: Penguin, 1992).

revolution is not inhibited by insulating contentious moral claims from political will through the mechanism of law and constitutional reason.

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